

# Alternative Dispute Resolution



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# **ALTERNATIVE DISPUTE RESOLUTION**

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## Editor's Note

Welcome to the *Alternative Dispute Resolution Journal*, Volume. 9 no. 4, 2021, a publication of the Chartered Institute of Arbitrators-Kenya Branch (CIArb-K).

The Journal is a scholarly publication that focuses on key and emerging themes in *Alternative Dispute Resolution (ADR)* and other related fields of knowledge. It entails debate across a wide range of ADR mechanisms including arbitration, mediation, traditional justice systems, construction adjudication and Online Dispute Resolution (ODR).

We are pleased with the tremendous growth the Journal has witnessed since it was launched. It is now one of the most authoritative and cited publications in ADR and access to justice both in Kenya and across the globe. The Journal is an invaluable resource for scholars, ADR practitioners, policy makers, students and all those who seek information on ADR and access to justice.

The papers featured in this volume cover pertinent topics in Alternative Dispute Resolution including *A critique of the Alternative Justice Systems (AJS) Policy Framework in Kenya; Nurturing International Commercial Arbitration in Kenya; The Bangalore Principles of Judicial Conduct: Judges as Arbitrators; Court Annexed Mediation in Kenya: An Expository Analysis of Its Efficacy; Navigating Emerging Trends to Craft an Enforceable Mediation Settlement Agreement; Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation; Arbitration for Construction Disputes in Kenya. Kind master or errant servant?; The Implication of Disclosure Obligations of Arbitrators for Arbitration Practice in Zambia; Embracing Technology Powered Alternative Dispute Resolution (ADR) In A Post Pandemic Africa: A Catalyst for Change in The E-Commerce, Trade and Justice Sectors and Dispute Resolution in Construction: Why Arbitration Lost the First Port of Call Status in Many Standard Forms of Contracts to Adjudication.* The volume also contains two case reviews titled *Arbitrators' Duty to Disclose Revisited, Newcastle United Football Company Limited Vs the Football Association Premier League Limited & 3 Others (English High Court) and Finality of The Arbitral Award Reaffirmed, Express Connections Limited Vs Easy Properties Limited (2021) eKLR.*

Despite the inherent benefits of ADR mechanisms in the quest towards justice, concerns continue to emerge on how to maximize the full potential of ADR and promote access to justice. The Journal offers useful insight on some of these concerns. The volume is

expected to contribute to the ongoing debate on ADR and access to justice and trigger appropriate responses towards enhancing the uptake of ADR in Kenya.

The Journal adheres to the highest quality of academic standards and validity of data. It is peer reviewed and refereed. The Editorial team welcomes feedback from our readers across the globe to enable us continue improving the Journal.

CIArb-K takes this opportunity to thank the publisher, contributing authors, Editorial Team, reviewers, scholars and those who have made it possible to continue publishing such a high impact journal.

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He has experience in over 60 Arbitrations and Mediations, as arbitrator, Mediator and Party Representative. He has published a book, *Commercial and Investment Arbitration: An African Perspective*; and over 20 Articles on the subject in peer reviewed Journals.

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## **A critique of the Alternative Justice Systems (AJS) Policy Framework in Kenya**

*By: Francis Kariuki\**

### **Abstract**

*On 27<sup>th</sup> August 2020, the Judiciary together with its partners formally launched the AJS policy framework and the AJS Baseline Policy. The launch of the policy was eagerly awaited as there was hope that it would provide a proper policy framework for the operationalization of Traditional Dispute Resolutions Mechanisms (TDRMs) in Kenya. This paper offers a critique of the policy. It shows that the policy which was formulated and launched, does not offer an appropriate framework for promoting TDRMs. In addition, the author illustrates how the formulation of the policy as a whole, placed TDRMs (which are informal justice mechanisms) at the hands of state-led/formal institutions. The paper argues that such a formalistic and top-down approach depicts, and is a continuation of colonial and postcolonial state policies aimed at suppressing and destroying customary governance frameworks despite their resilience, popularity and legitimacy amongst the people of Kenya. Moreover, the bundling together of TDRMs and the other dispute resolution mechanisms (which have existing regulatory arrangements), creates an avenue for the subversion of processes that have and continue to be relied upon in accessing justice by millions of Kenyans.*

### **1. Introduction**

On 27<sup>th</sup> august 2020, the Chief Justice of the Republic of Kenya, Hon. David Maraga launched two documents, that is, the Alternative Justice Systems Framework Policy: Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (hereinafter “the AJS Framework Policy”) and the Alternative Justice Systems Baseline Policy: Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (hereinafter the “AJS Baseline Policy”). The aim of the policy documents is to propose strategies for mainstreaming and upholding autonomous practices of AJS mechanisms using methods that meet the constitutional threshold and international human rights standards.<sup>1</sup> The Policy frameworks are the result of a taskforce established by former

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<sup>1</sup> Judiciary of Kenya, ‘Alternative Justice Systems Policy Framework’ (Judiciary of Kenya 2020), vii.

chief justice, Dr. Willy Mutunga.<sup>2</sup> The taskforce arose from a forum of dialogues between the then Chief Justice and diverse councils of elders from all over the country.<sup>3</sup> Shortly thereafter, the Judiciary incorporated AJS as a central strategy for responding to the internal crisis of backlog of cases within the Judiciary, as well as an avenue for realizing the transformative intent of the Constitution of Kenya, 2010.<sup>4</sup> The AJS Baseline Policy was developed through a research design that entailed: dialogues convened between various councils of elders and the then Chief Justice; learning sessions conducted by the taskforce mainly in Othaya, Nyeri, Isiolo, and Kericho; a series of town-hall conversations that were named “Community empowerment workshops on AJS” convened by the Taskforce between 2016 and 2017; in-house research on various subject areas; and stakeholder forums convened with representatives from various institutions that are charged with the duty to provide or promote access to justice in Kenya. It is the AJS Baseline Policy that informed the formulation of the AJS Framework Policy.<sup>5</sup>

Whereas the AJS Baseline Policy has recognised the role that TDRMs have historically played in dispute resolution in Kenya, it fails to canvass TDRMs in an in-depth manner.<sup>6</sup> The AJS Baseline Policy looks at TDRMs before, during and after colonization, and in the post-2010 Constitution era.<sup>7</sup> It also acknowledges that most disputes are resolved outside courts using AJS especially TDRMs.<sup>8</sup> However, in designing the policy framework for AJS and recommendations, the AJS Policy fails to set up a proper framework for TDRMs that would thrive as a *sui generis* dispute resolution mechanism as envisioned in Article 159(2)(c) of the 2010 Constitution. Rather, the Policy ends up designing new, and amorphous mechanisms, and thus ends up bundling up TDRMs with other dispute resolution mechanisms, and refers to them as AJS.<sup>9</sup> This creates tremendous conceptual, practical and technical challenges in developing an appropriate framework for operationalizing TDRMs as per the 2010 Constitution.

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<sup>2</sup> Kenya Gazette (Special Issue) Gazette Notice. Vol. CXVIII-No.21, 4th March 2016.

<sup>3</sup> Judiciary of Kenya, ‘Alternative Justice Systems Baseline Policy’ Judiciary of Kenya (2020), vii.

<sup>4</sup> Ibid.

<sup>5</sup> Judiciary of Kenya, ‘Alternative Justice Systems Policy Framework’ Judiciary of Kenya (2020), 1.

<sup>6</sup> Judiciary of Kenya, ‘Alternative Justice Systems Baseline Policy’ Judiciary of Kenya (2020), 1-5.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid, 1-9.

<sup>9</sup> Ibid, 6.

The purpose of this paper is to critique the AJS Policy framework and the AJS Baseline Policy in promoting TDRMs in Kenya. Part 1 is this introduction offering a brief background to the critique. Part 2 critiques and problematizes the usage of the term AJS rather than TDRMs in the policy. Part 3 deals with the human rights-based approach in designing the AJS framework and its impact on TDRMs. In Part 4, the paper evaluates the proposed AJS typologies while the interactions between courts and AJS are discussed in Part 5. Part 6 discusses the remuneration of AJS practitioners. Part 7 looks at the role of the Judiciary Training Institute (JTI) in providing training for TDRMs practitioners. Part 8 critiques the role of the suggested AJS practitioners in TDRMs. The paper then gives recommendations on what the AJS Policies should have focused on.

## **2. Conceptualising TDRMs and the usage of the term ‘AJS’ in the Policy**

According to AJS Baseline Policy, the choice of the phrase ‘Alternative Justice Systems’ is because it is an expression of the plural-legal systems which exist in Kenya.<sup>10</sup> While the AJS Baseline Policy intended to look at the different dispute resolution mechanisms existing in Kenya, the Policy equates TDRMs to AJS, a move with tremendous implications. First, this creates a difficulty for TDRMs, especially those governed by customary laws. This is because from the onset, it appears that the aim is to bundle them together with other mechanisms, which is definitely likely to suffocate and undermine them. Second, a keen look at Article 159(3) of the Constitution, demonstrates that it is the TDRMs that are subjected to the repugnancy clause and the constitutionality test therein, and not the other dispute resolution mechanisms that have existing regulatory frameworks. It is noteworthy, that there are other provisions of the Constitution, such as article 60(g), which talk of the use of ‘recognised local community initiatives consistent with this Constitution’ in resolving land disputes. The mechanisms in article 60 of the Constitution are not subjected to the repugnancy clause, but only a constitutional test implying that they are conceptually different from the TDRMs in article 159 of the Constitution.

Third, lumping together TDRMs under AJS, seems to perpetuate the false superiority and legitimacy of formal justice systems (in particular courts, in spite of the known fetters and impediments in accessing justice through courts in Kenya) as the mainstream justice mechanisms while suffocating and relegating TDRMs to the sidelines as ‘alternatives’. Whereas the term ‘alternative’ may be used to aptly describe other mechanisms for dispute resolution such as courts, church leaders, chiefs, *et cetera*, which have not been practiced in Kenya since time immemorial, the term cannot be used

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<sup>10</sup> Ibid.



to describe customary-based justice systems which have remained resilient, legitimate and popular in spite of years of onslaught by formal justice systems. Withal, the use of the term ‘alternative’ in describing Alternative Dispute Resolution (ADR) mechanisms has already elicited enormous criticisms within and among ADR practitioners, as it tends to show that the formal justice systems are the mainstream and/or appropriate forums for dispute resolution while ADR is the ‘alternative.’ However, the shift towards ADR processes such as arbitration and mediation and their recognition and use in a wide spectrum of disputes globally shows that they are more appropriate in dispute resolution rather courts especially where there is need to maintenance relationships such as in commercial disputes.

In his speech during the launch of the Policy, former Chief Justice David Maraga acknowledged that since 90% of disputes in Kenya are resolved outside the formal justice system,<sup>11</sup> this explains why the 2010 Constitution found a place for TDRMs. It is noteworthy that the term TDRMs refers to those mechanisms that have been practiced by communities since time immemorial and passed from one generation to the other.<sup>12</sup> Those mechanisms must have had a long, tried and tested history, unlike some of the AJS proposed in the Policy. There is no shortage of TDRMs in Kenya. Indeed, Kenyan communities continue to use them in the resolution of grievances and disputes. Most TDRMs, are based on the customs, traditions and practices of the various communities.<sup>13</sup> Those customs, traditions and practices, are however not static or absolute, but are inherently dynamic, fluid and subject to change. Consequently, TDRMs are equally dynamic, and continue to evolve in time and space.<sup>14</sup> Indeed, through interactions with people and the environment, communities do develop new customs, traditions or customary practices to govern their way of life. As such, the term ‘traditional’ in TDRMs can indeed encompass recent enactments with traditions that have existed since time immemorial or comprise new traditions.<sup>15</sup> Consequently, the use of the term ‘alternative’ in the policy might work to inferiorise, weaken, undermine and suffocate the main mechanisms that most Kenyans use to access justice.

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<sup>11</sup> Speech by former Chief Justice David Maraga  
<https://www.youtube.com/watch?v=C8IAAtP3i1I>

<sup>12</sup> Francis Kariuki, ‘Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology’ (2015), 12.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid, 13.

### **3. The human rights framework and AJS**

The AJS Baseline Policy recommends a rights-based approach in developing a policy framework for AJS.<sup>16</sup> The rationale for this is that Article 159(2)(c) of the Constitution of Kenya, explicitly requires AJS to be promoted as a principle and practice. The AJS Baseline Policy suggests *inter alia* that: human rights provide an appropriate language and context for rebalancing the society; human rights is an ongoing societal construct enables interchange between law, politics and culture; human rights is the most transformative language for our society, scripts of personhood that embody values such as dignity, equity, respect, protection, equality and public service have always been part and parcel of our common civilization as reflected in our diverse ethnic and cultural practices.<sup>17</sup> With the foregoing reasons, the Baseline Policy proceeds to create further standards under the human rights approach to wit: duty to respect, duty to protect and duty to transform.<sup>18</sup>

Applying the three (3) duties to TDRMs is likely to present challenges in the workings of TDRMs. First, the duty to respect requires the Judiciary and other State organs not to interfere with the AJS process from start to finish.<sup>19</sup> However, there is a caveat in that the government can interfere with AJS from time to time.<sup>20</sup> The Judiciary is tasked with the role of conducting audits on AJS to ensure that due process is followed or where there is an alleged violation of human rights in the process used in the AJS.<sup>21</sup> However, such scrutiny must be in compliance with the Constitution and other relevant laws<sup>22</sup> as it may curtail the independence of TDRMs, and take away the attributes that make them legitimate and accessible, and undermine the decisions made under TDRMs.

Second, the duty to protect requires the enactment of laws, policies and regulations for AJS and its mechanisms to guard against human rights violations, and provide remedies where these processes have resulted in human rights violations.<sup>23</sup> Due to the backdoor created to curtail the promotion of TDRMs in a legal pluralistic society by the repugnancy clause in Article 159(3) of the 2010 Constitution, the duty to protect further creates more hurdles in the promotion of TDRMs. In addition, the court is also already

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<sup>16</sup> Judiciary of Kenya, ‘Alternative Justice Systems Baseline Policy’ Judiciary of Kenya (2020), 59.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, 60-64.

<sup>19</sup> *Ibid.*, 60.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, 61.

there to play a supervisory role over TDRMs to ensure compliance with the constitutional and repugnancy tests.<sup>24</sup>

The third is the duty to transform. Under this duty, the State is required to facilitate right holders' access to and utilization of AJS.<sup>25</sup> In order to ensure alignment to the Constitution, the duty to transform requires the State to establish the minimum core content. In an effort to promote AJS, the duty sees a need to remedy the gaps that exist within the AJS entities and processes in order to ensure efficiency and effectiveness.<sup>26</sup> Interestingly, state-courts with their fair share of challenges, are the ones to engender efficiency and effectiveness in processes that have been working well for hundreds of years. A better approach would have been to assess why TDRMs have remained popular and legitimate amongst our communities, and draw useful lessons from them in designing or reimagining a justice system that work for justice consumers. Such an approach would perhaps address deference towards the narrow western and alien views of law and justice, where customary laws and institutions are seen as primitive and barbaric.<sup>27</sup>

This attitude that TDRMs needs to be transformed fails to appreciate that for them to thrive well there is need for an intercultural engagement between customary law and state law as well as formal justice systems and informal justice systems. Such an intercultural dialogue, must be respectful of customary institutions; recognise their contribution in promoting justice and that neither the formal institutions of justice nor customary ones, can deliver justice without the other.

Even though TDRMs face human rights-related concerns, for instance, regarding gender discrimination, inhumane treatment, and violation of the right to a fair hearing,<sup>28</sup> they are already subjected to a human rights approach in the Constitution of Kenya 2010 that requires them to be used in a way that does not contravene the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or

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<sup>24</sup> Francis Kariuki, 'Traditional Dispute Resolution Mechanisms in the Administration of Justice in Kenya' in ES. Nwauche (ed.) *Citizenship and Customary Law in Africa* (Centre for African Legal Studies, 2020) 49.

<sup>25</sup> Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy' Judiciary of Kenya (2020), 63-64.

<sup>26</sup> Ibid.

<sup>27</sup> Francis Kariuki *et al*, *Property Law* (Strathmore University Press, 2016).

<sup>28</sup> Francis Kariuki, 'Traditional Dispute Resolution Mechanisms in the Administration of Justice in Kenya' in ES. Nwauche (ed.) *Citizenship and Customary Law in Africa* (Centre for African Legal Studies, 2020) 33-68, 48.

morality; or is inconsistent with this Constitution or any written law.<sup>29</sup> Further, under the Judicature Act, TDRMs shall not be used in any civil matter where the laws are repugnant to justice and morality or inconsistent with any written law.<sup>30</sup> Whereas compliance with human rights is essential in protecting the rights of those who engage TDRMs, assuming that within customary institutions human rights are generally not respected is a reflection of cultural superiority of western ideals embodied in our laws, and is tantamount to legal imperialism. However, such a thinking is premised on a wrong assumption that within customary governance systems there is no concept of human rights, justice or morality that can be used as a matrix.<sup>31</sup> Already, there are better opportunities for the achievement of justice within TDRMs than with the African state criminal justice systems because the former aims at the restoration of rights, dignity, interests, and wellbeing of victims, offenders, and the entire community.<sup>32</sup>

Lastly, there are scholars who have recognised the limits of a rights based approach as a conceptual lens, for it ‘...views the individual as the center of the moral universe’ is problematic in studying TDRMs which operate within communities that live collectively, and that are mostly concerned with the maintenance of social harmony and cohesiveness, as it can denigrate those communities, collectives or group rights.<sup>33</sup>

The human rights approach undertaken in the Policy Framework, also seems to inform the ‘agency theory of jurisdiction of AJS’ that is proposed therein. According to this theory, the important question to ask to determine the jurisdiction of AJS is,

*‘...if it can be objectively determined that the parties to a given dispute have consensually and voluntarily submitted themselves to the AJS mode of dispute resolution; and whether the consent of the parties can be objectively and credibly be determined to be informed, mutual, free and revocable. If the answer is in the affirmative and if there is no specific legislation or public policy ousting*

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<sup>29</sup> Article 159(3), Constitution of Kenya, 2010.

<sup>30</sup> Section 3(2), Judicature Act (Chapter 8, Laws of Kenya).

<sup>31</sup> Francis Kariuki, ‘Traditional Dispute Resolution Mechanisms in the Administration of Justice in Kenya’ in ES. Nwauche (ed.) *Citizenship and Customary Law in Africa* (Centre for African Legal Studies, 2020) 49.

<sup>32</sup> *Ibid.*

<sup>33</sup> Makau Mutua, ‘Human Rights in Africa: The Limited Promise of Liberalism’ 51 *African Studies Review* (2008) 17-39. See also Karl Klare, ‘Legal Theory and Democratic Reconstruction’ 25 *University of British Columbia Law Review* (1991) 69-104; David Kennedy, ‘The International Human Rights Movement: Part of the Problem’ 15 *Harvard Human Rights Journal* (2002) 101-25.

*the jurisdiction of AJS mode of dispute resolution, then the dispute is amenable to the AJS mode of dispute resolution – whether the dispute is formally determined to be “civil” or “criminal.”*<sup>34</sup>

The author finds the deployment of the agency theory of jurisdiction here problematic, as it is informed by a human rights lingua, which as mentioned earlier, is centered on an individual whereas most African communities, especially those who use TDRMs, they live collectively.

#### **4. Typologies of AJS recommended in the AJS Policy**

The second issue is the AJS recommended. The AJS Baseline Policy identified 4 AJS that should be considered to wit:

##### **(a) Autonomous AJS Institutions**

According to the Policy, Autonomous AJS Institutions are independent mechanisms run entirely by the community. The community determines the decision-makers and the processes to be followed without any interventions or regulations from the State.<sup>35</sup> However, the Policy puts a caveat on this autonomy. It states that, in as much as this AJS shall be independent and free from interference, the Judiciary is obligated to audit this province with the view of ensuring that due process standards are kept. If it finds any incident of non-compliance, it must advise key personnel in this province on steps that should be taken to rectify them.<sup>36</sup>

By putting a caveat in the recommendation in which the court still plays an oversight role, it cements the unified approach taken by the 2010 Constitution which confers on the Judiciary the mandate to promote and encourage TDRMs.<sup>37</sup> Mandating state courts with the role of promoting TDRMs, presents jurisprudential and practical challenges, and casts doubts into the future development of customary law and TDRMs in Kenya.<sup>38</sup>

The Policy has, therefore, gone a step further and increased the role of the formal courts, consequently creating a solid foundation for the subversion of customary laws.

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<sup>34</sup> Judiciary of Kenya, ‘Alternative Justice Systems Baseline Policy’ Judiciary of Kenya (2020), xvii.

<sup>35</sup> Ibid, 51.

<sup>36</sup> Ibid, 60.

<sup>37</sup> Francis Kariuki, ‘Traditional Dispute Resolution Mechanisms in the Administration of Justice in Kenya’ in ES. Nwauche (ed.) *Citizenship and Customary Law in Africa* (Centre for African Legal Studies, 2020) 59.

<sup>38</sup> Ibid, 59.

In that regard, Kenya departs from other jurisdictions such as Ghana and Nigeria which have traditional or customary courts separate from the formal courts, and which give more deference to the application of customary laws.<sup>39</sup> The autonomous AJS envisaged in this Policy is not tantamount to creation of customary courts, and neither are they independent due to the role vested on courts to check compliance with constitutional thresholds for TDRMs.<sup>40</sup>

### **(b) Autonomous Third-Party AJS Institutions**

According to the AJS Policy, these can be state-sanctioned institutions such as chiefs, the police, probation officers, child welfare officers, village elders under the county governments, and the chair of *Nyumba Kumi* (ten houses) groupings, among others.<sup>41</sup> It is noteworthy that by looking at these mechanisms, that are already regulated by other statutes, and are already working effectively in their respective spheres, the Policy veers off from its core mandate which is promotion of TDRMs. Further, this also creates confusion as the policies talk of autonomous third-party and regulated AJS as separate. In the Policy, the autonomous third-party AJS are endorsed while disregarding the regulated AJS yet both are governed by other laws. Perhaps the autonomous third-party, were endorsed partly due to the fact that ‘...*the State and non-State third parties are not part of any State judicial or quasi-judicial mechanisms*’<sup>42</sup> hence the need to find a place to ‘house’ them.

Whereas these third-party mechanisms, could be part of the informal dispute resolution mechanisms or TDRMs, Article 159(2)(c) of the Constitution does not envisage such processes. This is so because, some of these mechanisms such as the chiefs, police, probation officers and child welfare officers, have standalone statutes, guidelines and codes of ethics governing their operations. Additionally, one wonders whether they are subject to the repugnancy and/or constitutional limits placed upon TDRMs in Article 159(3) of the Constitution. The limitation placed on TDRMs in Article 159(3) of the Constitution is due to the long-held view that they sometimes contravene the bill of rights or are repugnant to justice or morality or results in outcomes that are repugnant to justice or morality.

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<sup>39</sup> Ibid.

<sup>40</sup> Article 159(3), Constitution of Kenya (2010).

<sup>41</sup> Judiciary of Kenya, ‘Alternative Justice Systems Baseline Policy’ Judiciary of Kenya (2020), 51-52.

<sup>42</sup> Ibid, 52.

Further, Article 11 of the Constitution of Kenya provides that the State shall promote culture as it is the foundation of a Nation. The Policy itself recognises this and acknowledges the need to protect cultural practices that are consistent with the Bill of Rights, and the need for the Judiciary to push the boundaries to ensure that their outcomes reflect the transformative character of the Constitution.<sup>43</sup> However, by merging TDRMs with other regulated mechanisms, the Policy seems to depart from its focus on TDRMs, as seen from the historical context outlined in the Policy and the justifications given for its creation.<sup>44</sup>

### **(c) Court-Annexed AJS Institutions**

These are AJS processes used to resolve disputes outside the court, although under its guidance and partial involvement.<sup>45</sup> Examples of court annexed AJS that are currently running include the court annexed mediation services,<sup>46</sup> and arbitration where the court's role is to recognize and enforce an arbitral award.<sup>47</sup> The courts have also encouraged the use of chiefs, probation officers and police in resolving disputes. These methods of resolving disputes already have their own laws that govern how disputes will be resolved under those mechanisms. The court-annexed institutions are envisioned to run under the guiding principles provided by the Policy.<sup>48</sup>

However, for customary AJS the courts should not be seen to make rules governing how dispute resolution is done by TDRM practitioners. The role of the courts should be to check for constitutional compliance in dispute resolution using TDRMs. The AJS Baseline Policy had already envisioned this under the Autonomous AJS, where it recognized that the duty to protect under autonomous AJS, entails developing laws, policies and regulations for AJS and its mechanisms that guard against human rights violations, and provide remedies where these processes have resulted in human rights violations.<sup>49</sup>

Further, the duty to respect in autonomous AJS requires the Judiciary to ensure that there is no interference in the AJS processes, from start to finish. Once a complaint is lodged,

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<sup>43</sup> Ibid, 63.

<sup>44</sup> Ibid, 1-5.

<sup>45</sup> Ibid, 52.

<sup>46</sup> Kenya Law <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf>

<sup>47</sup> Section 36, Arbitration Act, Cap. 49, Laws of Kenya (Revised, 2012).

<sup>48</sup> Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy' Judiciary of Kenya (2020), 60.

<sup>49</sup> Ibid, 61.

the process should proceed uninterrupted.<sup>50</sup> However, with the introduction of the court-annexed AJS for TDRMs, the court will further increase its role of policing TDRMs, and might not allow them to thrive with minimal interference.

#### **(d) Regulated AJS institutions**

These are AJS mechanisms created, regulated, and practiced either entirely or partially by State-based law or statute.<sup>51</sup> An example of this is the short-lived Land Disputes Tribunals in Kenya.<sup>52</sup> This model was rejected by the Policy writers because it will likely unduly distort AJS practices in Kenya; it is too readily amenable to appropriation; and may undermine rather than promote AJS practices overall.<sup>53</sup>

Inclusion of the Regulated AJS in the Policy framework, supports the argument in this paper, that the conceptualisation of AJS in the Policy was fundamentally wrong as Article 159(2)(c) of the Constitution does not seem to focus on mechanisms that are already regulated in other legal frameworks. And as mentioned earlier, the bundling depicts attempts at eroding and transforming TDRMs. Indeed, one of the declared goal of the Policy is to ‘transform’ AJS. Further, this bundling shows depicts a lack of appreciation of customary law and TDRMs in governance generally, and in enhancing access to justice amongst the people. Customary laws and TDRMs have remained resilient, popular and legitimate among many Kenyans and have refused to die in spite of many years of onslaught through governmental fiat because they are dynamic and are a reflection of their lived realities. .<sup>54</sup> However, the Taskforce identified the autonomous, autonomous third-party, and court-annexed AJS Institutions, as the typologies that adhere to the human rights framework of AJS.<sup>55</sup>

### **5. Interactions between AJS and Courts**

The policy addresses the interaction between the Courts and matters determined by or before AJS institutions. The Baseline Policy proposes four compatible standards of review or interaction between courts and AJS. First, is deference, where courts review AJS cases for procedural propriety and proportionality only. Second, is recognition and

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<sup>50</sup> Ibid, 60.

<sup>51</sup> Ibid, 53.

<sup>52</sup> Ibid, 53.

<sup>53</sup> Ibid, xvii.

<sup>54</sup> Francis Kariuki, ‘Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR’ 2 *Alternative Dispute Resolution Journal*, 1 (2014), 203.

<sup>55</sup> Judiciary of Kenya, ‘Alternative Justice Systems Policy Framework’ (Judiciary of Kenya 2020), 8.



enforcement in the mode of arbitral awards. Third, is the facilitative interaction where AJS awards/process provide evidence for the parties in the Court process. Four, is convergence, where Courts defer to the AJS process only when both parties agree. However, the Baseline Policy contemptuous view of TDRMs, is evident when it indicates that the convergence approach ‘would fetter the Courts’ duty to promote AJS’ and that there is ‘need to acknowledge that AJS is a dispute resolution forum just like the Courts: the end game is getting a dispute satisfactorily resolved.’<sup>56</sup> Further, it proposes to ‘give judicial officers the freehand in assessing matters in the docket and encourage parties to give AJS a chance in appropriate cases even where one party is not agreeable.’ While the convergence approach is only mentioned in the Baseline Policy, the Framework Policy does not say anything regarding that approach.

The Framework Policy, however shows a preference for the application of either the Deference or Recognition and Enforcement Operational Doctrines, while also indicating that there may also be instances where a prior agreement of the parties or specific circumstances of the case make the Monist or Facilitative interaction doctrines appropriate.<sup>57</sup> The author will therefore examine these approaches in the next section:

### **5.1 Deference approach**

Whereas the deference approach is preferred by the Policy, in assessing procedural propriety and proportionality, caution is needed in view of the retention of the repugnancy clause in our Constitution. Looking back at the treatment of customary law in courts in the past, shows how some courts have treated customary law and decisions by TDRMs with utter contempt. As argued elsewhere, the retention of the repugnancy clause in article 159(3) of the 2010 Constitution is a backdoor attempt at curtailing the promotion of TDRMs in a legal pluralistic society.<sup>58</sup> Unless, clear guidelines are put in place on the assessment of procedural propriety and proportionality, parties who go through TDRMs, might not realise justice especially where the court’s view of justice or understanding conflict with the TDRMs decision.

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<sup>56</sup> Judiciary of Kenya, ‘Alternative Justice Systems Baseline Policy’ Judiciary of Kenya (2020), 57.

<sup>57</sup> Judiciary of Kenya, ‘Alternative Justice Systems Policy Framework’ (Judiciary of Kenya 2020), 9.

<sup>58</sup> F Kariuki ‘Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR’ (2014) 2(1) *Alternative Dispute Resolution* 217.

## **5.2 Recognition and enforcement approach**

Further, while the preference for the Recognition and Enforcement approach in the Policy, might be useful and supportive to TDRMs, it fails to recognize that communities have enforcement mechanisms that they use to enforce TDRMs decisions, and might not need to resort to court for recognition and enforcement. For instance, in *Republic v Mohamed Abdow Mohamed*<sup>59</sup> the High Court upheld the application of TDRMs following Islamic law and customs, and discharged an accused person who had been charged with murder.<sup>60</sup> It is noteworthy that in this case, the parties did not resort to court to seek recognition and enforcement of the TDRMs decision, as they had already enforced it themselves. This was through the families of the accused and the deceased person meeting and agreeing on some form of compensation ‘wherein camels, goats and other traditional ornaments were paid to the aggrieved family’ including a ritual that was performed to pay for the blood of the deceased to his family as provided for under the Islamic law and customs.<sup>61</sup> Subsequently, the court allowed the application for withdrawal, citing the powers of the Director of Public Prosecutions to discontinue proceedings. The recognition and enforcement approach is borrowed from arbitral law and practice, and of note, is the lack of clarity on whether there is a right of appeal against the decision of a court to set aside the TDRMs award.

## **5.3 Monist approach**

On the monist approach, the Policy suggests that courts can treat previous TDRMs process or award as tribunal of “first instance” from which a dissatisfied party is permitted to appeal to the Court. In this mode, the Court conducts a review of both facts and law as a first appellate Court does.<sup>62</sup> Such an approach exposes TDRMs decisions to endless litigation thus defeating the essence of these mechanisms. The Policy however does not show a preference of this mode.

## **5.4 Facilitative interaction**

The facilitative interaction occurs when the AJS award or process is used as evidence in an on-going Court process. However, the Policy does not show a preference for this mode. The court, therefore, does not accept and enforce the AJS award or verdict as given in the AJS proceedings, but the award or proceedings serve as one of the pieces of evidence the Court uses to reach its own verdict. The probative value the Court assigns

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<sup>59</sup> *R v Mohamed Abdow Criminal Case No. 86 of 2011* [2013] eKLR.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> Judiciary of Kenya, ‘Alternative Justice Systems Policy Framework’ (Judiciary of Kenya 2020), 9.

to this evidence will vary depending on the nature of the AJS proceedings.<sup>63</sup> This is problematic and can create subjectivity on the part of judicial officers especially where the dispute touches of customary laws that the court is not familiar with. Such an approach is bound to present challenges in view of the ambiguity surrounding the application of TDRMs generally, where courts have treated the decisions of TDRMs differently, occasioning jurisprudential confusion in terms of whether they are applicable, when, how and under what circumstances.<sup>64</sup>

## **6. Remuneration**

In developing the AJS Baseline Policy, the policymakers raised a question as to whether AJS Practitioners in the court-annexed mediation should be remunerated for their services. The conclusion was that they should be paid.<sup>65</sup> Further, there was a general conclusion that all AJS practitioners should be paid.<sup>66</sup> The AJS Baseline Policy also noted that under the county government structure, elders are paid allowances.<sup>67</sup> The policy suggests that the funding and payment of AJS personnel will be funded by the national government.<sup>68</sup>

The policy, however, acknowledges that looking for funds will be a challenge given that the Judiciary is already underfunded.<sup>69</sup> It also acknowledges the need for strong accountability measures to be put in place to ensure that adequate funding is obtained for the AJS Mechanisms.<sup>70</sup>

However, what the policy fails to recognise is that under most TDRMs money is never the underlying motivation of the dispute resolvers. In most instances, it is a mark of honour that one serves the community in assisting in resolving an issue. In essence, the underlying motivation in resolving disputes and conflicts is the recognition that disputes

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<sup>63</sup> Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy' Judiciary of Kenya (2020), 58.

<sup>64</sup> F. Kariuki, 'Traditional Dispute Resolution Mechanisms in the Administration of Justice in Kenya' (2020), 52.

<sup>65</sup> Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy' Judiciary of Kenya (2020), 78.

<sup>66</sup> *Ibid*, 79.

<sup>67</sup> Section 53(4) of the County Governments Act, No. 17, Laws of Kenya (2012).

<sup>68</sup> Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy' Judiciary of Kenya (2020), 79.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid*.

and conflicts are a threat to the existence of society and are thus avoided.<sup>71</sup> Also, in Jomo Kenyatta's book facing Mt. Kenya he documents that among the Gikuyu people 'an elder in a community renders his services freely.' In this regard he observes as follows:

*"He receives no remuneration in the way of a salary, but helps the community with his advice and experience in the same way as he directs the management of his own homestead and family group. In recognition of these services, he receives public tributes ceremonially, and is regarded specifically as the father and officiating priest of the community."*<sup>72</sup>

Consequently, stating that AJS personnel must be paid may distort the already established modes of compensation that different communities have. Further, it may lead to cases of corruption in the TDRMs system because dispute resolvers may end up being motivated by money. This may create instances where justice is not served as one can easily influence a decision by paying off the one resolving the dispute.

## **7. Training**

The AJS Baseline Policy proposes that all personnel who will be part of the AJS system should undergo training on delivery of excellent services.<sup>73</sup> The policy envisions that the training will be conducted by the Judicial Training Institute. The training will be focused on specific issues already pre-identified by a baseline study.<sup>74</sup> The overall objective is to ensure compliance with due process standards. However, whereas such training can be directed towards the third-party AJS and court-annexed AJS, for customary-based justice systems where communities already know how to manage their disputes, such training should not amount to prescribing to them how they should resolve disputes. It ought to be limited to due process aspects only.

In an attempt to create a standard procedure to apply to AJS, the policy seems to ignore that the people it seeks to train already have knowledge, skills and certain competencies that help them in their work of dispute resolution. This is of particular concern, especially in TDRMs. TDRMs are legitimate because those who preside over them are trusted and the community has confidence in them. As noted by Justice Barak, "the judge

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<sup>71</sup> F. Kariuki, 'Conflict Resolution by Elders in Africa' *Alternative Dispute Resolution* (2015), 12.

<sup>72</sup> J. Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), 38-41.

<sup>73</sup> Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy' Judiciary of Kenya (2020), 70.

<sup>74</sup> *Ibid.*

has neither a sword nor a purse, all he has is the public's confidence in him.”<sup>75</sup> In the case of TDRMs, this is demonstrated by the fact that communities continue to resort to these mechanisms despite the onslaught by the formal systems.<sup>76</sup> Moreover, the Policy fails to recognise that communities have different ways of resolving disputes, and that proposing a standard training procedure may lead to a clash of ideologies, and may be different from what the communities practice.

## 8. AJS Practitioners

The AJS Baseline policy gives certain standards based on the Judicial Service Act<sup>77</sup> which AJS practitioners should adhere to these are: professional experience; written and oral communication skills; integrity; fairness; good judgment life experience; commitment to public and community service.<sup>78</sup>

It is not clear whether such a policy prescription was informed by ignorance, or outright contempt for customary-based dispute resolution mechanisms. Additionally, one wonders whether the members of the Taskforce were really informed by the findings of the baseline study since clearly, if they did, they could not have prescribed such standards for AJS processes. For customary based mechanisms, requiring the dispute resolvers to comply with some of these tests is tantamount to retraining them on how to do what they have done since time immemorial or rewriting their customary laws and practices.

The Policy once again attempts a one size fits all approach. In this instance, it uses the formal judicial system in determining the criteria of who can be an AJS practitioner. What the Policy fails to recognise is that the criteria may not work with TDRMs. For example, most of the people who resolve disputes under TDRMs do not have writing skills. What will constitute professional experience will be construed from a formal judicial system point of view. The qualities that are highlighted as a requirement under the Judicial Service Act are construed differently in TDRMs. Again, what the formal justice system may consider fair may not be seen as fair in TDRMs and *vice versa*. Even more absurd, is the fact that the Policy even recognizes the need for practitioners who

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<sup>75</sup> Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' 116(16) *Harvard Law Review* (2002), 19-162.

<sup>76</sup> Francis Kariuki, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR' 2 *Alternative Dispute Resolution Journal* (2014), 203.

<sup>77</sup> Act No. 1 of 2011.

<sup>78</sup> Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy' Judiciary of Kenya (2020), 69.

are conversant with the traditions and knowledge of the communities they will be working in.<sup>79</sup> Clearly, this could be interpreted as an attempt at transforming AJS, and taking away the dispute resolution mandate from communities.

Further, the Policy advocates for criteria in which AJS practitioners should be disciplined in case they go against their mandate.<sup>80</sup> However, it does not give any proposals regarding how this should be done. It appears the policy envisions a disciplinary system that is in line with the formal disciplinary systems. Once again, the policy fails to realise that for TDRMs, communities already have their own mechanisms of dealing with such matters. In relation to the role of lawyers in the AJS process, the Policy acknowledges that one of the reasons for AJS is that most people cannot afford to hire lawyers to assist them in resolving disputes.<sup>81</sup> It proceeds to suggest that under AJS processes, we should turn to paralegals whose work is to offer legal information but they should not represent anyone in the forum.<sup>82</sup> The Policy once again appears to have deviated from its mandate of promoting TDRMs as it promotes the use of formal legal resources in a TDRM matter. It fails to recognise that TDRMs are dispute resolution systems and one that the paralegals may not understand, if they do not understand the customary laws of the community.

## **9. Conclusion**

The AJS Policy Framework was expected to provide an appropriate framework for operationalizing TDRMs, and hence contribute to enhanced access to justice. It was hoped that with the Policy, TDRMs which have remained resilient, popular and legitimate among communities in the dispensation of justice, would have a framework that operationalises them by, *inter alia*, outlining instances when they would apply; due process requirements; jurisdictional issues; legitimization of TDRMs; outlining instances when courts can intervene to support and promote TDRMs; and creating an intercultural framework that allows TDRMs to interact with formal courts.

However, the AJS Policy framework have not adequately addressed the above issues, and thus the Policy is likely to impede rather than contribute to the promotion of TDRMs. Instead, the Policy embodies a colonial, Eurocentric and Anglo-American view of justice that tends to privilege formal courts while undermining indigenous

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<sup>79</sup> Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy' Judiciary of Kenya (2020), 69.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, 75.

<sup>82</sup> *Ibid.*, 76.

conceptions of justice and avenues for accessing justice. Such an approach will ultimately prioritize formal courts as the principal forums for justice dispensation, while TDRMs will merely be seen as vestiges of customary governance system that ought to 'die'. Clearly, the choice of the term 'alternative' depicts this attitude, an attitude that aims at transforming, killing, suffocating and subverting TDRMs, yet existing data shows that millions of Kenyans in rural areas are relying on these mechanisms in the resolution of their grievances and disputes.

Consequently, I doubt whether the AJS Policy Framework will contribute to enhanced access to justice amongst Kenyans in light of the serious constitutional and legal fetters placed on TDRMs. The following recommendations are suggested:

- (a) There is a need to re-examine the AJS Mechanisms suggested by the Policy specifically the Third Party AJS, Court Annexed and even the Regulated mechanism. These three are already regulated elsewhere, and should not form part of AJS. Moreover, their inclusion in the Policy, only serves to cloud, and undermine a critical focus on TDRMs proper. Further, if third party AJS are to be endorsed, there is no sound rationale for not endorsing regulated AJS, as illustrated above since they are already regulated in other legal frameworks.
- (b) A proper framework for promoting TDRMs, ought to ensure minimal interference from courts. Even though Article 159(2)(c) encourages the judiciary to promote AJS such as TDRMs, the promotion should not be one that leads to more interference from the Judiciary as this Policy does.
- (c) There is a need to look for alternative ways of compensating AJS practitioners that is not necessarily based on money. This can be looked at from the various ways in which communities pay tribute to their AJS practitioners. Rather than convert TDRMs from a non-commercial paradigm, the Policy should aim at recognizing and legitimizing the various frameworks that communities are using to compensate their dispute resolvers. This might even reduce the costs of implementation and running the AJS mechanisms.
- (d) Training of AJS practitioners should not be left to the Judicial Training Institute. And if, the AJS practitioners are to be trained, it should be on the procedural and due process safeguards, and how to ensure compliance with the Constitution.
- (e) The Policy should be clear on what the role of the courts should be in the entire AJS Mechanisms. In the Policy, courts appear to play a very prominent role in the work of AJS, and this might undermine the efficacy of AJS processes. The role of courts in AJS ought to be clarified. As it is, the AJS Policy just stops

short of making courts the default system. However, this is not a surprise, since the use of the term ‘alternative’ clearly depicts the view of the drafters of the Policy towards, TDRMs. They are treated as the alternative system, while the courts are the principal and appropriate justice system.

- (f) The AJS Policy should have addressed jurisdiction matters affecting TDRMs. It ought to have defined and clarified the jurisdiction (that is personal, territorial, substantive or pecuniary) of TDRMs in law vis-à-vis formal courts<sup>83</sup> especially when dealing with customary-based justice systems.

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<sup>83</sup> F. Kariuki, *Traditional Dispute Resolution Mechanisms in the Administration of Justice in Kenya*, 62.



## Nurturing International Commercial Arbitration in Kenya

By: *Kariuki Muigua\**

### *Abstract*

*This paper offers a critical examination of the extent to which international commercial arbitration has taken root in Kenya. In particular, the discourse looks at the legal framework governing arbitration and identifies the challenges therein hindering the prosperity of international commercial arbitration in Kenya. The challenges and opportunities in the practice of international commercial arbitration in Kenya are explored in view of the need to nurture the same in the context of Kenya. The author identifies the main problems facing international commercial arbitration in Kenya and proposes certain measures that would make it flourish in Kenya.*

### **1.0 Introduction**

This paper offers a critical examination of the extent to which international commercial arbitration has taken root in Kenya. In particular, the discourse looks at the legal framework governing arbitration and identifies the challenges therein hindering the prosperity of international commercial arbitration in Kenya. The challenges and opportunities in the practice of international commercial arbitration in Kenya are explored in view of the need to nurture the same in the context of Kenya. The author identifies the main problems facing international commercial arbitration in Kenya and proposes certain measures that would make it flourish in Kenya.

### **2.0 International Commercial Arbitration in Kenya: Legal and Institutional Framework**

It is noteworthy that international arbitrations take place within a complex and vitally important international legal framework that comprises *inter alia*: contemporary

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international conventions, national arbitration legislation, and institutional arbitration rules, all of which provide a specialized and supportive enforcement regime for most international commercial arbitrations<sup>1</sup> and international investment arbitration .

Further, it has been observed that the international legal regimes for international commercial and investment arbitrations have been established, and progressively refined with the express goal of facilitating international trade and investment by providing a stable, predictable, and effective legal framework in which these commercial activities may be conducted<sup>1</sup>. This is justified on the ground that enforcement of international arbitral agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation.<sup>2</sup>

The basic legal framework for international commercial arbitration was established in the first decades of the twentieth century, with the 1923 Geneva Protocol and 1927 Geneva Convention, the enactment of national arbitration legislation that paralleled these instruments and the development of effective institutional arbitration rules.<sup>3</sup> Further, the current legal regime for international commercial arbitration was developed in significant part during the second half of the twentieth century, with countries from all parts of the globe entering into international arbitration conventions (particularly the New York Convention) and enacting national arbitration statutes designed specifically to facilitate the arbitral process; at the same time, national courts in most states gave robust effect to these legislative instruments, often extending or elaborating on their terms.<sup>4</sup>

It is in recognition of this fact that Kenya, being a key player in international trade and a preferred international investments destination has put in place a legal framework for the recognition and promotion of international commercial arbitration. Arbitration in Kenya is generally governed by the *Arbitration Act*<sup>1</sup> and the Arbitration Rules therein. However, it is worth mentioning that although the words international commercial arbitration are not expressly provided for under the domestic laws on arbitration in

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<sup>1</sup> *Introduction to International Arbitration*, page 1. Available at <http://www.aspenpublishers.com/%5CAspenUI%5CSampleChaptersPDF%5C625.pdf> [Accessed on 08/10/2021]

<sup>2</sup> *Ibid.*

<sup>3</sup> *David L. Threlkeld & Co. v. Metallgesellschaft Ltd*, 923 F.2d 245, 248 (2d Cir. 1991) as quoted in *Introduction to International Arbitration*, op.cit. Page 1.

<sup>3</sup> *Ibid*

<sup>4</sup> *Ibid*

Kenya, its inclusion can be inferred from the Arbitration Act, 1995<sup>5</sup>. This is because section 3(1) of the Act defines “arbitration” to mean *any arbitration whether or not administered by a permanent arbitral institution*. Even more significant is section 2 of the Act which provides that *except as otherwise provided in a particular case the provisions of the Act shall apply to domestic arbitration and international arbitration (emphasis added)*.

Section 3(3) defines an international arbitration as one where: *the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; one of the following places is situated outside the state in which the parties have their places of business— the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or any place where a substantial part of the obligations of the commercial relationship (emphasis added) is to be performed or the place with which the subject-matter of the dispute is most closely connected; or the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state*.

The inclusion of the phrase commercial relationship in the definition of international arbitration can be construed to mean that the Kenyan *Arbitration Act* contemplates international commercial arbitration. In addition to enacting the *Arbitration Act*, 1995 for domestic and international arbitrations, in legislation that was promulgated in 1995, Kenya has acceded to the 1958 *New York Convention on the Recognition and Enforcement of Arbitral Awards* (NYC)<sup>6</sup> and to *International Convention on the Settlement of Investment Disputes* (ICSID)<sup>7</sup> both of which deal with international commercial arbitration.

Section 36(2) of the Arbitration Act provides that an international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the *New*

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<sup>5</sup> Introduced by Arbitration Amendment Act No. 11 of 2009, s. 2.

<sup>6</sup> The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation. The 1958 New York Convention is an important convention in the recognition and enforcement of foreign arbitral awards and this is an important factor in giving legitimacy to such arbitral awards regardless of state boundaries. This is usually achieved through providing common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.

<sup>7</sup> 575 UNTS 159 / [1991] ATS 23 / 4 ILM 532 (1965) / UKTS 25 (1967)

York Convention<sup>8</sup> or any other convention to which Kenya is signatory and relating to arbitral awards<sup>9</sup>.

The Act provides an exhaustive list of the only grounds upon which the Kenyan courts may refuse recognition of an international arbitration award<sup>10</sup>. These grounds include where a party furnishes proof to the High Court that a party to the arbitration was under some incapacity, the arbitration agreement is not valid under the law to which the parties have subjected it, the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case, the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration and the the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.<sup>11</sup> The High Court may also refuse recognition or enforcement of an arbitral award where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya or the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.<sup>12</sup>

### 3.0 Extent of Court Intervention in Arbitration

The Kenyan Arbitration Act has as far as possible attempted to reflect the international best practices in international commercial arbitration. For instance, Section 10 of the Act states that *except as provided in this Act, no court shall intervene in matters*

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<sup>8</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation. The Convention, in principle, applies to all arbitral awards (Article I, paragraphs (1) and (2)). However, Article I paragraph (3) allows states to make reservations: ‘When ... acceding to this Convention ... any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration. The effect of the above are the two reservations commonly referred to as the reciprocity reservation and the commercial reservation.

<sup>9</sup> The importance of the arbitration clause in an agreement is that any court proceedings commenced are stayed pending the settlement of the dispute by arbitration. An arbitral award can be enforced by the leave of the High Court of Kenya in the same way any court order or decree is enforced.

<sup>10</sup> Arbitration Act, No.4 of 1995, Sec. 37; For a further discussion on the role of court, see Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, 2012 chapter Ten (pp.166-195), Glenwood Publishers, 2012.

<sup>11</sup> Ibid

<sup>12</sup> Ibid

governed by this Act. The concept of limitation of judicial intervention is generally accepted in arbitral practice across the world.<sup>13</sup> The English Arbitration Act provides that ‘*in matters governed by this Act the court should not intervene except as provided by this Act*<sup>14</sup>.’ Further, the UNCITRAL Model Law on International Commercial Arbitration provides that ‘*in matters governed by this law, no courts shall intervene except where so provided in this law*<sup>15</sup>.’

Thus, it has rightly been observed that *the role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration but will also be a clear negation of the legislative intent of the Arbitration Act*.<sup>16</sup>

Courts in Kenya have pronounced themselves on the issue of judicial intervention in arbitration. The Supreme Court of Kenya in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*<sup>17</sup>, stated as follows:

*[52] We note in the above context that, the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the Arbitration Act indicates that, “the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process.” It was also reiterated that the limitation of the extent of the Courts’ interference was to ensure an, “expeditious and efficient way of handling commercial disputes.”*

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<sup>13</sup>Muigua.K., Arbitration Law and the Right of Appeal in Kenya, available at <http://kmco.co.ke/wp-content/uploads/2021/01/Arbitration-Law-and-the-Right-of-Appeal-in-Kenya-Kariuki-Muigua-9th-January-2021.pdf> (accessed on 09/10/2021)

<sup>14</sup> Arbitration Act, 1996 (Chapter 23), United Kingdom, S 1 (c)

<sup>15</sup> UNCITRAL Model Law on International Commercial Arbitration (United Nations Document A/40/17, annex 1) Section 5.

<sup>16</sup> Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited (2015).

<sup>17</sup> *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*, Petition No. 12 of 2016, (2019) eKLR

[53] Similarly, the Model Law also advocates for “limiting and clearly defining Court involvement” in arbitration. This reasoning is informed by the fact that “parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the “finality and expediency of the arbitral process.” Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in Article 159(2) (c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it. However, the arbitration process is not absolutely immune from the Court process, hence the present conundrum.

Further, the Supreme Court of Kenya in *Geo Chem Middle East –vs- Kenya Bureau of Standards*<sup>18</sup> decided as follows:

*41. Having so stated, we must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of Courts has been greatly diminished notwithstanding the narrow window created by Sections 35 and 39 of the Act. To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in Nyutu and Synergy should not be taken as stating anything to the contrary. In this regard, one issue we did not pronounce ourselves on in the Nyutu and Synergy decisions, is whether a further appeal lies to this Court from a determination by the Court of Appeal. For the avoidance of doubt, we now declare that in conformity with the principle of the need for expedition in arbitration matters, where the Court of Appeal assumes jurisdiction in conformity with the principle established in these two decisions, and delivers a consequential Judgment, no further appeal should ordinarily lie therefrom to this Court.*

A similar position was also held by the Supreme Court in *Cape Holdings Limited –vs- Synergy Industrial Credit Limited*<sup>19</sup> where the Supreme Court reiterated the decision in *Geo Chem Middle East –vs- Kenya Bureau of Standards* (supra) and refused to entertain an appeal emanating from the Court of Appeal, where the Court of Appeal had assumed jurisdiction and delivered a consequential judgment in conformity with the principles

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<sup>18</sup> *Geo Chem Middle East –vs- Kenya Bureau of Standards*, Petition No. 47 of 2019 (2020) eKLR

<sup>19</sup> *Cape Holdings Limited –vs- Synergy Industrial Credit Limited*, Application No.5 of 2021

established in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* (Supra).

The precedent flowing from the above decisions highlights the extent of court intervention in arbitration in Kenya. The Arbitration Act envisages a narrow window of court intervention within the confines of sections 35 and 39. However, the Act also allows intervention by the High Court to determine issues where parties fail to agree or to assist the arbitral tribunal in some other way. Section 6 of the Act confers the High court powers to *stay legal proceedings and refer the matter to arbitration* where there is pre-existing agreement to refer the matter for arbitration.

Section 11(1) of the Act confers the High court the power *to determine the number of arbitrators* if parties fail to agree on the same. Regarding the appointment of arbitrators, Section 12 of the Act confers the court the power *to appoint the arbitrator(s) where parties fail to agree on the procedure of appointing the arbitrator(s)*. Section 7 of the Act confers the High Court the power *to grant interim measures of protection where a party so requests*. However, the section provides that where the arbitral tribunal has already ruled on such an application, then the High court will treat such a ruling as a conclusive outcome of that application. Section 14(1) of the Act grants the High Court the power *to decide on an application by a party in arbitration proceedings challenging an arbitrator*. Further, Section 15(2) grants the High Court powers *to decide on the termination of the mandate of an arbitrator who fails to act or whom it becomes impossible to act, where party are unable to do so*.

Section 17 thereof also gives the High court the powers *to make the final decision on the question of jurisdiction of the arbitral tribunal*. Section 28 provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court *assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence*.

Section 35 confers the High court powers *to set aside an arbitral award under the circumstances provided under that provision*. Section 35(1) is to the effect that *recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3)*. This implication here is that the Court will not act in such matters unless a dissatisfied party invites it to do so. The grounds which the applicant must prove for the arbitral award to be set aside are: *incapacity of one of the parties; an invalid arbitration agreement; Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the*



*applicant was unable to present its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award.*

Apart from the above, the High Court may also set aside arbitral awards *where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya*<sup>20</sup>.

Kenya has enacted an Act of Parliament in an effort to nurture international commercial arbitration in the country<sup>21</sup>. The object of the *Nairobi Centre for International Arbitration Act* is to provide for the establishment of a regional centre for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution among other purposes<sup>22</sup>. The Act establishes a centre known as the Nairobi Centre for International Arbitration<sup>23</sup>. The functions of the Centre include to *inter alia: promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; and ensure that arbitration is reserved as the dispute resolution process of choice*<sup>24</sup>. Also noteworthy is the fact that the Act establishes a Court to be known as the Arbitral Court<sup>25</sup>. The Court is to have exclusive original and appellate jurisdiction *to hear and determine all disputes referred to it in accordance with this Act or any other written law and its decisions are to be final*<sup>26</sup>. These provisions are useful in guaranteeing *confidentiality and non-interference ordinary national courts*. Also significant is the provision that subject to any other rules of procedure by the Court, *the Arbitration Rules of the United Nations Commission on International Trade Law, with necessary modifications, shall apply to matters governed by the Act*<sup>27</sup>.

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<sup>20</sup> Arbitration Act, No.4 of 1995, S. 35(2) (b)

<sup>21</sup> Nairobi Centre for International Arbitration Act, No 26 of 2013, Government Printer, Nairobi

<sup>22</sup> Ibid, Recital

<sup>23</sup> Ibid, Sec 4

<sup>24</sup> Ibid, Sec 5

<sup>25</sup> Ibid, Sec 21

<sup>26</sup> Ibid, Sec 22

<sup>27</sup> Ibid, Sec 23



## **4.0 Challenges Facing the Practice of International Commercial Arbitration in Kenya**

### **4.1 Inadequate Legal and Institutional Framework on international commercial Arbitration**

There have been inadequate legal regimes and infrastructures for the efficient and effective organization and conduct of international commercial arbitration in Kenya<sup>28</sup>. This has denied the local international arbitrators the fora to display their skills and expertise in international commercial arbitration. Progress has made towards addressing this challenge such as the enactment of the Nairobi Centre for International Arbitration Act and the subsequent establishment of the Nairobi Centre for International Arbitration under section 4 of the Act. However, there exists a challenge on the capacity of existing institutions to meet the demands for ADR mechanisms introduced by the constitution as well as handling the commercial arbitration matters<sup>29</sup>. Much needs to be done to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR.

### **4.2 Appointment of International Arbitrators by Parties**

Despite there being individuals with the relevant knowledge, skill and experience on international dispute resolution and competent institutions, which specialize in, or are devoted to, facilitating alternative dispute resolution (ADR), there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turfs to appoint arbitrators<sup>30</sup>. Most disputants prefer to appoint their non-nationals as arbitrators in international disputes, thus resulting in instances where even some Africans go for non-Africans to be arbitrators. Indeed, it has been observed that the near absence of African arbitrators in ICSID arbitration proceedings can in part be explained by the fact that African states predominantly appoint international lawyers

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<sup>28</sup> Muigua. K, 'Promoting International Commercial Arbitration in Africa', page 14, available at <http://www.kmco.co.ke/attachments/article/119/PROMOTING%20INTERNATIONAL%20COMMERCIAL%20ARBITRATION%20IN%20AFRICA.pdf> [Accessed on 08/10/2021];

<sup>29</sup> Muigua.K., Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Making-East-Africa-a-Hub-for-International-Commercial-Arbitration.pdf> (accessed on 08/10/2021)

<sup>30</sup> See generally, Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa', *African Development Bank, Law for Development Review*. Available at <https://www.mcgill.ca/files/isid/LDR.2.pdf> [Accessed on 08/10/2021].

to represent their interests<sup>31</sup>. This portrays Africa to the outside world as a place where there are no qualified arbitrators to be appointed as international commercial arbitrators.

### **4.3 Inadequate Marketing**

Kenya and the African continent in general have been portrayed as less developed in terms of handling international commercial arbitration, and little has been done in marketing of Kenya as a centre for international commercial arbitration<sup>32</sup>. Many people outside Africa still carry with them the perception that Africa does not have adequate qualified international commercial arbitrators. They have therefore not sought to know whether this is the position as there has also not been much effort from Africans themselves to refute this assumption<sup>33</sup>.

### **4.4 Uncertainty in Drafting Arbitration Clauses**

There is the need to draft the arbitration clause in a clear manner to avoid misinterpretation. Uncertainty in drafting arbitration clauses has always drawn the attention of courts leading to unnecessary interference. This interference intimidates the foreigners thus making them shy away from African centres<sup>34</sup>. There is also need to ensure that the instances of court intervention are kept to the minimum so as to boost the confidence of commercial disputants in the willingness of courts to uphold the outcome of the international commercial arbitrations held in the country.

### **4.5 Interference by National Courts**

Section 10 of the Kenyan Arbitration Act provides that except as provided in the Act, no court shall intervene in matters governed by the Act<sup>35</sup>. This provision echoes Article 5 of the UNCITRAL Model Law on international commercial arbitration. In effect, the article limits the scope of the role of the court in arbitration only to situations that are

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<sup>31</sup> Daele. K., & De Reya. M, 'Africa's track record in ICSID proceedings' *Kluwer Arbitration Blog*, 30 May2012, available at <http://kluwerarbitrationblog.com/blog/2012/05/30/africa%E2%80%99s-track-record-in-icsid-proceedings/> [Accessed on 08/10/2021].

<sup>32</sup> Muigua. K., 'Promoting International Commercial Arbitration in Africa', op. cit. page 15.

<sup>33</sup> Lovells.H, 'Arbitrating in Africa'. Available at [http://www.hoganlovellsafrica.com/\\_uploads/Publications/Arbitrating\\_in\\_Africa\\_-\\_Hogan\\_Lovells\\_March\\_2013.pdf](http://www.hoganlovellsafrica.com/_uploads/Publications/Arbitrating_in_Africa_-_Hogan_Lovells_March_2013.pdf) [Accessed on 08/10/2021].

<sup>34</sup> Drafting of arbitration clause will depend on what law informs it. For instance, jurisdictions that have embraced UNCITRAL Model Law will adopt this law while those that are not signatories may have different laws informing the same. This may result in conflict in the understanding of such a clause.

<sup>35</sup> Arbitration Act, No.4 of 1995, S 10

contemplated under the Model Law.

However, it has been noted that even when an African state has become a party to the relevant treaties, there might still be the perception that its courts could not be relied on to apply the text correctly or in good faith, with a further argument that national legal frameworks are not conducive for the constitution of arbitral tribunals and to the conduct of arbitration, permitting the ‘local court’ to interfere unduly in arbitral proceedings<sup>36</sup>. Sometimes matters will be appealed all the way to the highest court on the law of the land in search of setting aside of awards. Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending<sup>37</sup>. This delays finalization of the matter as well as watering down the perceived advantages of arbitration and ADR in general. This can only be corrected through setting up tribunals or courts with finality in their decisions and operating free of national courts interference.

Court interference intimidates investors since they are never sure what reasoning the court might adopt should it be called upon to deliberate on such disputes.

#### **4.6 Uncertainty of Costs**

It has been observed that arbitration is now a service industry, and a very profitable one at that with the arbitral institution, the arbitrators, the lawyers, the expert witnesses and the providers of ancillary services all charging fees on a scale<sup>38</sup>. There have not been very clear guidelines on the remuneration of arbitrators and foreigners are not always very sure on what they would have to pay if and when they engage African international arbitrators to arbitrate their commercial disputes. This is because the issue is often left to the particular institutional guidelines. For instance, the Kenyan branch of Chartered Institute of Arbitrators has its own rules and guidelines on the

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<sup>36</sup> Muigua.K., *Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya*, Kenya Law Review (2010), Available at <http://www.kenyalaw.org/klr/index.php?id=824>

For instance, the Arbitration between Kanyotta Holdings Limited and Chevron Kenya Limited (CALTEX) made its way to the Kenya High Court and Court of Appeal after the award was challenged (2012 eKLR)

<sup>37</sup> Ibid

<sup>38</sup> Lord Mustill, *Arbitration: History and Background* (1989) 6:2 J. Int’l Arb. 43. Op. cit. Page 10. Available at <http://law.queensu.ca/international/globalLawProgramsAtTheBISC/courseInfo/courseOutlineMaterials2012/internationalCommercialArbitration/Mustill1989.pdf> [Accessed on 08/10/2021].

remuneration of its arbitrators. However, these are only applicable to those who practice arbitration under the Institute and thus have limited applicability<sup>39</sup>.

#### **4.7 Perception of Corruption**

A bleak image is painted to the international community regarding the governance system in place in Kenya. This hinders the expansion of the scope of international commercial arbitration as the view is taken to imply that justice is impossible to achieve in Africa. Further, it has been argued that at times governments are also perceived to be interfering with private commercial arbitration matters<sup>40</sup>. For instance, the government may try to influence the outcome of the process especially where there are its interests at stake and put forward the argument of grounds of public policy.<sup>41</sup>

#### **4.8 Bias against Africa**

With racism still existing in society, Africa has borne the blunt of it with the bias rendering Africa's image as a corrupt and uncivilized continent. It has been observed that Parties to disputes rarely select African cities as venues for international arbitration, and this is so even for some international arbitral institutions or arbitrators, when asked to make the choice<sup>42</sup>.

#### **5.0 Way Forward**

In the face of globalisation, it is important that international trade and investment take place with minimal interference by territorial barriers such as unnecessary domestic courts' intervention<sup>43</sup>. It has been asserted that the settlement of disputes between parties to an international transaction, arbitration has clear advantages over litigation in national courts. The foreign court can be an alien environment for a businessman

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<sup>39</sup> See CI Arb Kenya Website Available at [www.ciarbkenya.org](http://www.ciarbkenya.org) [Accessed on 08/10/2021].

<sup>40</sup> Muigua.K., Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Making-East-Africa-a-Hub-for-International-Commercial-Arbitration.pdf> (accessed on 08/10/2021)

<sup>41</sup> Ibid

<sup>42</sup> Amazu A. Asouzu, International Commercial Arbitration and African States: Practice, Participation and Institutional Development, University Press, Cambridge, 2001. PP. 5-6 Available at <http://catdir.loc.gov/catdir/samples/cam031/2001018482.pdf> [Accessed: 08/10/2021].

<sup>43</sup> See generally United Nations, Uniform Commercial Law in the Twenty-First Century: Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992. Available at [http://www.uncitral.org/pdf/english/texts/general/Uniform\\_Commercial\\_Law\\_Congress\\_1992\\_e.pdf](http://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf) [Accessed on 08/10/2021].

because of his unfamiliarity with the procedure which may be followed, the laws to be applied, and even the mentality of the foreign judges<sup>44</sup>. In contrast with international commercial arbitration parties coming from different legal systems can provide for a procedure which is mutually acceptable. They can anticipate which law shall be applied: a particular law or even a *lex mercatoria*<sup>45</sup> of a trade. They can also appoint a person of their choice having expert knowledge in the field<sup>46</sup>. Thus, it is argued that these and other advantages are only potential until the necessary legal framework can be internationally secured, at least providing that the commitment to arbitrate is enforceable and that the arbitral decision can be executed in many countries, precluding the possibility that a national court review the merits of the decision<sup>47</sup>.

There is a need to employ mechanisms that will help nurture and demonstrate Kenya to the outside world as a place with international commercial arbitrators with sufficient knowledge and expertise to be appointed to arbitrate international arbitrators. There is also the need to put in place adequate legal regimes and infrastructure for the efficient and effective organization and conduct of international commercial arbitration in Africa. This ranges from legislating comprehensive law on international commercial arbitration as well as setting up world class arbitration centres in Kenya to complement the Nairobi Centre for International Arbitration (NCIA). There is also the Centre for Alternative Dispute Resolution (CADR) which is an initiative by the Chartered Institute of Arbitrators, Kenya and was incorporated in May, 2013. Its objective is to establish and maintain a regional Dispute Resolution Centre in the country. The CADR

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<sup>44</sup> Albert Jan van den Berg, 'The New York Arbitration Convention of 1958', T.M.C. Asses Institute, The Hague, 1981, *Kluwer Law and Taxation Publishers*. Page 1. Available at [www.newyorkconvention.org/userfiles/.../312\\_nyac-i-in-one-document](http://www.newyorkconvention.org/userfiles/.../312_nyac-i-in-one-document). [Accessed on 08/10/2021].

<sup>45</sup> It has been rightly noted that though called the "lex mercatoria," the merchants' law was not statutory law in any country nor was it enforceable in any national Court. The "law merchant" was a more or less unwritten code representing the trade customs and trade practices habitually and uniformly observed by the merchants of every great trading city or country. As traders made their way laboriously from one country to another with their merchandise for sale or barter, with them they carried not merely their goods but also their own law. It, and not the national law of their own country or of the country in which they happened to be, applied as between them in regard to all commercial transactions. It was enforced by consular courts held in any country by itinerant consuls who accompanied groups of their own national merchants to the great fairs in that country. [See Lynden Macassey, International Commercial Arbitration, —Its Origin, Development And Importance, *American Bar Association Journal*, Vol. 24, No. 7 (July 1938), pp. 518-524, 581-582, page 519. Available at <http://www.jstor.org/stable/25713701> [Accessed: 09/10/2021].

<sup>46</sup> Ibid

<sup>47</sup> Ibid

is a positive step towards nurturing international commercial arbitration in Kenya<sup>48</sup>. This will afford the local international commercial arbitrators the fora to showcase their skills and expertise in international commercial arbitration and will also attract international clients from outside Africa. It has been noted that there should be basic minimum standards for international commercial arbitration centres or institutions. These include: modern arbitration rules; modern and efficient administrative and technological facilities; Security and safety of documents; Expertise within its staff; and some serious degree of permanence<sup>49</sup>.

There is a need to set up more regional centres for training of international commercial arbitrators in Africa and Kenya. The Kenyan Chapter of Chartered Institute of Arbitrators trains arbitrators across Africa and has trained arbitrators in countries like Nigeria, Zambia, Uganda and even Malawi<sup>50</sup>. Kenya can indeed play a pivotal role in nurturing international commercial arbitration, not only in Kenya but also across the African continent.

There is also need for the existing institutions to seek collaboration with more international commercial arbitration institutions since this will work as an effective marketing tool for the existing institutions. For instance, the Kenyan Chartered Institute of Arbitrators Branch maintains a close relationship with the International Law Institute (ILI) Kampala and the Centre for Africa Peace and Conflict Resolution (CAPCR) of California State University to conduct Courses in Mediation and other forms of ADR both locally and internationally. There is need for all African centres and institutions to do the same to promote international commercial arbitration in Africa.

The Kenyan law on arbitration appreciates the need to limit court intervention in arbitration to a basic minimum<sup>51</sup>. It has been argued that the relationship between the courts and the arbitral process can be made much closer, both practically and

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<sup>48</sup>See CIArb Kenya Website, Op. Cit.

<sup>49</sup> See Muigua, K., 'Promoting International Commercial Arbitration in Africa', op.cit. page 14; See also Emilia Onyema, Effective Utilization of Arbitrators and Arbitration, Institutions in Africa by Appointors, 4th Arbitration and ADR in Africa Workshop, *Empowering Africa in the 21<sup>st</sup> Century through Arbitration & ADR* Conrad Hilton Hotel, Cairo Egypt 29-31 July 2008, Available at < [http://eprints.soas.ac.uk/5300/1/Arbitrators\\_and\\_Institutions\\_in\\_Africa.pdf](http://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf)> 1. [Accessed on 08/10/2021].

<sup>50</sup> See CIArb Kenya Website, Op. Cit.

<sup>51</sup> Arbitration Act, No.4 of 1995, S 10

psychologically<sup>52</sup>. The psychological link can be strengthened by encouraging all or at least a good number of the commercial judges and advocates to take up training in arbitration and consequently ensuring that they benefit from having prior experience of arbitration either as representative advocates or actual arbitrators<sup>53</sup>. This will subsequently boost the confidence of foreigners in the African Arbitration institutions as well as the role of courts. Effective and reliable application of international commercial arbitration in Kenya has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously.

## **6.0 Conclusion**

There is need to develop a clear framework in Kenya within which international commercial arbitration can be further nurtured. There are arbitral institutions already in place in Kenya as highlighted in this paper. The presence of such institutions in the country points to an acceptance of alternative dispute resolution modes as well as the need to nurture the practice of international commercial arbitration other than exporting commercial disputes to foreign countries for settlement<sup>54</sup>. With the right frameworks in place, Kenya indeed has the capacity to conduct successful international commercial arbitration. Nurturing international commercial arbitration in Kenya is a necessity whose time has come<sup>55</sup>.

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<sup>52</sup> Muigua. K., *Settling Disputes Through Arbitration in Kenya*, Glenwood Publishers Limited, 3<sup>rd</sup> Edition, 2017

<sup>53</sup> Lord Mustill, *Arbitration: History and Background* (1989) 6:2 J. Int'l Arb. 43. Op. cit. Page 4.

<sup>54</sup> Muigua.K., 'Promoting International Commercial Arbitration in Africa', op. cit. page 15.

<sup>55</sup> For a further discussion on the role of court, see Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, 2012 chapter Ten (pp.166-195), Glenwood Publishers, 2012.

## References

Albert Jan van den Berg, ‘The New York Arbitration Convention of 1958’, T.M.C. Asses Institute, The Hague, 1981, *Kluwer Law and Taxation Publishers*. Available at [www.newyorkconvention.org/userfiles/.../312\\_nyac-i-in-one-document](http://www.newyorkconvention.org/userfiles/.../312_nyac-i-in-one-document).

Amazu A. Asouzu, ‘Some Fundamental Concerns and Issues about International Arbitration in Africa’, *African Development Bank, Law for Development Review*. Available at <https://www.mcgill.ca/files/isid/LDR.2.pdf>

Amazu A.Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, University Press, Cambridge, 2001. Available at <http://catdir.loc.gov/catdir/samples/cam031/2001018482.pdf>

Arbitration Act, 1996 (Chapter 23), United Kingdom,

Arbitration Act, No. 4 of 1995 (2009) [Revised Edition 2019, Government Printer, Nairobi

Cape Holdings Limited –vs- Synergy Industrial Credit Limited, Application No.5 of 2021

CIArb Kenya Website Available at [www.ciarbkenya.org](http://www.ciarbkenya.org)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958

Emilia Onyema, Effective Utilization of Arbitrators and Arbitration, Institutions in Africa by Appointors, 4th Arbitration and ADR in Africa Workshop, *Empowering Africa in the 21<sup>st</sup> Century through Arbitration & ADR* Conrad Hilton Hotel, Cairo Egypt 29-31 July 2008,

Geo Chem Middle East –vs- Kenya Bureau of Standards, Petition No. 47 of 2019 (2020) Eklr Hogan Lovells, ‘Arbitrating in Africa’. Available at [http://www.hoganlovellsafrica.com/\\_uploads/Publications/Arbitrating\\_in\\_Africa\\_-Hogan\\_Lovells\\_March\\_2013.pdf](http://www.hoganlovellsafrica.com/_uploads/Publications/Arbitrating_in_Africa_-Hogan_Lovells_March_2013.pdf)



Introduction to International Arbitration’, page 1. Available at <http://www.aspenpublishers.com/%5CAspenUI%5CSampleChaptersPDF%5C625.pdf>

Karel Daele, Mishcon de Reya, ‘Africa’s track record in ICSID proceedings’ *Kluwer Arbitration Blog*, 30 May 2012, available at <http://kluwarbitrationblog.com/blog/2012/05/30/africa%E2%80%99s-track-record-in-icsid-proceedings/>

Kariuki Muigua ‘Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya’. Available at <http://www.kmco.co.ke/attachments/article/114/Making%20East%20Africa%20a%20Hub%20for%20International%20Commercial%20Arbitration.pdf>

Kariuki Muigua ‘Promoting International Commercial Arbitration in Africa’, available at <http://www.kmco.co.ke/attachments/article/119/PROMOTING%20INTERNATIONAL%20COMMERCIAL%20ARBITRATION%20IN%20AFRICA.pdf>

Kariuki Muigua *Settling Disputes through Arbitration in Kenya*, Glenwood Publishers, 3<sup>rd</sup> Edition, 2017

Kariuki Muigua, *Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending And Arbitration In Kenya*, *Kenya Law Review* (2010), Available at <http://www.kenyalaw.org/klr/index.php?id=824>

Kariuki Muigua., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited (2015).

Kariuki Muigua., *Arbitration Law and the Right of Appeal in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2021/01/Arbitration-Law-and-the-Right-of-Appeal-in-Kenya-Kariuki-Muigua-9th-January-2021.pdf>

Lynden Macassey, *International Commercial Arbitration, —Its Origin, Development And Importance*, *American Bar Association Journal*, Vol. 24, No. 7 (July 1938), pp. 518-524, 581-582.

Nairobi Centre for International Arbitration Act, No 26 of 2013, Government Printer,

Nairobi

Nyutu Agrovat Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Petition No. 12 of 2016, (2019) eKLR  
UNCITRAL Model Law on International Commercial Arbitration (United Nations Document A/40/17, annex 1)

United Nations, Uniform Commercial Law in the Twenty-First Century: Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992. Available at  
[http://www.uncitral.org/pdf/english/texts/general/Uniform\\_Commercial\\_Law\\_Congress\\_1992\\_e.pdf](http://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf)

## **The Bangalore Principles of Judicial Conduct: Judges as Arbitrators**

*By: Bwalya Lumbwe\**

### **1. Introduction**

The Bangalore Principles of Judicial Conduct (The Bangalore Principles) are an initiative of the United Nations Office on Drugs and Crime (UNODC) and were adopted in July 2006 by the Member States of United Nations Economic and Social Council (ECOSOC).<sup>1</sup> ECOSOC recognize them ‘as representing a further development of, and as being complementary to, the 1985 United Nations Basic Principles on the Independence of the Judiciary’.<sup>2</sup>

The Bangalore Principles’ aim, is to establish standards for ethical conduct of judges worldwide.<sup>3</sup> They are further designed to provide guidance to judges and afford judicial authorities worldwide, a structure for regulating judicial conduct,<sup>4</sup> whether through a national code of conduct or other mechanism.<sup>5</sup> Another intended goal is to assist members of the executive, the legislature, the lawyers, and the members of the public in general, to better understand and support the judiciary.<sup>6</sup>

Under the principles, a judge is defined as any person exercising judicial power, however designated.<sup>7</sup> Depending on the jurisdiction, such a person may be referred to

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<sup>1</sup> United Nations Office on Drugs and Crime, *The Bangalore Principles of Judicial Conduct*, (United Nations, Vienna, 2018) p18.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*, p 8.

<sup>4</sup> *ibid.*

<sup>5</sup> United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (United Nations Office on Drugs and Crime). See also (n4) p 18.

<sup>6</sup> (n4).

<sup>7</sup> (n2) p 17 Definitions.

as a sitting, acting,<sup>1</sup> active,<sup>2</sup> present<sup>3</sup> or serving judge to distinguish them from retired judges who in many jurisdictions may retain the title, though preceded by the word retired. Henceforth, the article will refer to such persons as simply judges or a judge.

Both ECOSOC and the Bangalore Principles encourage Member States of the United Nations to take the principles into consideration when reviewing or developing rules with respect to judicial professional or ethical conduct.<sup>4</sup>

Some States have adopted the Bangalore Principles, while others have modelled their own principles of judicial conduct on them.<sup>5</sup> Some international organizations have also looked at the principles positively and endorsed them.<sup>6</sup> The Bangalore Principles come with an accompanying document which is; the Commentary on the Bangalore Principles of Judicial Conduct.<sup>7</sup>

The Bangalore Principles on Judicial Conduct are increasingly seen as a document which judiciaries and legal systems worldwide can accept unconditionally.<sup>8</sup> This is because the principles imply the highest traditions relating to judicial functions that is envisaged in all cultures and legal systems.<sup>9</sup>

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<sup>1</sup>Should acting judges sit as arbitrators< <https://www.lexisnexis.co.uk/blog/dispute-resolution/should-acting-judges-sit-as-arbitrators>> accessed 29 June 2021 (LexisNexis UK blogs).

<sup>2</sup> Such as Sweden. See Gerhard Wegen, Stephen Wilske, Gleiss Lutz, Contributing Editors, *Getting the Deal Through: Arbitration 2017* (12<sup>th</sup> Edn, Law Business Research, 2017).

<sup>3</sup> Such as Thailand. See Gerhard Wegen, Stephen Wilske, Gleiss Lutz, Contributing Editors, *Getting the Deal Through: Arbitration 2017* (12<sup>th</sup> Edn, Law Business Research, 2017).

<sup>4</sup> United Nations Office on Drugs and Crime, *The Bangalore Principles of Judicial Conduct*, (United Nations, Vienna, 2018) p4, p18 (Pii); United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (United Nations Office on Drugs and Crime) p iv.

<sup>5</sup>(n8) p iv e.g., Zambia Kenya, Nigeria Namibia.

<sup>6</sup>Ibid. The principles are recognized by bodies such as the American Bar Association and the International Commission of Jurists and the judges of the member States of the Council of Europe.

<sup>7</sup>Published by the United Nations Office on Drugs and Crime and found at <[https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry\\_on\\_the\\_Bangalore\\_principles\\_of\\_Judicial\\_Conduct.pdf](https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf) > accessed 8 October 2021.

<sup>8</sup> United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (United Nations Office on Drugs and Crime) PIII.

<sup>9</sup> ibid.

The principles consist of six fundamental and universal values<sup>10</sup> being:

- Value 1: Independence
- Value 2: Impartiality
- Value 3: Integrity
- Value 4: Propriety
- Value 5: Equality
- Value 6: Competence and diligence

For the purposes of this article only Value 4 is discussed which is the Propriety Principle, as it deals directly with judges practicing as arbitrators.<sup>11</sup>

## **2. Why the Bangalore Principles?**

In many jurisdictions, the question often arises as to whether judges can and should sit as arbitrators, giving rise to a number of issues<sup>12</sup> some of which are discussed below. This question continues to be asked regardless of whether or not a jurisdiction permits judges to sit as arbitrators.<sup>13</sup>

Different jurisdictions have different rules on how they deal with the issue of sitting judges<sup>14</sup> being involved, in other activities aside from judicial duties,<sup>15</sup> or referred to in other jurisdictions as extra judicial activities.<sup>16</sup> As indicated above, the Bangalore Principle's aim, is to establish standards for ethical conduct of judges worldwide.<sup>17</sup> The principles offer uniform rules which jurisdictions may adopt or tweak in dealing with a range of ethical and professional issues including judges practicing as arbitrators. There are various arguments in support and in opposition of permitting judges to sit as arbitrators. Arguments in support include that, a judge is uniquely qualified to sit as an

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<sup>10</sup> United Nations Office on Drugs and Crime, *The Bangalore Principles of Judicial Conduct*, (United Nations, Vienna, 2018) p 8-16.

<sup>11</sup> *ibid* p11.

<sup>12</sup>Should acting judges sit as arbitrators< <https://www.lexisnexis.co.uk/blog/dispute-resolution/should-acting-judges-sit-as-arbitrators>> accessed 29 June 2021 (LexisNexis UK blogs)

<sup>13</sup>*ibid*.

<sup>14</sup>UK, see *Sitting Judge in British English*

<<https://www.collinsdictionary.com/dictionary/english/sitting-judge>> accessed 29 June 2021.

<sup>15</sup> For example, in Kenya under s 17, *The Judicial Service (Code of Conduct and Ethics) Regulations*, 2020.

<sup>16</sup> For example, in Zambia under s 11, *The Judicial (Code of Conduct) and Ethics) Act*, No. 13, 1999.

<sup>17</sup> United Nations Office on Drugs and Crime, *The Bangalore Principles of Judicial Conduct*, (United Nations, Vienna, 2018) p 8.

arbitrator.<sup>18</sup> In addition, as judges are well versed in the law, they can be trusted to deliver a clear and reasoned award.<sup>19</sup> The opposite position is that judges simply should not sit as arbitrators as this is inconsistent with the public position of a judge.<sup>20</sup> The debate raises a wide range of questions which include whether:

- a judge should accept fees for sitting as an arbitrator.<sup>21</sup>
- a judge has sufficient time to devote to the arbitration.<sup>22</sup>
- there is a danger that a sitting judge will exert too much influence over other members of a tribunal.<sup>23</sup>
- a judge will be seen as more qualified by the parties and legal counsel than other ‘lay’ arbitrators creating a perception problem thereby perpetuating the appointment of judges in arbitrations.
- in cases of setting aside an award, whether a presiding judge will view a colleague’s award independently and be impartial.

### **3. The Bangalore Propriety Principle Vis-à-vis Judges Practicing as Arbitrators**

The Bangalore Propriety Principle<sup>24</sup> states that:

Propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge.<sup>25</sup>

The dictionary definition of the word propriety is ‘*conformity to conventionally accepted standards of behaviour or morals*.’<sup>26</sup> The principle is followed by sub-principals which are under the title ‘Application’, the first being 4.1 and which states that:

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<sup>18</sup>Should acting judges sit as arbitrators< <https://www.lexisnexis.co.uk/blog/dispute-resolution/should-acting-judges-sit-as-arbitrators>> accessed 29 June 2021 (LexisNexis UK blogs).

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Value 4.

<sup>25</sup> United Nations Office on Drugs and Crime, Commentary on the Bangalore Principles of Judicial Conduct (United Nations Office on Drugs and Crime, p 11).

<sup>26</sup>Meaning of propriety in English: propriety< <https://www.lexico.com/definition/Propriety>> accessed 12 July 2021.

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.<sup>27</sup>

This is followed by other sub-principles, including 4.12 which provides that:

A judge shall not practice law whilst the holder of judicial office.<sup>28</sup>

These principles thus consider sitting judges acting as arbitrators as being improper. The commentary on the Bangalore Principles notes that interpretations as to the scope of the bar on judges practicing law varies from jurisdictions to jurisdiction.<sup>29</sup> The commentary further notes that in some civil law countries, some judges that serve in a jurisdiction's highest courts are permitted to perform work as arbitrators or mediators.<sup>30</sup> In common law countries, on the other hand, judges about to retire have in some instances also been permitted to carry out remunerated work as international arbitrators in a body established by a foreign Government.<sup>31</sup>

The commentary further states that:

Ordinarily, at least in common law jurisdictions, a judge should not act as an arbitrator or mediator, or otherwise perform judicial functions in a private capacity **unless expressly authorized by law**.<sup>32</sup> The integrity of the judiciary is commonly thought to be undermined if a judge takes advantage of the judicial office by rendering private dispute resolution services for pecuniary gain as an extrajudicial activity. Even when performed without charge, such services may interfere with the proper performance of judicial functions.<sup>33</sup>

Evidently the Bangalore Principles considers judges practicing judicial functions in a private capacity or extra judicial capacity as unacceptable. Both instances are considered as taking advantage of the judicial office. It is the view of this author that, it need not matter whether a judge is permitted to practice as an arbitrator under the law or not. This so because judges practicing as arbitrators with permission, may

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<sup>27</sup> (n32) p 12.

<sup>28</sup>(n32), p 13.

<sup>29</sup> United Nations Office on Drugs and Crime, Commentary on the Bangalore Principles of Judicial Conduct (United Nations Office on Drugs and Crime) p 92-93.

<sup>30</sup>ibid.

<sup>31</sup>Ibid.

<sup>32</sup> My emphasis.

<sup>33</sup>(n34).

just as well succumb to external influences as those judges that practice without express permission,<sup>34</sup> a matter discussed further below.

#### **4. Jurisdictional Practices**

As earlier stated, different jurisdictions deal with the issue of judges acting as arbitrators in diverse ways. For many years, the Law Business Research<sup>35</sup> has been publishing results from various jurisdictions based on the question:

Are there any restrictions as to who may act as an arbitrator?

The question is posed under the general theme ‘Constitution of Arbitral Tribunal-Eligibility of arbitrators.’<sup>36</sup> The publication is now in its 16<sup>th</sup> year and offers insight into how different jurisdiction deal with the issue of judges practicing as arbitrators. For information, it is not the same jurisdictions that respond year to year and some jurisdictions will not appear in some editions, while new ones will appear.

The article looks at the responses to the above question under the 2017 (12<sup>th</sup> edition) publication, for no other reason other than it had the most jurisdictional responses as compared to other publications easily available in the series.<sup>37</sup> Below is a summary of responses from different jurisdictions based on that edition<sup>38</sup> and presented in the order of the research, which alphabetical.

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<sup>34</sup>United Nations, Basic Principles on the Independence of the Judiciary (United Nations 1985) par 2 .

<sup>35</sup> Gerhard Wegen, Stephen Wilske, Gleiss Lutz, Contributing Editors *Getting the Deal Through: Arbitration 2017* (12<sup>th</sup> edition, Law Business Research, 2017).

<sup>36</sup> Question number 15.

<sup>37</sup> It possible that there are other publications which may have higher responses, but these were not easily accessible.

<sup>38</sup> (n42).



<b>Number</b>	<b>Jurisdiction</b>	<b>Response</b>
1	Angola	Nil
2	Austria	Active judges are barred under statute regulating their profession
3	Belgium	Judges are barred under the Belgium Judicial Code art. 298 to act as arbitrators for compensation
4	Brazil	Active judges are barred under law no. 35/79
5	Chile	Judges, prosecutors, public notaries or legal entities are barred
6	China	Judges are barred under Supreme People's Court rules
7	Colombia	Nil
8	Croatia	Arbitration Act restricts appointment of judges as presiding or sole arbitrators
9	Dominican Republic	Retired Judges are not barred implying that active judges are barred
10	Ecuador	Active judges are barred
11	Egypt	Active Judges are required to obtain permission.
12	England & Wales	Active Judges of the Commercial Court of England and Wales are barred unless with permission from the Lord Chief Justice. Implying that Appeal Court and Supreme Court Judges are barred. Can only act as sole arbitrators.
13	Equatorial Guinea	Nil
14	France	Active judges are barred

	Germany	Active Judges or other civil servants may act as arbitrators only with the permission of their respective supervisory authority
16	Ghana	Nil
17	Greece	Active judges may act as arbitrators on a rotational basis and receive restricted fees under the Civil Code of Procedure (Arts. 871A,882A)
18	Hong Kong	Nil
19	Hungary	Nil
20	India	Nil
21	Indonesia	Active judges, prosecutors, clerks of court and other government or court officials are barred from being appointed as arbitrators under Arbitration Law No. 30 of 1999
22	Italy	Active judges are barred but for exceptional cases and specifically authorised to do so
23	Japan	Retired judges may act as arbitrators implying that active judges are barred
24	Kenya	Nil
<b>Number</b>	<b>Jurisdiction</b>	<b>Response</b>
25	Korea	Sitting judges are barred because of their judicial duty not to engage in for profit activities
26	Mexico	Article 101 Mexican Constitution bars judges, their secretaries, and members of the Council of the Federal Judiciary
27	Morocco	Active judges barred as they are prohibited from any other activity

28	Mozambique	Nil
29	Myanmar	Nil
30	Nigeria	Serving judges are barred
31	Portugal	Nil
32	Qatar	Nil
33	Romania	Acting judges are barred
34	Singapore	Nil
35	Slovakia	Certain exceptions are laid down for public officials such judges or public prosecutors in the legislation on protection of public interest (Barred??)
36	Spain	Active judges, magistrates and public prosecutors are barred
37	Sweden	Active judges are permitted to act
38	Switzerland	Active judges in principle are permitted
39	Taiwan	Judicial Yuan letter 1993 bars government official including active judges
40	Thailand	Present judges are barred
41	Turkey	Judges, Prosecutors are barred under Law of Judges and Prosecutors no. 2802 as they cannot engage in any kind of activity for private gain or take office for any public or private duties other than those specified in law
42	Ukraine	Active judges and other public servants are barred because of anti-corruption and non-compatibility regulations
43	United Arab Emirates	Nil

44	United States	State and federal judicial ethics and codes generally bar serving judges
45	Venezuela	Active judges are barred under the law regulating the judiciary

#### 4.1. Interpretation of Results

To begin with, bear in mind that the question, ‘*Are there any restrictions as to who may act as an arbitrator?*’, does not directly ask if judges are permitted or not permitted to practice as arbitrators.

In the table, Nil, means that the response provided has not addressed whether judges are permitted, not permitted or to some extent permitted to practice as arbitrators in a particular jurisdiction.

In summary, the research shows that 24 jurisdictions out of 45 or 53% do not permit judges to acting as arbitrators. Twelve (12) of the 45 or 27% have not provided an answer as to whether judges are permitted to practice as arbitrators or not. Seven (7) out of the 45 or 16% have some form of restriction on judges practicing as arbitrators while 2 out of 45 or 4% permit their judges to practice as arbitrators.

Thus, in many jurisdictions, for example in Austria, Brazil, China, Thailand,<sup>39</sup> sitting judges are barred from sitting as arbitrators. In other jurisdictions such as Sweden and Switzerland,<sup>40</sup> no such limitation exists. In England and Wales, only sitting judges of the Commercial Court and the Technology and Construction Court,<sup>41</sup> are permitted but only with the consent of the Chief Justice.<sup>42</sup> They can also only sit as sole arbitrators.<sup>43</sup> In other words, a judge who is appointed as an arbitrator cannot sit in any other capacity

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<sup>39</sup> See Gerhard Wegen, Stephen Wilske, Gleiss Lutz, Contributing Editors, *Getting the Deal Through: Arbitration 2017* (12<sup>th</sup> Edn, Law Business Research, 2017).

<sup>40</sup> *ibid* and also Gerhard Wegen, Stephen Wilske, Gleiss Lutz, Contributing Editors, *Getting the Deal Through: Arbitration 2020* (15<sup>th</sup> Edn, Law Business Research, 2020).

<sup>41</sup> As these are first tier courts, it means that judges of the Appeal or Supreme Court are not permitted to sit as arbitrators.

<sup>42</sup> Full title is the Lord Chief Justice who is also President of the Courts of England and Wales.

<sup>43</sup> Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (5<sup>th</sup> Edn, Wiley Blackwell) p 443-444.

such as party appointed arbitrator or chairman of a tribunal.<sup>44</sup> The situation in Scotland, on the other hand, permits first level judges of its courts to sit as sole arbitrators as well be part of a tribunal, but again only with the permission of the President of the highest court.<sup>45</sup> Scotland, though, is not one of those jurisdictions included in the 12<sup>th</sup> edition.

The research also reveals that, it is unusual to find the regulations permitting judges or otherwise to sit as arbitrators under the arbitration legislation of a jurisdiction.<sup>46</sup> Of all the 12<sup>th</sup> edition responses, not a single regulation is found under the arbitration legislation. These regulations are more likely to be found in judicial codes of conduct<sup>47</sup> or statute regulating the judicial profession,<sup>48</sup> or in certain instances in voluntary and non-binding codes of conduct.<sup>49</sup>

In some instances, these other regulations may not expressly and directly bar judges from practicing as arbitrators but may impliedly do so by stating that judges are not permitted to engage in for profit activities<sup>50</sup> or are barred to participate in other activities for compensation.<sup>51</sup> Arbitrators are compensated for services rendered by being paid fees, hence, in that regard acting as an arbitrator can be considered as a for profit undertaking.

In the case of India and Kenya, the 12<sup>th</sup> edition responses are limited to the direct provisions in the arbitration legislation. These responses do not refer to any Code of Conduct or other legislative mechanisms or case law which may contain provisions limiting or barring judges from acting as arbitrators. Therefore, it is plausible that some

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<sup>44</sup> Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (5<sup>th</sup> Edn, Wiley Blackwell) p 443-444.

<sup>45</sup> s 25, Arbitration (Scotland) Act 2010. Full title is the Lord President of the Court of Sessions.

<sup>46</sup> England and Wales as well Scotland being some of the exceptions.

<sup>47</sup> In Belgium the barring provision is found in the Country's judicial code art 298. In Brazil it is found under law 35/79. In Kenya the barring is under the Judicial Service (Code of Conduct and Ethics) Regulations, 2020 while in India, it is under case law.

<sup>48</sup> In Austria the barring provision is found under the statute regulating the judge's profession. See Gerhard Wegen, Stephen Wilske, Gleiss Lutz, Contributing Editors, *Getting the Deal Through: Arbitration 2017* (12<sup>th</sup> Edn, Law Business Research, 2017).

<sup>49</sup> Code of Conduct for United States Judge <<https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>> accessed 29 June 2021.

<sup>50</sup> See Korea (South Korea) in Gerhard Wegen, Stephen Wilske, Gleiss Lutz, Contributing Editors, *Getting the Deal Through: Arbitration 2017* (12<sup>th</sup> Edn, Law Business Research, 2017).

<sup>51</sup> *ibid.*

jurisdictions provide incorrect responses because the correct position is found elsewhere other than the arbitration legislation.

In Kenya, it is an accepted position in the judiciary, the legal fraternity, and arbitrators, that judges cannot sit as arbitrators. However, the source of this exclusion appears to be indirect. This is so because the Judicial Service (Code of Conduct and Ethics) Regulations, 2020<sup>52</sup> bars sitting judges from engaging in activities that interfere with the performance of judicial duties.<sup>53</sup> It is, thus, a conceivable argument to make, that a judge sitting as an arbitrator constitutes interference with the performance of judicial duties. Furthermore, the permissible activities are to be performed at no salary<sup>54</sup> though ‘*subject to any legal requirements relating to public disclosure, a judge may receive a token gift, award, honorarium, benefit, or allowance as appropriate to the occasion, if the gift, award, honorarium, or benefit would not be reasonably perceived as intended to influence the performance of judicial duties.*’<sup>55</sup> Again, it is conceivable to argue that arbitrator fees can be regarded as a form of a salary, though strictly speaking fees are generally in two parts; the individual remuneration and costs. An inconsistency to this Kenyan position is found in Zambia. Zambia has a very similar code of conduct<sup>56</sup> as in Kenya, but judges ‘freely’ practice as arbitrators despite the similar constraints found in each countries code of practice. Zambia for information was not part of the 12<sup>th</sup> edition research.

In the Union of India (India), case law prohibits judges to practice as arbitrators but as indicated above, the response in the research is mute as to whether Indian judges practice arbitration or otherwise. India in this regard is an interesting case and well worth looking at in detail and may well be a model for other countries. The Indian reasoning as to why judges are not permitted to practice as arbitrators is discussed below in some detail.

If Kenya and India are added to the 12<sup>th</sup> edition responses as jurisdictions in which judges are not permitted to practice as arbitrators, the percentage of such increases from 53% to 58%. On these results, a slim majority of the world bars judges from practicing as arbitrators.

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<sup>52</sup> s17(1).

<sup>53</sup> See for example the Judicial Service (Code of Conduct and Ethics) Regulations, 2020, s 17(1)(e), Kenya.

<sup>54</sup> s 17(2), The Judicial Service (Code of Conduct and Ethics) Regulations, 2020.

<sup>55</sup> s 17(4), The Judicial Service (Code of Conduct and Ethics) Regulations, 2020.

<sup>56</sup> Judicial Code of Conduct No 13, 1999.

#### **4.2. The Union of India Practice: A Model?**

The Union of India serves as a good example of constraints that should ordinarily be placed on judges even without the Bangalore Principles because judges occupy a special position in society.

In this regard India, has a settled principle of case law that a full-time employee of the government of the Union of India is not entitled to take up any other employment or vocation.<sup>57</sup> Judges in many countries of the world, including India, are full time employees of governments, specifically under the judiciary. Hence, Indian jurisprudence bars judges, who are full time employees of the Union of India, from discharging judicial or quasi-judicial functions or from getting involved in any other commercial legal activity and from specifically acting as arbitrators.<sup>58</sup> This bar also includes retired judges serving in positions where they perform judicial or quasi-judicial functions.<sup>59</sup>

The reasoning behind this rule is that permitting judges to practice as arbitrators *'would necessarily require them to interact, in all possibility, with the same set of people or professionals who appear before them in their capacity as'* judicial or quasi-judicial officers while they are whole time judicial office holders, *'giving rise to speculation about their impartiality in discharge of their duty in such capacity.'*<sup>60</sup> Put another way, judges are not permitted to practice as arbitrators as they would be interacting with lawyers and other professionals, who may later appear before them in a court of law while presiding over other issues. This may undermine the independence and impartiality of a court in a case, were for example, a favour by a lawyer appointing a judge as an arbitrator for pecuniary gain, may be exchanged for a favorable outcome in

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<sup>57</sup> W.P.(C) 866/2010, Decided 11 December 2015 by the then Chief Justice of India, Mr. Justice Rajiv Sahai Endlaw [14]; Bwalya Lumbwe LLM/MSc Construction Law and Arbitration Dissertation: Issues in Arbitration in Zambia-Challenges Pertaining to the Arbitration Act, Related and Subsidiary Legislation, submitted to The Robert Gordon University, Aberdeen Business School, May 2017.

<sup>58</sup> Common Cause vs The Union of India, W.P.(C) 866/2010, Decided 11 December 2015 by Chief Justice Mr. Justice Rajiv Sahai Endlaw. [14]. This includes Chairpersons / Presidents / Members of Tribunals / Commissions / Statutory Authorities who are retired judges discharging judicial or quasi-judicial functions in that capacity; LLM/MSc Construction Law and Arbitration Dissertation: Issues in Arbitration in Zambia-Challenges Pertaining to the Arbitration Act, Related and Subsidiary Legislation, submitted to The Robert Gordon University, Aberdeen Business School, May 2017.

<sup>59</sup> Common Cause vs The Union of India, W.P.(C) 866/2010, Decided 11 December 2015 by Chief Justice Mr. Justice Rajiv Sahai Endlaw.[14]

<sup>60</sup> Ibid. Emphasis mine.

court. When carrying out their judicial functions, judges must be free of any improper influence.<sup>61</sup> A judge acting as an arbitrator may, thus, be a source of improper influence. In India, these rules apply to all full-time or whole-time government employees as indicated above. As a further example, in terms of doctors practicing privately, the court held, in the context of rural postings that if doctors were permitted private practice, patients visiting the rural health centres and hospitals would suffer and that such a restriction is in the interest of the public for social good.<sup>62</sup> The court also stated that there is evidence to indicate that allowing government doctors to do private practice results in neglect of essential parts of duties as a government doctor and distracts the attention and energy from the task assigned.<sup>63</sup>

The same principles are applicable to all government employees including teachers, university lecturers, prosecutors etc.<sup>64</sup> The Indian principles, so well explained in *Common Cause v. Union of India*, 2015 SCC Online Del 14003,<sup>65</sup> and other cases<sup>66</sup> are just as applicable in other countries or should be just as applicable. Hence, permitting judges to privately act as arbitrators may well result in neglecting judicial duties as well as be a distraction from judicial functions aside from being an energy consuming activity.

The Bangalore Principles permit judges to ‘Engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.’<sup>67</sup> Judges practicing as arbitrators, is not one such activity given the backlog of cases in many jurisdictions.<sup>68</sup>

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<sup>61</sup>Independence< <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/>> accessed 13 July 2021.

<sup>62</sup> (n 66) [14(i)].

<sup>63</sup> *Common Cause vs The Union of India*, *Common Cause v. Union of India*, 2015 SCC Online Del 14003, decided on 11.12.2015 [14(i)].

<sup>64</sup> *Common Cause vs The Union of India*, *Common Cause v. Union of India*, 2015 SCC Online Del 14003, decided on 11.12.2015 [14(ii)-(ix)].

<sup>65</sup> decided on 11.12.2015.

<sup>66</sup> See cases referred to in *Common Cause vs The Union of India*, *Common Cause v. Union of India*, 2015 SCC Online Del 14003, decided on 11.12.2015 [14(i)-(ix)].

<sup>67</sup> United Nations Office on Drugs and Crime, *The Bangalore Principles of Judicial Conduct*, (United Nations, Vienna, 2018) 4.11(d) p13; United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (United Nations Office on Drugs and Crime) par 4.11.4.

<sup>68</sup> Bwalya Lumbwe, ‘Constitution of Dispute Boards: What are the Salient Issues’ (*Alternative Dispute Resolution*, vol 7, issue 1, 2019) 291.



## 5. Conclusion

There are 195 countries in the world today of which 193 are members states of the United Nations<sup>69</sup> and two hold the non-member observer status.<sup>70</sup> Taiwan, included in the 12<sup>th</sup> edition responses, is considered as represented by The Peoples Republic of China.<sup>71</sup> This article only considers 45 jurisdictions with one or two others added in. That leaves a balance of 150 other jurisdictions or so to be studied.

The above figures, thus, indicate that there is room for further research as to how many more jurisdictions permit, do not permit or partially permit judges to act as arbitrators. This further research, though, should not only examine the arbitration legislation, but also other legislation which contain standards for ethical conduct of judges such as judicial codes of conduct. As indicated earlier, arbitration statutes are not likely to include bars or otherwise on judges practising as arbitrators.

Combining all the yearly responses from the different Law Business Research editions and similar research publications such as the Chambers Global Practice Guide: International Arbitration,<sup>72</sup> will yield a more accurate picture of how the world treats judges as arbitrators. However, specifically including, as part of the question, whether sitting judges are permitted or not, to act as arbitrators and under what regulations, will produce more accurate responses.

The Union of India's case law provides excellent reasoning as why judges should not be permitted to act as arbitrators while holding judicial office. In this regard, India is a model that should be emulated by other jurisdictions and so should the propriety principles under the Bangalore Principles. Hence, there is a need for further awareness of the Bangalore Principles, worldwide, as well as the Union of India's position on the issue of judges practicing as arbitrators.

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<sup>69</sup> Countries in the World<<https://www.worldometers.info/geography/how-many-countries-are-there-in-the-world/>> accessed 13 October 2021; See also, How Many Countries are there 2021<<https://worldpopulationreview.com/country-rankings/how-many-countries-are-there>> accessed 13 October 2021.

<sup>70</sup> Palestine and the Holy See/ Vatican City; See also, How Many Countries are there 2021<<https://worldpopulationreview.com/country-rankings/how-many-countries-are-there>> accessed 13 October 2021.

<sup>71</sup>(n76).

<sup>72</sup> For the 2021 edition Gary Bond is listed as the author and published by Chambers and Partners while in the 2020 edition he is listed as a Contributing Editor.

As indicated in the very first statement of this article, The Bangalore Principles of Judicial Conduct are an initiative of the United Nations Office on Drugs and Crime (UNODC). ‘UNODC’s mission is to contribute to global peace and security, human rights and development by making the world safer from drugs, crime, corruption and terrorism.’<sup>73</sup> The fact that this United Nations office was at the forefront of producing such a document is perhaps an indication that if judges are permitted to practice as arbitrators this may well lead to an increase in white collar judicial crime perpetuated through arbitration. However, there is no evidence available that in jurisdictions where judges do practice as arbitrators, there is necessarily an increase in crime or corruption in the judiciary. Nevertheless, and in ending, it is worth remembering the old adage, ‘prevention is better than cure.’<sup>74</sup>

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<sup>73</sup> United Nations Office on Drugs and Crime < <https://www.unodc.org/> > accessed 14 October 2021.

<sup>74</sup> Often attributed to the Dutch philosopher Desiderius Erasmus in around 1500.

## **Bibliography**

### **Legislation**

The Judicial Service (Code of Conduct and Ethics) Regulations, 2020(Kenya)

The Judicial (Code of Conduct) Act, No. 13, 1999(Zambia)

Judges Code of Ethics, Federal Constitution, 2009(Malaysia)

Arbitration (Scotland) Act 2010

### **Codes of Conduct**

Code of Conduct for United States Judge <<https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>> accessed 29 June 2021

Judicial Officers' Code Ethics 2019 (Malaysia)

The Uganda Code of Judicial Conduct (Uganda)

### **Case Law**

*Common Cause vs The Union of India*, W.P.(C) 866/2010, Decided 11 December 2015

*Common Cause vs The Union of India*, *Common Cause v. Union of India*, 2015 SCC Online Del 14003

### **Internet Resources**

Should acting judges sit as arbitrators< <https://www.lexisnexis.co.uk/blog/dispute-resolution/should-acting-judges-sit-as-arbitrators>> accessed 29 June 2021 (LexisNexis UK blogs)

United Nations Office on Drugs and Crime and found at <[https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry\\_on\\_the\\_Bangalore\\_principles\\_of\\_Judicial\\_Conduct.pdf](https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf) > accessed 8 October 2021

Meaning of propriety in English: propriety

< <https://www.lexico.com/definition/Propriety>> accessed 12 July 2021

Independence< <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/>> accessed 13 July 2021

*The Bangalore Principles of Judicial Conduct:  
Judges as Arbitrators: Bwalya Lumbwe*

(2021) 9(4) *Alternative Dispute Resolution*

Countries in the World <<https://www.worldometers.info/geography/how-many-countries-are-there-in-the-world/>> accessed 13 October 2021

How Many Countries are there 2021 < <https://worldpopulationreview.com/country-rankings/how-many-countries-are-there> > accessed 13 October 2021

United Nations Office on Drugs and Crime < <https://www.unodc.org/>> accessed 14 October 2021

### **Other Resources**

United Nations Office on Drugs and Crime, *The Bangalore Principles of Judicial Conduct*, (United Nations, Vienna, 2018)

United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (United Nations Office on Drugs and Crime)

Gerhard Wegen, Stephen Wilske, Gleiss Lutz, Contributing Editors, *Getting the Deal Through: Arbitration 2017* (12<sup>th</sup> edn, Law Business Research, 2017)

Gerhard Wegen, Stephen Wilske, Gleiss Lutz, Contributing Editors, *Getting the Deal Through: Arbitration 2020* (15<sup>th</sup> edn, Law Business Research, 2020)

Gerhard Wegen, Stephen Wilske, Gleiss Lutz, Contributing Editors, *Getting the Deal Through: Arbitration 2016* (13<sup>th</sup> edn, Law Business Research, 2020)

United Nations, *Basic Principles on the Independence of the Judiciary* (United Nations 1985)

Gary Bond, Contributing Editor, *Chambers Global Practice Guide: International Arbitration* (Chambers and Partners, 2020)

Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (5<sup>th</sup> Edn, Wiley Blackwell)

Bwalya Lumbwe, LLM/MSc *Construction Law and Arbitration Dissertation: Issues in Arbitration in Zambia-Challenges Pertaining to the Arbitration Act, Related and Subsidiary Legislation*, submitted to The Robert Gordon University, Aberdeen Business School, May 2017

*The Bangalore Principles of Judicial Conduct:  
Judges as Arbitrators: Bwalya Lumbwe*

(2021) 9(4) *Alternative Dispute Resolution*

Bwalya Lumbwe, 'Constitution of Dispute Boards: What are the Salient Issues' (Alternative Dispute Resolution, vol 7, issue 1, 2019)

Statute of the International Court of Justice

Nathalie Bernasconi-Osterwalder, Martin Dietrich Brauch, Is "Moonlighting" a Problem? The role of ICJ judges in ISDS (November 2017)

Gellaine T. Newton, Like Oil and Vinegar, Sitting Judges and Arbitrators Do Not Mix: Delaware's Unique Attempt at Judicial Arbitration (Arbitration Law Review, Volume 5 *Yearbook on Arbitration and Mediation*, Article 28)

Can't Fight the Moonlight? Actually, You Can: ICJ Judges to Stop Acting as Arbitrators in Investor-State Disputes <<https://www.ejiltalk.org/cant-fight-the-moonlight-actually-you-can-icj-judges-to-stop-acting-as-arbitrators-in-investor-state-disputes/>> accessed 20 July 2021

**Case Review: Arbitrators' Duty to Disclose Revisited -  
Newcastle United Football Company Limited vs The Football Association  
Premier League Limited & 3 Others (English High Court)**

*By: Wilfred Mutubwa\**

**Introduction**

This was the hearing of two applications by the Claimant Newcastle United Football Company/Club ("NUFC") being:

- i) An application by NUFC under section 24(1) (a) of the Arbitration Act 1996 ("AA"), made by way of arbitration claim form sealed on 9 November 2020, for the removal of the second defendant as an arbitrator on the ground that circumstances exist that give rise to justifiable doubts as to his impartiality (the "Section 24 Application"); and
- ii) An application by NUFC under CPR r. 62.10(1), for an order that the Section 24 Application be heard in public (the "Public Hearing Application").

**Background**

NUFC is a limited liability company that trades as a football club, which currently plays in a football league owned and controlled by PLL ("the League"). NUFC is a shareholder in PLL, as are all other clubs playing in the League and, as is common ground, is bound by PLL's Rules.

The current owners of the shares in NUFC wished to sell their shares to PZ Newco Limited, which is ultimately owned by the Public Investment Fund, a Saudi Arabian sovereign wealth fund ("PIF"). PLL contends, but NUFC does not accept, that PIF is controlled by the government of the Kingdom of Saudi Arabia ("KSA"). Section F of PLL's Rules requires PLL to disqualify individuals and entities from acting as a

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***Case Review: Arbitrators' Duty to Disclose  
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Wilfred Mutubwa***

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"Director" of a club in certain defined circumstances and to refuse to agree a change of control or the proposed appointment of a director for like reasons.

By a decision letter dated 12 June 2020 (the "decision letter"), PLL concluded that KSA would become a Director of NUFC as that term is defined in Section A of PLL's Rules by reason of the Control (as that term is defined in Section A of PLL's Rules) that was or would be exercised by KSA over PZ Newco Limited via PIF.

NUFC disputes this conclusion and the lawfulness of the process by which it was arrived at by PLL. It is this dispute that is the subject of the reference with which these proceedings are concerned.

### **Applicable Principles**

The Court applied the following principles in this case

By the Arbitration Act ( AA ), s.24(1)(a):

"(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds –

a) That circumstances exist that give rise to justifiable doubts as to his impartiality ..."  
` see *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416 *per* Lord Hope at paragraphs 2-3. The objective observer will have regard to the possibility of opportunistic or tactical challenges - see *Halliburton Co v Chubb Bermuda Insurance Ltd* (ibid.) *per* Lord Hodge at paragraph 68. This last factor is material because "... *the arbitrator may reasonably feel under an obligation to carry out the remit unless there are substantial grounds for self-disqualification. Similarly, a court, when asked to remove an arbitrator, needs to be astute to see whether the ground of real possibility of bias is made out*". Ultimately, a court is required to evaluate on the whole of the evidence available at the hearing of the application whether a real (as opposed to a fanciful) possibility of bias has been made out, assessed by reference to the circumstances known at the time the section 24 application is heard.

The arbitrator is under a duty to disclose to the parties to an arbitration matters that could arguably lead a fair minded and informed observer to conclude that there was a real

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possibility that the arbitrator was biased because such disclosure demonstrates impartiality from the beginning – see *Halliburton Co v Chubb Bermuda Insurance Ltd* (ibid.) *per* Lord Hodge at paragraphs 70 and 76 - 81. The duty to disclose applies to a potentially wider group of circumstances that might on ultimate examination justify recusal. The rationale for this is simply that unless there is disclosure the parties may or will not know of the circumstances so as to enable them to decide whether to challenge the appointment or not. Not every circumstance that an arbitrator will be under a duty to disclose will justify recusal but the failure to disclose even that which on investigation does not justify recusal or removal may support a conclusion that an arbitrator is apparently biased.

Here an issue concerns the degree to which the second defendant should have disclosed his role in other arbitrations and his role in advising PLL and EFL in relation to Section F of PLL's Rules.

The International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("IBAG") can assist a court in identifying what is an unacceptable conflict of interest and what matters may require disclosure in an arbitral context – see *Halliburton Co v Chubb Bermuda Insurance Ltd* (ibid.) *per* Lord Hodge at paragraphs 71. It is relatively frequently referred to and relied on by arbitrators. However, the principles to be derived from those Guidelines do not take effect as if they are English law. The provisions of IBAG are simply a material consideration in the evaluation that the general principles referred to above require to be undertaken in each case.

In relation to disclosure, the IBAG creates three lists of potential conflict situations being the Red List, which sets out situations objectively amounting to a conflict, which can be waivable or non-waivable depending on the facts; the Orange List, which contains situations that may give rise to doubts over impartiality and so should be disclosed in case the parties wish to explore the issue further; and a Green List that lists situations that do not suggest any conflict.

### **The Orange List includes situations**

- (a) where the arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been



consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship; and

- (b) where the arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.

### **Discussion**

The Court considered each of the four grounds separately and then determined whether viewing all the grounds cumulatively but qualified by the conclusions it had reached in relation to each individually there is a real possibility of bias has been made out, assessed by reference to the circumstances as at the date of the hearing of this application. The court adopted this course because it accepted NUFC's submission that it is the cumulative effect that matters.

### **Disposal**

In those circumstances the Section 24 Application failed and was dismissed

In those circumstances, NUFC's submission was rejected on the ground that the court failed to engage with its arguments.

### **Case Note**

The vexing question as to whether a party appointed arbitrator is expected to be independent, or just impartial and objective, has continued to confound even the most ardent of practitioners in arbitration. This decision seems to give clarity to the duty of the arbitrator to disclose, in repeat appointments. The decision in *Halliburton Co v Chubb Bermuda Insurance Ltd* is affirmed and its principles reiterated. In the Kenyan context, the High court in *Vinayak Builders v S&M Properties (2021) eKLR* underscores the arbitrators duty to disclose any matter that would potentially reflect conflict on his part, even if it eventually does not affect his objectivity. The duty to disclose is sacrosanct

## **Court Annexed Mediation in Kenya: An Expository Analysis of Its Efficacy**

**By: *Kenneth Wyne Mutuma\****

### **Abstract**

*In its 2018/2019 Performance Management and Measurements Understanding Report, the Judiciary of Kenya acknowledged that one of its biggest challenges in the dispensation of justice was the inherent backlog of cases. As a result, the judiciary has attempted to improve access to justice through several initiatives, one of which this paper seeks to analyse i.e., Court Annexed Mediation (CAM). This paper will first conceptualise the current status on access to justice, and the reasons why CAM was institutionalised. The paper will then go ahead and contextualise the concept of CAM, its parameters, legal framework, and how the CAM process is undertaken. The paper will then analyse the challenges facing CAM, among them, the mandatory nature of the process, the challenge of funding, acceptability of the process by disputants and their advocates, as well as challenges that the mediators face. Lastly, the paper will make recommendations, which if implemented, could go a long way in enhancing and cementing the place of CAM in the Kenyan legal framework, in its effort to enhance access to justice.*

### **Introduction**

Backlog of cases is one of the biggest challenges facing access to justice in the Kenyan judicial system.<sup>1</sup> According to a recent Judiciary sponsored report on the administration of justice, the ideal timelines for cases in Kenya from filing to judgement should be

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<sup>1</sup>The Judiciary, *The 2018/2019 Performance Management and Measurement Understandings Evaluation Report*, (2020) p. 46.

twelve months.<sup>2</sup> However, despite this, the backlog in cases for the period of the report i.e. 2018/2019 stood at 337,403 with 39,428 cases therein being more than five years old.<sup>3</sup> The most affected courts with the highest backlog were the Magistrates Court and High Court.<sup>4</sup> Various factors have been identified as contributing to this backlog including: lack of adequate infrastructure, low budgetary allocations and lack of sufficient human resource capacity on courts.<sup>5</sup>

This paper focuses exclusively on the concept of Court Annexed Mediation. In doing so, this article begins by providing a general conceptual understanding of Alternative Dispute Resolution (*ADR*) and more specifically, Court Annexed Mediation (*CAM*) process, including its statutory foundations and the judicial pronouncements related to it. The paper then undertakes a critical review of the *CAM* looking into challenges that have arisen and continue to impact upon the process. The paper concludes with recommendations which if taken into consideration, could play a significant role in the quest to improve access to justice in Kenya.

### ***The Institutionalization of Court Annexed Mediation in Kenya***

The Constitution of Kenya 2010 which is lauded as one of the most transformative Constitutions in the history of constitutional dispensations world over, forms the bedrock upon which the Kenyan people could finally access justice without hindrance.

For a start, Article 48 of the Constitution 2010 provides for the right to access to justice, in which the State is mandated to ensure access to justice for all persons.<sup>6</sup> One way of attaining access to justice is as provided for under Article 159 (2) (c) of the Constitution 2010, which provides that "in exercising judicial authority, the courts and tribunals shall be guided by alternative forms of dispute resolution, and among them is mediation."<sup>7</sup> The scope of Article 159(2)(c) is expanded by Article 189(4),<sup>8</sup> which mandates parliament to come up with national legislation that provides for the settling of inter-governmental disputes by alternative dispute resolution mechanisms, including mediation. As a result, statutory acts have been enacted and amended to meet this requirement. For instance,

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<sup>2</sup>The Judiciary, *The 2018/2019 State of the Judiciary and Administration of Justice Report*, (2020) p. 30.

<sup>3</sup>Ibid, p. 13.

<sup>4</sup> Ibid, p. 14.

<sup>5</sup> Ibid, 15.

<sup>6</sup> The Constitution of Kenya, 2010 Article 48.

<sup>7</sup> The Constitution of Kenya, 2010 Article 159 (2) (c).

<sup>8</sup>Ibid, Article 189(4).

the Civil Procedure Act (Cap 21) was amended to enable the court to refer disputes to mediation upon the request of the parties or if in the opinion of the court the matter was best handled by mediation. This is in line with the overriding objective of the Civil Procedure Act.<sup>9</sup>

It is against this backdrop that the concept of Court Annexed Mediation was institutionalised within the court dispute resolution framework. It behoves one then to understand the basic tenets of mediation. Mediation is defined as “a voluntary process in which a trained and impartial third person, the mediator, helps the parties in dispute to reach an amicable settlement that is responsive to their needs and acceptable to all sides.”<sup>10</sup> Section 2 of the Kenya Mediation Bill, 2020 conceptualises mediation as “a facilitative and confidential structured process in which parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable settlement agreement to resolve their dispute with the assistance of an independent third party called a mediator.”<sup>11</sup>

Court Annexed Mediation is a form of mediation in which cases brought to court for litigation are referred to mediation for possible settlement.<sup>12</sup> The Court Annexed Mediation Project (CAMP) - a 2016 project introduced by the judiciary of Kenya with the support of the World Bank’s Judiciary Performance Improvement Project (JPIP)<sup>13</sup>- was meant to reduce the backlog of cases within the Kenyan courts, that has persistently affected access to thousands if not millions of justice-seeking Kenyans and/or other persons, within the Kenyan justice system.

It commenced in April 2016 and was run through a pilot programme that began in the Commercial and Family Divisions of the High Court in Nairobi. In justifying this decision, the Registrar asserted that:

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<sup>9</sup> The Civil Procedure Act, 2010, Cap 21, Revised in 2012 Section 1A (1).

<sup>10</sup>What is Mediation? (*Mediation.judiciary.hk*, 2021)

[https://mediation.judiciary.hk/en/doc/What\\_is\\_Mediation-Eng.pdf](https://mediation.judiciary.hk/en/doc/What_is_Mediation-Eng.pdf) accessed 14 June 2021.

<sup>11</sup> The Mediation Bill, 2020 Section 2.

<sup>12</sup> F Shako, ‘*Mediation in The Courts’ Embrace: Introduction of Court-Annexed Mediation into The Justice System in Kenya* (Transnational Dispute Management (TDM), 2021) <https://www.transnational-dispute-management.com/article.asp?key=2438> accessed 14 June 2021.

<sup>13</sup> World Bank, *Court Annexed Mediation Offers Alternative To Delayed Justice For Kenyans* (World Bank, 2017) <https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> accessed 14 June 2021.

“The cases in the Commercial Division of the High Court are worth billions of shillings, which if resolved expeditiously, would release substantial resources into the economy that have been tied up in litigation. On the other hand, the Family Division of the High Court is the Division in which disagreements tear families apart as generations fight over family wealth.”<sup>14</sup>

The programme was later operationalised by the Chief Justice of the Republic of Kenya through Gazette Notice No. 1890 of 2016. Several organs have been instituted, in order to steer the project ahead, including the Mediation Accreditation Committee (MAC) (whose mandate was to create a training and code of conduct framework for professional mediators); the Alternative Dispute Operationalization Committee (AOC) and the Secretariat. Once the pilot project was completed, a multi-stakeholder taskforce was formed with several objectives, among them, establishing and formulating an appropriate judiciary policy on CAM, as well as the roll out of CAM to all court stations in Kenya.<sup>15</sup>

Over time, it has extended to almost all other courts of equal stature countrywide,<sup>16</sup> and the process is still underway, with a view of ensuring that the programme is rolled in all court stations in Kenya.<sup>17</sup> To further enhance this debate, this paper shifts its attention to the jurisprudence advanced by the courts, with regards CAM. While referring the matter to Court Annexed Mediation, Justice J.N. Mulwa, in the case of *Sethi Sarabjeet Singh v Henry Musaviri Ambwere*,<sup>18</sup> justified his decision by stating that:

Article 159 (12) (c) of the 2010 Kenya Constitution encourages parties to explore alternative forms of dispute resolution including reconciliation, mediation, arbitration, and other forms that are not repugnant to justice and morality. One such form is the Court Annexed Mediation which has been rolled

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<sup>14</sup>A Amadi, *Here Is the Judiciary's Solution to Case Backlog* (judiciary.go.ke, 2019) <https://www.judiciary.go.ke/here-is-the-judiciarys-solution-to-case-backlog/> accessed 14 June 2021.

<sup>15</sup> J Anyombe, *Court Annexed Mediation in Kenya: An Examination of The Challenges and Opportunities* (Masters thesis, The University of Nairobi 2020).

<sup>16</sup> S Ater, *Strides In Court Annexed Mediation In Kenya*, (Mediate.com, 2019) [https://www.mediate.com/articles/ater-strides-in-mediation-in-kenya.cfm#:~:text=The%20Court%20Annexed%20Mediation%20\(CAM,significant%20progress%20has%20been%20made.&text=These%20include%20court%20stations%20in,%2C%20Mombasa%2C%20Nakuru%20and%20Nyeri.](https://www.mediate.com/articles/ater-strides-in-mediation-in-kenya.cfm#:~:text=The%20Court%20Annexed%20Mediation%20(CAM,significant%20progress%20has%20been%20made.&text=These%20include%20court%20stations%20in,%2C%20Mombasa%2C%20Nakuru%20and%20Nyeri.) accessed 14 June 2021.

<sup>17</sup> *Ibid.*

<sup>18</sup> [2019] *eKLR*, Civil Case 33 of 2017.

out in various court stations including Nakuru law courts. In my view, this suit in its entirety is one that mediation would resolve the dispute within a very short time. I say so because there are on record attempts by the parties to resolve the dispute. Court Annexed Mediation will not only resolve the application but the entire suit on mutual grounds. For that reason, I shall refer the dispute therein for mediation. The mediation registrar of this court shall appoint a duly accredited mediator whose terms of reference shall be to bring the parties together and determine the issues as appears in the pleadings, among others. This exercise should take no more than 60 days from the date of appointment of the mediator. The matter shall be mentioned on a date to be agreed upon, the interim order of injunction against the defendant is extended for a period of 70 days from the date of this order or until such time that the matter may be mentioned before the court.<sup>19</sup>

This is a clear indication that the mainstream judicial framework is willing to embrace the place of CAM in dispute resolution, as an alternative method of access to justice. This assertion is further supported by the case of *Samuel Mboru Gitonga v Kenya Power & Lighting Co. Ltd*,<sup>20</sup> in which, while considering Section 6 of the Energy Act<sup>21</sup> under which the Energy Regulatory Commission has the power to investigate complaints or disputes between parties, the court was of the view that in order to save the parties further delays in having the case tried in a court of formal law with its procedures and work load, the matter should be referred to CAM.

From the foregoing, it is clear that the courts are making great attempts with regards the implementation of the Constitution of Kenya 2010, which inculcates a wholesome judicial authority that adopts co-existence of ADR alongside the formal court justice system.<sup>22</sup> This is based on the fact that mediation has specific characteristics that are generally different from litigation and attract users. First, mediation's consensual nature is one of the key features.<sup>23</sup> Secondly, mediation processes empower parties to choose for themselves the ADR method and outcome, and lastly, it guarantees to parties the opportunity to access justice.

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<sup>19</sup> Ibid, par 5-7.

<sup>20</sup> [2019] eKLR, Civil Case 122 of 2009.

<sup>21</sup> The Energy Act, No. 12 of 2006 Section 6.

<sup>22</sup> The Constitution of Kenya, 2010 Article 159 2(c).

<sup>23</sup> *Halsey v Milton Keynes General NHS Trust* (2004) EWCA Civ 576.

### ***The Court Annexed Mediation Process***

For a matter to be referred to CAM, a judicial officer, the Mediation Deputy Registrar (MDR) undertakes a critical analysis of the fundamental issues which form the basis of the dispute in question, with a view of establishing whether or not the matter is viable for settlement by mediation through a process commonly referred to as *case screening*.<sup>24</sup>

Once a case has been ascertained to be viable for mediation, the MDR pursuant to Rule 5 of the Mediation (Pilot Project Rules) 2015 is mandated to notify the parties within seven days of completion of screening that the matter has been referred to mediation.<sup>25</sup> Upon such notification, parties are required to file a case summary within seven days. Further on, the MDR nominates three qualified mediators from the register of accredited mediators, which is maintained by the Mediation Accreditation Committee (MAC). Parties are at liberty to state their preference from the mediators provided, in order of priority, and file the same with the MDR within seven days of receipt of the list of nominated mediators. Upon receipt of this notice, the MDR within seven days appoints a mediator, giving due consideration to the parties' preference, notifying the parties of the mediator who has been appointed.<sup>26</sup>

Once the preliminary issues have been dispensed with, the appointed mediator fixes the first date of the initial mediation session. In this session, commonly referred to as a *pre-mediation conference*, the mediator provides guidelines on the mediation process including the rules of engagement and other relevant information.<sup>27</sup> The mediation proceedings ought to be concluded within sixty days from the date that the case was referred to mediation. However, the mediation rules allow for extension of time, but for no more than ten days. In considering whether to grant a request for extension of time, the MDR is guided by several factors, such as the complexity of the case, or the number of parties involved. Upon conclusion of mediation, the mediator then files a mediation report with the MDR that is adopted by the court and can be enforced as a judgment or an order of court.<sup>28</sup>

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<sup>24</sup>Court Annexed Mediation, (*Bma.co.ke*, 2021)

[https://www.bma.co.ke/wp-content/uploads/2017/03/COURT\\_ANNEXED\\_MEDIATION.pdf](https://www.bma.co.ke/wp-content/uploads/2017/03/COURT_ANNEXED_MEDIATION.pdf) accessed 14 June 2021.

<sup>25</sup> The Mediation (Pilot Project) Rules, 2015 Rule 5.

<sup>26</sup> The Mediation (Pilot Project) Rules, 2015 Rule 6.

<sup>27</sup> H I Abramson, *Mediation representation: Advocating in a problem-solving process*, (2004, International Institute for Trial Advocacy).

<sup>28</sup> The Mediation (Pilot Project) Rules, 2015 Rule 14.



### **Effectiveness of Court Annexed Mediation in Kenya**

The effectiveness of a process or activity is usually evidenced by its corresponding outcome. Five years since inception of CAM, the question remains the extent that CAM has achieved the objectives for which it was established. Has it furthered access to justice and reduced the backlog of cases within the mainstream justice system? There is reason to believe, even in the absence of conclusive research, that the CAM process has at the very least partially achieved the results for which it was set up. For instance, it has enhanced access to justice for thousands of justice-seeking parties, whose cases have been pending in court due to backlog. In addition, it has facilitated and enhanced the ease of doing business within Kenya. This is based on the fact that the amount of time spent in legal battles through the mainstream court framework has reduced to a great extent, courtesy of CAMP.<sup>29</sup>

In order to enhance the success of the process, it is imperative to note the following important aspects. First, if a matter is referred to mediation and one of the parties to the dispute consistently and deliberately fails to comply with any of the mediator's directions, or consistently and without any justifiable reason fails to attend the mediation sessions, the mediator is mandated to lodge a certificate of non-compliance with the MDR, who then forwards the same to court. From the foregoing, the court can then order the parties to attend further mediation sessions on terms to be set by the court, strike out the pleadings of the non-complying party, order that the defaulting party pays costs or make any other orders that it may deem fit.<sup>30</sup> This is then to mean that Court Annexed Mediation is mandatory, and once a matter has been referred for CAM, then the parties' autonomy with regards voluntary submission to mediation is ousted.<sup>31</sup>

Secondly, one of the most important components of any mediation process is the aspect of confidentiality. The importance of confidentiality is underscored by two main justifications. First, legal liability and secondly, creating a conducive environment for mediation to take place.<sup>32</sup> As a result, for the success of the Court Annexed Mediation process to bear any fruitful result, several confidentiality observation measures have

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<sup>29</sup>World Bank, *Court Annexed Mediation Offers Alternative To Delayed Justice For Kenyans* (World Bank, 2017) <https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> accessed 14 June 2021.

<sup>30</sup> The Mediation (Pilot Project) Rules, 2015 Rule 11.

<sup>31</sup> M Hanks, *Perspectives on Mandatory Mediation*, (2012, UNSWLJ, vol 35, No. 929).

<sup>32</sup> J Pollack, *The Importance of Confidentiality in Mediation*, (Pollack Peacebuilding Systems, 2017) <https://pollackpeacebuilding.com/blog/importance-confidentiality-in-mediation/> accessed 14 June 2021.



been institutionalised. For instance, all communication during mediation sessions, up to and including the mediator's notes is deemed confidential, and as a result, it cannot be admissible as any evidence in any ongoing or subsequent litigation proceedings.

In addition, any information obtained either orally or in writing during the mediation process is deemed as confidential information which cannot be disclosed, unless that information is required by law to be disclosed.<sup>33</sup> In addition to this, neither the mediator, nor any person appearing in a mediation session may be compelled to testify about the mediation in any proceedings before any court of law.<sup>34</sup> As a matter of fact, Rule 12(4) of the Court Annexed Mediation Rules stipulate that no person present or appearing at a mediation session may use any electronic device of any nature to record the mediation proceedings, and any breach of the aforesaid rule is tantamount to contempt of court. In spite of the fact that the confidentiality requirement is not an absolute right as evidenced by the conditions under which information may be disclosed, this paper concurs with Stuart Widman's argument that courts must take the smallest bites possible out of the confidentiality shield when a carve-out is warranted.<sup>35</sup>

In as far as the economic value of resolution of disputes is concerned, the place of mediation in creating and enhancing the ease of doing business in Kenya-which is best reflected through economic gains- cannot be underestimated. In ranking countries with regards to the ease of doing business, the World Bank assesses among other things the country's enforcement of contracts and resolution of disputes arising thereof. Kenya has steadily improved from position 92 in 2016, to position 80 in 2017 and position 61 in 2018. It has been suggested that this improvement coincides with the use of mediation as a mechanism for resolving disputes and the money released back to the economy through successful resolution of disputes in this manner. More specifically in relation to CAM, statistics indicate that in its 2019-2020 financial year, a total of 4315 cases were referred to CAM, out of which a total of 1290 cases were settled with a total monetary

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<sup>33</sup> K Muigua, *Making Mediation Work For All: Understanding The Mediation Process*, (Kmco.co.ke, 2021) <http://kmco.co.ke/wp-content/uploads/2018/08/Making-Mediation-Work-for-all-Understanding-the-Mediation-Process-August-2018-1.pdf> accessed 14 June 2021.

<sup>34</sup> The Mediation (Pilot Project) Rules, 2015 Rule 12 (3).

<sup>35</sup> S Widman, *Confidentiality and Its Exceptions in Mediation*, 2020 available at <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/confidentiality-and-its-exceptions-in-mediation/> accessed 13 October 2021.

value of Kshs. 7.2 billion.<sup>36</sup> This represented a settlement rate of 53.8 percent in the Commercial and 55.7% in the Family Divisions. Part of this savings are not simply related to an outcome of settlement but further includes the speed with which disputes are resolved. For example, the same report went on to state that the average settlement period was ninety days, which in consequence reveals a huge variance in comparison with the mainstream court process.<sup>37</sup> This is best enunciated by the resultant effects of the process, through which, for instance, in 2017, 1.9 billion Kenya Shillings was released back<sup>38</sup> while in the first quarter of 2019 alone, 3.8 billion Kenya Shillings had been released back to the economy.<sup>39</sup>

Another very important and effective outcome of MAC is its capacity for repairing broken relationships. In contrast, litigation has had and continues to have numerous negative effects on the parties due to its adversarial nature in which there must be a winner and a loser, relationships are broken, and enmity ensues. This extends to the basic units of the society-the family- since the process is a winner takes it all sort of dispute resolution mechanism. As a result, the social fabric that binds the community together becomes broken, and this may have catastrophic effects in the near future.

Beyond the impact that all of this has on the sustainability of the relationships of the parties, it is likely that CAM, in line with the unique advantages of mediation, has increased the levels of client satisfaction. Unlike litigation, CAM seeks to identify the party's interests in contrast to their legal rights, in order to resolve the dispute at hand and also allows parties to craft their own solution.<sup>40</sup> In addition, the goals of the disputing parties play a significant role in the success of the process. Parties tend to consider the mechanism which will meet their needs and interests. According to the Malawian Law Reform Commission, other factors that the parties have to consider in selecting a technique to resolve the dispute are costs, need for confidentiality or privacy, the need to protect reputation, how long the technique will take to resolve the dispute, whether the disputants want to keep relationships, whether the parties want third parties to assist

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<sup>36</sup> The Judiciary of Kenya, *the Judiciary Finance and Administration Sub-Committee Report Financial Year 2019/2020*, (2020).

<sup>37</sup> *Ibid.*

<sup>38</sup> Mediation Task Force, *Mediation Task Force Initial Report Presented to the Chief Justice of the Republic of Kenya*, (2018) p. 12.

<sup>39</sup> Business Daily, *Expand cases Mediation to attract more business, 2019* available at <<https://www.businessdailyafrica.com/analysis/editorials/Expand-cases-mediation-to-attract-more-business/4259378-5104922-14m7pjvz/index.html>.

<sup>40</sup> *Ibid.*

in resolving the dispute, how complex the matters are, and whether the parties want a decision that is binding.<sup>41</sup>

Further, the issue of cost of a Court Annexed Mediation Process is a matter of paramount importance. A study conducted by the Centre for Democracy and Governance in the US found out that court-annexed mediation is affected by the same administrative complexities and costs like that of litigation. The study also established that the reduction of time and costs also depends on the time that the disputants go for mediation and whether the same results in a settlement. The earlier the disputants go for ADR the more likely they can settle and the less time and money they will spend. This paper holds the view that, despite the fact that the institutionalization of CAM is quite expensive, its sustainability is quite affordable, as juxtaposed with mainstream litigation processes.

This paper advances two key arguments to that effect. First, the remuneration of the mediators is cheaper, when compared to that of judges and magistrates. This is further enhanced by the fact that the court annexed mediators are paid a uniform sum, as opposed to judges and magistrates, who fall into different job groups, and whose remuneration is determined by several factors such as rank. Despite the fact that there have been consistent calls for a critical review of the remuneration of the mediators depending on factors such as the complexity of the matter and the number of parties involved, the project will still have the potential of being less expensive to sustain. Secondly, unlike in litigation whereby the parties are mandated to pay colossal sums of court fees and other expenses such as hiring their legal team, the cost of the mediation process is borne by CAM. As a consequence, therefore, the parties are able to access justice without the financial implications that would befall them, had they opted for litigation.

For the foregoing reasons, this paper contends that CAM has and will play an integral role in facilitating and enhancing access to justice and thereby reducing backlog of cases before court. Notwithstanding the fact that the judiciary continues to grapple with a backlog of cases, CAM has shown the potential for transforming and streamlining alternative platforms through which to access justice.<sup>42</sup>

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<sup>41</sup> Law Reform, 'Alternative Dispute Resolution' in The Civil Justice System in Scotland- A Case for Review? The Final Report of the Civil Justice Advisory Group (Scottish Consumer Council, 2005) p. 48.

<sup>42</sup> The Judiciary of Kenya, *State of the Judiciary and Administration of Justice Report in 2018*, (2020).

## **Challenges Facing Court Annexed Mediation in Kenya**

Despite having taken off as a noble, transformative and a high potential undertaking, CAM has grappled with challenges right from its inception. They include challenges such as funding, the mandatory nature of CAM, capacity of mediators, inadequate public awareness and the place of lawyers as stakeholders in the justice system.

### ***Funding***

It is worth noting that since its inception, both the pilot and the national roll-out of the programme has not been granted financial independence from normal dispute resolution mechanisms.<sup>43</sup> At the pilot phase, no funds were specifically set aside for the project by the Judiciary to cater for: payment of mediators, infrastructure, and stationery. All operational expenses were drawn out of the Registrar of High Court's budget,<sup>44</sup> the Judicial Performance Improvement Project and other partners such as the International Development Law Organization.<sup>45</sup> As a result, the sustainability of the entire project is under threat, particularly in view of government austerity measures which have become acute with the impact of the Coronavirus pandemic (COVID19). The present season has seen the government slashing the budgets of ministries and state corporations as well as the Judiciary. As CAM is financially reliant on the judiciary, this paper opines that the inadequacy of funds to run the programme could adversely impact upon the project.

### ***The Mandatory Nature of CAM***

In its definition, mediation brings about the concept of voluntariness, however, mandatory mediation takes away the voluntariness of this process by taking away the parties' freedom of choosing a dispute resolution mechanism from the onset.<sup>46</sup> In his article, *Mediation and the Judicial institution*, Sir Laurence Street contends that:

A court that makes available a judge or a registrar to conduct a true mediation is forsaking a fundamental precept upon which public confidence in the integrity and impartiality of the court system is founded. Private access to a representative of a court by one party, in which the dispute is discussed, and views are

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<sup>43</sup> J Anyombe, *Court Annexed Mediation in Kenya: An Examination of The Challenges and Opportunities* (Masters, The University of Nairobi 2020).

<sup>44</sup> Mediation Task Force Initial Report Presented to the Chief Justice of the Republic of Kenya, March 21, 2018.

<sup>45</sup> Ibid.

<sup>46</sup> K Muigua, *Court Sanctioned Mediation in Kenya-An Appraisal* (Kmco.co.ke, 2015) <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf> accessed 14 June 2021.

expressed in the absence of the other party, is a repudiation of basic principles of natural justice.<sup>47</sup>

Unlike the mainstream principles of mediation with regards to the autonomy and voluntariness of the process, mandatory mediation takes away those unique features. Consequently, this thereby violates a fundamental principle of natural justice which is the right to fair hearing. The right to a fair hearing is violated in the sense that the moment the parties are forced into mediation, their liberty in the process of acquiring justice is taken away from them.

As a consequence, therefore, when mediation is mandated, whether for the benefit of the parties or to reduce the backlog in the judiciary, it takes away from the very essence of mediation which is a more voluntary process. The effect then is hindrance to a fair hearing, as the parties do not get to choose the method used.<sup>48</sup>

Lord Justice Dyson in the case of *Halsey v Milton Keynes General NHS Trust*<sup>49</sup> argues that there is a fundamental difference between encouraging parties into mediation and forcing them to do so. Forcing them to mediate would lead to a fundamental breach of the principles of human dignity which are on the various freedoms with regard to getting justice.<sup>50</sup>

In their article, *Judicial (Mis) use of ADR? A Debate*, the authors, Sander, William and Debra argue that there is a difference between “*coercion in mediation*” and “*coercion into mediation.*” The authors note that Court Mandated Mediation (in our case, Court

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<sup>47</sup> Sir Laurence Street, *Mediation and the Judicial institution*, (1997, Australian Law Journal, Vol. 71, No. 794-6).

<sup>48</sup> M S Ba Wazir, *An analysis of mandatory mediation*, (2016).

<sup>49</sup> [2004] EWCA Civ 576 (11 May 2004).

<sup>50</sup> Based on the case of *Mark Omollo Agencies & 2 Others vs. Daniel Kioko Kaindi & Another*, it was submitted that if the proceedings before the lower court are not stayed, the effect will be that the matter will proceed to Court Annexed Mediation which is contrary to the agreed mode of dispute settlement in the insurance policy and in the event that mediation fails, the dispute will go back to court for adjudication still contrary to the agreed mode of dispute settlement provided for in the policy. In that case, there will be nothing preventing the lower court from finally determining the dispute in the Respondent’s favour even before the conclusion of the Appeal lodged, in which event there will be nothing to stay or refer to arbitration even if the Appeal succeeds. In that event, the Appellant, who chose arbitration as the mode of dispute settlement, would suffer irreparably notwithstanding that it may in the end succeed in the Appeal and the said Appeal will just be a trifling Appeal. Worthless. It will indeed have been rendered nugatory.

Annexed Mediation) may be mandatory but the parties are allowed to arrive at decisions voluntarily.<sup>51</sup> On the other hand, coercion in mediation does not amount to mediation.<sup>52</sup>

Coercion is also discussed at a different level whereby a party may be “*coerced within the mediation*” which may occur within entry or exit.<sup>53</sup> Mediators may be involved in the controlling of the process of mediation.<sup>54</sup> Some writers have labelled coercion as encouragement of parties to mediate by pointing out the need for some coercion for persons to accept the mediation process and that such coercion would be acceptable especially when the mediation is court referred.<sup>55</sup>

In his article, *Court Sanctioned Mediation in Kenya- An Appraisal*, Dr Kariuki Muigua approaches mediation from a two-pronged perspective; a legal and political approach. He notes that mediation from the legal perspective is focused on settlement and does not bear the attributes to mediation. He further argues that mediation from a political perspective offers little or no autonomy for parties to elect the mediator, the process and outcome. In addition, he goes on to assert that the root cause of the mediation is not addressed because of the power balance. On the other hand, mediation from the political perspective reflects true mediation since it allows parties to have autonomy in choosing the mediator and consenting into the process. According to Dr Muigua, the political process does not rely on any coercion and that it is focused on finding a common ground towards obtaining an amicable solution among the parties concerned.<sup>56</sup>

From the foregoing, it is evident that the mandatory nature of CAM has brought with it a lot of backlash, scepticism and negative image, which has negatively impacted its

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<sup>51</sup>D Quek, *Mandatory mediation: An oxymoron-examining the feasibility of implementing a court-mandated mediation program*, (2009, Cardozo J. Conflict Resolution 11) p. 479.

<sup>52</sup>E A Frank, H A William & E Debra, *Judicial (Mis) use of ADR? A Debate*, (1996, University of Toledo Law Review Vol. 27) p. 885.

<sup>53</sup>T Hedeem, *Coercion and self-determination in court-connected mediation: All mediations are voluntary, but some are more voluntary than others*, (2005, Justice System Journal, vol. 26(3)) pp. 273-291.

<sup>54</sup>J D Rosenberg, *In defense of mediation*, (1991, Ariz. L. Rev., Vol. 33) p. 467.

<sup>55</sup>F Shako, ‘Mediation in The Courts’ Embrace: Introduction of Court-Annexed Mediation into The Justice System in Kenya (Transnational Dispute Management (TDM), 2021) <https://www.transnational-dispute-management.com/article.asp?key=2438> accessed 14 June 2021.

<sup>56</sup>Kariuki Muigua, *Court Sanctioned Mediation in Kenya- An Appraisal*, available at <<http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf>>

ability to serve the actual purposes for which it was institutionalised, and as result, therefore, this may affect its ability to realise its objectives in the long run.

### ***Acceptability of CAM***

The formal nature of Court Annexed Mediation may pose a threat to the acceptability of the concept by Kenyans. Formal mediation is still a new concept within Kenya, and it is when the concept is taking root. This paper takes cognizance that mediation has been practiced by the Kenyan African traditional communities for a long time. The bulk of Kenya remains rural and aligned with traditional dispute resolution mechanisms e.g., disputes rooted in community relations like land and family.

According to Amanda Boniface, the key feature of African mediation is that it embodies a communitarian aspect of dispute resolution<sup>57</sup>. In other words, African mediation is a group mediation that involves not only the disputants and the mediator but the entire community. The whole community takes part in the resolution of the dispute because Africans believe that a conflict does not only affect the disputants but the entire community. Any effort towards peace and reconciliation is the responsibility of the entire community. The participants in African mediation include the disputants and their immediate families, the witnesses, the mediators and members of the community. During the African mediation process, every member takes part in the discussion and can pose a question or suggest the way forward to settle the matter.<sup>58</sup>

However, the tenets of the CAM are moulded around the western understanding of mediation and how the process should be conducted, and this is a different format of practice as juxtaposed with the traditional African mediation system. It is not clear whether employing this arrangement will realise the outcomes envisaged by CAM seeing as many of the disputants that come to the court are rooted in traditional relationships. CAM has not provided for this vital link between it and employing platforms that may be well suited to parties coming from this traditional customary set up. Therefore, forcing Kenyans into the process might make them averse to embracing it, since they will deem it with suspicion.

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<sup>57</sup>Amanda Boniface, 'African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context' (2012) Volume 15 No5 PER/PELJ.

<sup>58</sup> Ibid.



### ***Acceptability of the Process by Advocates***

According to stakeholders of the CAM project, advocates have not been properly sensitized about the process, the advocates' role and the benefits of CAM. The opposition of CAM by advocates is largely based on the belief that CAM is a threat to advocates' income since they are the gatekeepers of the litigation process. Other advocates have raised their concern about the CAM process especially about: the constitutional backing of the project, the comprehensiveness of the mediator's training, applicability of judicial review to mediation, guidelines for referral of cases to mediation and the Judiciary's preparedness.<sup>59</sup>

In some cases, advocates have even gone to the extent of advising their clients to shun the mediation process altogether, when their matter has been screened and referred to mediation. This is based on the fact that the current training programme for advocates and legal officers is one that is inclined towards teaching them the predominantly adversarial legal system which majorly encourages the winner-takes-it-all mentality, and as a result, therefore, the advocates hardly embrace CAM, but rather, take it with a pinch of salt.

### **Recommendations**

From the foregoing, it is evident that the Court Annexed Mediation Project is a noble undertaking, with high potential for success. However, challenges identified above impede its progress and require careful reflection on how they may be overcome. This part of the paper presents recommendations which if put into consideration, will go a long way in enhancing the success of this undertaking.

### ***Creating Public Awareness on the Benefits of Mediation (Civic Education)***

Unlike African mediation, which is communitarian, western mediation perpetuates individualism and emphasizes disputants' autonomy. Jacqueline Nolan-Haley identifies the key features of western mediation and these include the confidentiality of the mediation process, disputants' self-determination, and mediators' impartiality.<sup>60</sup> As a result, most Kenyans are mostly versed with the traditional mediation procedures, as opposed to the western mediation practice.

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<sup>59</sup> Achere Ibifuro, *External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts*, (2017) p. 12.

<sup>60</sup> Jacqueline Nolan-Haley, 'Mediation and Access to Justice in Africa: Perspectives from Ghana' (2015) 21 *Harvard Negotiation Law Review* 59.



As a result, the promotion of mediation in public includes the application of powerful promotional strategies and tactics that allow placement of information to the public through the media, events, and discussion groups. Strategic promotion of mediation imparts the public with a set of tools for proactive management of the problems, conflicts, and disputes. The purpose of the promotional activities is to sensitize the community about creative dispute resolution in order to enable them to effectively participate in undertakings which concern them.<sup>61</sup> This is in line with Article 33(i)(a) of the Constitution 2010 which stipulates that every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas. In the context of CAM, this right can be realised through the provision of civic education that ensures that citizens have enhanced knowledge, understanding and ownership of the process.<sup>62</sup> As a result, citizens will be more informed about the benefits of handling their disputes through mediation, such as enhanced and strengthened relationships, quick resolution of their disputes in an amicable, less formal and less complicated process as opposed to court litigation.

### ***Capacity Building for Mediators***

As earlier discussed, the inadequacy of a regulative framework guiding the chief drivers of CAM-the mediators, is a serious challenge with which CAM continues to grapple with, since, the success or otherwise of the process rests partly on the mediators' shoulders. One key factor for the success of the programme is based on the professionalism of the mediators. In that regard, the mediators, who are the key drivers of this programme ought to be well-trained, in order to enhance efficiency, efficacy and professionalism in their undertaking. Currently, there has been an exponential increase in the number of institutions undertaking the training and certification of mediators. As a result, the mediators are handling disputes largely informed by their professional background. This leads to a varied approach towards dispute resolution.

Sceptics of the mediators training programme argue that 40 hours are not enough to train mediators especially if they do not have a dispute resolution background. There is a need for standardization of the training done by these institutions, to ensure that the training they offer is in line with the goals and objectives of the mediation industry, in order to enhance effectiveness and professionalism of the mediators. On the other hand,

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<sup>61</sup> S Aleksandra, P V Mucunski, & I Jana, *Awareness about mediation as an alternative form of dispute resolution: practices in the Republic of Macedonia*, (2015, International Journal of Cognitive Research in Science, Engineering and Education, Vol. 3(1).

<sup>62</sup>The Constitution of Kenya, 2010 Article 33(i) (a).

mediators need also to learn some basic principles of law such as commercial law principles of ‘liability’ and ‘quantum’ in addition to understanding mediation. This will in turn enhance their capacity to facilitate the mediation process.<sup>63</sup> Furthermore, there is a need for professional training for judicial officers, judiciary staff and the mediation secretariat. Since the staff form an essential component of the CAM project, they must be re-trained and be equipped with professional mediation skills. These staff members have various professional backgrounds hence their output is varied.

### ***Funding***

Due to lack of financial independence of the project, the project may be in danger of collapse since it relies entirely on the funding from the judiciary. Pursuant to Article 170 of the Constitution 2010, there is an established Judiciary Fund, which is administered by the Chief Registrar of the Judiciary.<sup>64</sup> In each financial year, the Chief Registrar is mandated to prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval, upon which the expenditure of the Judiciary becomes a charge on the Consolidated Fund. The funds are to be paid directly into the Judiciary Fund and are used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary. The reason for this fund is to enable the effective functioning of the judiciary through financial independence. This fund should be institutionalised accordingly, in order to enable the judiciary effectively to undertake its mandate, one of which is facilitating Court Annexed Mediation.

### ***Mandatory Referral to Mediation***

According to the Mediation Rules, every suit instituted in court shall be subject to mandatory screening by the MDR to determine suitability for mediation. The mandatory nature of CAM has been taken by some parties the wrong way. As noted above, mediation is ordinarily supposed to be a voluntary process which the parties consent to participate in without coercion or under the direction of any authority.<sup>65</sup> Voluntariness in this case can be explained in two ways- the parties agree to enter into mediation and the parties agree to reach a settlement. On the other hand, it is argued that the mandatory

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<sup>63</sup>Muigua K., *Enhancing the Court Annexed Mediation Environment in Kenya*, (2020, A Paper Presented at the 2nd NCIA International Arbitration Conference held from 4<sup>th</sup> to 6<sup>th</sup> March 2020 in Mombasa, Kenya. Conference Theme: “Tracking Africa’s Arbitration & ADR: It’s Business Unusual”).

<sup>64</sup> The Constitution of Kenya, 2010 Article 170.

<sup>65</sup>Christopher Moore, *Mediation Process: Practical Strategies to Resolving Conflict*, (1986).

nature of the Mediation Rules is not in the need to reach an agreement rather in the choice of the forum. That is, that the Mediation Rules do not have mandatory provisions on parties settling matters through mediation. However, the parties must adopt CAM in the resolution of their dispute. As a result, this does not in any way contribute to ‘denial of access of justice’ but only that it has been delayed until the determination of the dispute by mediation. The parties are therefore still free to determine the outcome of their dispute.<sup>66</sup> According to the Judiciary, the choice about mandatory referral is premised on the aim and objective of the Judiciary regarding the project. In this case, the Judiciary needs to clear the backlog of cases and improve case turnaround time and under such circumstances, adoption of voluntary referral to mediation would require detailed and far-reaching sensitization efforts.<sup>67</sup>

### ***Advocate Sensitization***

It is without a doubt that the current system does not favor the place of CAM-a non-adversarial conflict resolution mechanism- and there is need for quick action if positive change is to be achieved. This is based on the fact that advocates play a fundamental role in enhancing the settling of disputes between and or among the disputants through legal advice and guidance. There is an urgent need to sensitize advocates on the advantages that CAM provides with regards access to justice for their clients. In order to enhance the acceptability of the process, there is a need to undertake a critical review of the remuneration order, with a view of making it more friendly for advocates. This will go a long way in enhancing the acceptability of the process among advocates, since most of them are sceptical that its institutionalization would negatively affect their remuneration. In addition, there is need to sensitize the advocates that in this contemporary era, there is a paradigm shift with regards the adversarial mechanisms of dispute settlement, in which the notion of winner-takes-it-all is being slowly replaced by win-win solutions, with a view of enhancing cordial relationships between and among the disputing parties. This can be achieved through refresher training, as well as a reformulation of the current legal training framework.

### **Conclusion**

This paper has examined the origins and the legal framework governing the concept of Court Annexed Mediation, and whether or not it has met the expected outcome/

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<sup>66</sup> Sander, Allen & Hensler, *Community Mediation: Progress and Problems in Massachusetts Association of Mediation Programs* (1986).

<sup>67</sup> Achere Ibifuro, *External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts*, (2017) p .12.

intention. First, the paper considered the existing gaps with regards Court Annexed Mediation within the Kenyan legal framework. Secondly, the paper has identified the challenges and opportunities available, which ought to be considered in improving the entire CAM project. The primary challenges that CAM faces are funding, and the mandatory nature of the undertaking, which to a large extent impedes the acceptability of the programme within the general public. Although, the Judiciary has incurred a lot of expenses in the roll out of CAM, it is yet to get additional funding from the Exchequer to enable it to sustain the initiative, with the aim of attaining financial independence, and as a result, therefore, lack of funding could jeopardize the entire CAM project. Thirdly, the paper reviewed the best practices for Court Annexed Mediation and made proposals as well as recommendations on the identified gaps that currently exist with regards the full realization of its objectives, so as to facilitate changes where they are necessary.

## References

Abramson, H I, *Mediation representation: Advocating in a problem-solving process*, (2004, International Institute for Trial Advocacy).

Aleksandra, S, Mucunska, P V, & Jana, I, *Awareness about mediation as an alternative form of dispute resolution: practices in the Republic of Macedonia*, (2015, International Journal of Cognitive Research in Science, Engineering and Education, Vol. 3(1).

Amadi A, *Here Is the Judiciary's Solution to Case Backlog* (judiciary.go.ke, 2019) <https://www.judiciary.go.ke/here-is-the-judiciarys-solution-to-case-backlog/> accessed 14 June 2021.

Anyombe J, *Court Annexed Mediation in Kenya: An Examination of The Challenges and Opportunities* (Master's thesis, The University of Nairobi 2020).

Ater S, *Strides In Court Annexed Mediation In Kenya*, (*Mediate.com*, 2019) [https://www.mediate.com/articles/ater-strides-in-mediation-in-kenya.cfm#:~:text=The%20Court%20Annexed%20Mediation%20\(CAM,significant%20progress%20has%20been%20made.&text=These%20include%20court%20stations%20in.%2C%20Mombasa%2C%20Nakuru%20and%20Nyeri.](https://www.mediate.com/articles/ater-strides-in-mediation-in-kenya.cfm#:~:text=The%20Court%20Annexed%20Mediation%20(CAM,significant%20progress%20has%20been%20made.&text=These%20include%20court%20stations%20in.%2C%20Mombasa%2C%20Nakuru%20and%20Nyeri.) accessed 14 June 2021.

Ba Wazir, M S, *An analysis of Mandatory Mediation*, (2016).

Boniface A, 'African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context' (2012) Volume 15 No5 PER/PELJ.

Business Daily, *Expand cases Mediation to attract more business*, 2019 available at <https://www.businessdailyafrica.com/analysis/editorials/Expand-cases-mediation-to-attract-more-business/4259378-5104922-14m7pjevz/index.html>

Court Annexed Mediation, (Bma.co.ke, 2021) <https://www.bma.co.ke/wp-content/uploads/2017/03/COURT-ANNEXED-MEDIATION.pdf> accessed 14 June 2021.

Frank E A, William H A & Debra E, *Judicial (Mis) use of ADR? A Debate*, (1996, University of Toledo Law Review Vol. 27).

Hanks, M, *Perspectives on Mandatory Mediation*, (2012, UNSWLJ, vol 35, No. 929).

Hedeem, T, *Coercion and self-determination in court-connected mediation: All mediations are voluntary, but some are more voluntary than others*, (2005, Justice System Journal, vol. 26(3))

Ibifuro, A, *External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts*, (2017).

Law Reform, 'Alternative Dispute Resolution' in The Civil Justice System in Scotland- A Case for Review? The Final Report of the Civil Justice Advisory Group (Scottish Consumer Council, 2005).

Mediation Task Force Initial Report Presented to the Chief Justice of the Republic of Kenya, (2018).

Moore C, *Mediation Process: Practical Strategies to Resolving Conflict*, (1986).

Muigua K, Court Annexed ADR In the Kenyan Context, (*Kmco.co.ke*, 2021) <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Annexed-ADR.pdf> accessed 14 June 2021.

Muigua K, Court Sanctioned Mediation in Kenya-An Appraisal (*Kmco.co.ke*, 2015) <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf> accessed 14 June 2021.

Muigua K, Making Mediation Work For All: Understanding The Mediation Process, (*Kmco.co.ke*, 2021) <http://kmco.co.ke/wp-content/uploads/2018/08/Making-Mediation-Work-for-all-Understanding-the-Mediation-Process-August-2018-1.pdf> accessed 14 June 2021.

Muigua K, *Enhancing the Court Annexed Mediation Environment in Kenya*, (2020, A Paper Presented at the 2nd NCIA International Arbitration Conference held from 4<sup>th</sup> to

6<sup>th</sup> March 2020 in Mombasa, Kenya. Conference Theme: “Tracking Africa’s Arbitration & ADR: It’s Business Unusual”).

Nolan-Haley J, 'Mediation and Access to Justice in Africa: Perspectives from Ghana' (2015) 21 *Harvard Negotiation Law Review* 59.

Pollack J, The Importance of Confidentiality in Mediation, (*Pollack Peacebuilding Systems*, 2017) <https://pollackpeacebuilding.com/blog/importance-confidentiality-in-mediation/> accessed 14 June 2021.

Quek, D, *Mandatory mediation: An oxymoron-examining the feasibility of implementing a court-mandated mediation program*, (2009, *Cardozo J. Conflict Resolution* 11) p. 479.  
Rosenberg, J D, *In defense of mediation*, (1991, *Ariz. L. Rev.*, Vol. 33) p. 467.

Sander, Allen & Hensler, *Community Mediation: Progress and Problems in Massachusetts Association of Mediation Programs* (1986).

Shako F, ‘Mediation in The Courts’ Embrace: Introduction of Court-Annexed Mediation into The Justice System in Kenya (*Transnational Dispute Management (TDM)*, 2021) <https://www.transnational-dispute-management.com/article.asp?key=2438> accessed 14 June 2021.

Sir Laurence Street, *Mediation and the Judicial institution*, (1997, *Australian Law Journal*, Vol. 71, No. 794-6).

The Judiciary, *The 2018/2019 Performance Management and Measurement Understandings Evaluation Report*, (2020)

The Judiciary, *The 2018/2019 State of the Judiciary and Administration of Justice Report*, (2020)

The Judiciary of Kenya, *The Judiciary Finance and Administration Sub-Committee Report Financial Year 2019/2020*, (2020).

What is Mediation? (*Mediation.judiciary.hk*, 2021) [https://mediation.judiciary.hk/en/doc/What\\_is\\_Mediation-Eng.pdf](https://mediation.judiciary.hk/en/doc/What_is_Mediation-Eng.pdf) accessed 14 June 2021.

*Court Annexed Mediation in Kenya:  
An Expository Analysis of Its Efficacy:  
Kenneth Wyne Mutuma*

(2021)9(4) *Alternative Dispute Resolution*

Widman S, *Confidentiality and Its Exceptions in Mediation*, 2020 available at <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/confidentiality-and-its-exceptions-in-mediation/> accessed 13 October 2021.

World Bank, *Court Annexed Mediation Offers Alternative To Delayed Justice For Kenyans* (World Bank, 2017) <https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> accessed 14 June 2021.



## **Navigating Emerging Trends to Craft an Enforceable Mediation Settlement Agreement**

*By: Jacqueline Waihenya* \*

*This paper considers the primacy of the Mediation Settlement Agreement as the logical output of the mediation process. The article seeks to deconstruct the mediation process vis-à-vis the mediation settlement agreement, the instrument itself not only being a written summary of the parties' agreement but a tool for enforcement of the same. Also highlighted are emergent trends that have had an impact on mediation settlement agreements on the domestic as well as international planes.*

### **1. Introduction**

Court-mandated, court-annexed or court-connected mediation is a recent addition to the repertoire of dispute resolution mechanisms and it has not only evolved but exploded into the consciousness of the Kenyan litigant and litigator alike since its introduction to the country in 2012 via the *Statute Law (Miscellaneous Amendments) Act No. 12 of 2012*.<sup>1</sup> The advantages of cost effectiveness and speedy resolution compounded by the prevalent court backlogs and the recent effects of the COVID

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<sup>1</sup> Statute Law (Miscellaneous Amendments) Act No.12 of 2012 introduced Sections 2, 59A, 59B, 59C and 59D into the Civil Procedure Act (Cap 21) and Order 46 which defined mediation, the mediator and otherwise established for the Mediation Accreditation Committee and its mandate and provided the modalities for Court to refer matters to mediation as well as the enforcement of mediation settlement agreements arrived at through this process.

19 pandemic have further served to augment, escalate and entrench mediation not only as a popular mechanism<sup>2</sup> but it is further evolving into the preferred<sup>3</sup> alternative dispute resolution (ADR) mechanism in court and within the business arena as more and more transaction advocates and in-house lawyers write in mediation provisions into their dispute resolution clauses.

## 2. Mediation Settlement Agreements

A key pillar for the success of mediation is the widely held belief that the agreement outcome of the mediation process typically reduced into a mediation settlement agreement (MSA) has greater durability than a court judgment or an arbitration award or judgment emerging out of traditional dispute resolution mechanisms due to the parties' participation and consensus which guarantees their compliance.<sup>4</sup> Prevailing thinking has it that parties tend to identify strongly with mediation settlement agreements (MSAs) arrived at voluntarily and as such MSAs accordingly enjoy high levels of satisfaction and durability.<sup>5</sup>

Nevertheless, with the increased prevalence of mediation as a formal dispute resolution mechanism, situations where parties to an MSA have either breached their agreement or otherwise chosen to challenge their instrument are emerging and instances where one party has contended that no agreement exists or that the agreement is unenforceable for some reason are also increasing. Unravelling such situations and considering what to expect in such circumstances is a discussion that has gained currency and it is a subject requiring critical analysis and consideration.<sup>6</sup>

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<sup>2</sup>Kenneth Wyne Mutuma, *COVID 19: Construction Projects, Contracts and Disputes*, (2021)9(1) CIARB Alternative Dispute Resolution Journal 52, pg.66

<sup>3</sup> Kenneth R. Feinberg, *Mediation - A Preferred Method of Dispute Resolution*, 16 Pepp. L. Rev. 5 (1989) Available at: <http://digitalcommons.pepperdine.edu/plr/vol16/iss5/2> [Last accessed on 14 August 2021]

<sup>4</sup> Feinberg Supra, pg. S12

<sup>5</sup> Kariuki Muigua PHD, *Court Sanctioned Mediation in Kenya-An Appraisal (March 2015)* Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf> [Last accessed on 19 September 2021]

<sup>6</sup> Ronan Feehily, *The Legal Status and Enforceability of Mediated Settlement Agreements* (2013) 12 Hibernian LJ 1 Available on Heinonline [Last accessed on 19 September 2021]

## 2.1 Finality of the Mediation Settlement Agreement:

The fundamental premise in Kenya is that an MSA is not appealable<sup>7</sup> and in a considerable number of jurisdictions around the world Courts have taken the discernible view that as a matter of policy they will not interfere with the parties' consensus arising out of a credible mediation process. Courts will therefore and as a general rule uphold MSAs but their modalities of effecting them has however been diverse.<sup>8</sup> This policy favouring settlement is reflected on the international plane flowing from the values of self-determination and consensual outcomes which are widely endorsed as the principle of freedom of contract.<sup>9</sup> In addition to this the advent of the *United Nations Convention on International Settlement Agreements Resulting from Mediation*<sup>10</sup> popularly known as the Singapore Convention has added legal certainty to the enforcement of MSAs on the international plane.<sup>11</sup>

It is widely considered that parties are capable of assessing the value of their interests,<sup>12</sup> and the mediation process has gained credence as being flexible, fair and participatory leading to the premise that the MSA will likely be based on agreed standards and it will take the parties' interests into account as well as their idiosyncrasies and will most likely positively impact their future relationship.<sup>13</sup> The MSA therefore brings finality for the parties and no further litigation on

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<sup>7</sup> Kariuki Muigua PHD, *Enhancing The Court Annexed Mediation Environment in Kenya: A Paper Presented at the 2nd NCIA International Arbitration Conference held from 4th to 6th March 2020 in Mombasa, Kenya*. Available at <http://kmco.co.ke/wp-content/uploads/2020/03/Enhancing-The-Court-Annexed-Mediation-Environment-in-Kenya-00000002.pdf> [Last accessed on 20 September 2021]

<sup>8</sup> Bobette Wolski, *Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research* (2014) 7 *Contemp Asia Arb J* 87 Available on Heinonline [Last accessed on 20 September 2021]

<sup>9</sup> Bobette Wolski *Supra*, pg.101

<sup>10</sup> United Nations Commission on International Trade Law (UNCITRAL), *The United Nations Convention on International Settlement Agreements Resulting from Mediation* (New York, 2018) The Singapore Convention on Mediation. Available at [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements) [Last accessed on 15 August 2021]

<sup>11</sup> Jonathan C. Hamilton & Michele Grando, *The Rise of Global Mediation: A New Treaty Portends Growth* (28 June 2021) White & Case. Available at <https://www.whitecase.com/publications/alert/rise-global-mediation-new-treaty-portends-growth> [Last accessed on 20 September 2021]

<sup>12</sup> Bobette Wolski *Supra*, pg102

<sup>13</sup> Bobette Wolski *Supra*, pg103

settled issues ought to be entertained as it becomes the new legal and contractual relationship between them.<sup>14</sup> In *Re Estate of Oyosi Oyuoya (Deceased)*<sup>15</sup> the Honourable Lady Justice Jacqueline Kamau observed that once the mediation agreement is signed, it becomes final and binding as to the disputes that have been amicably resolved. In this case the Objectors were in support of their duly executed MSA whilst the 1<sup>st</sup> and 2<sup>nd</sup> Administrators were opposed to it and challenged the same before it was adopted in Court as a consent order. The Honourable Judge observed thus before directing that the said MSA be mentioned in court for adoption whether or not the parties attended court on the scheduled day:

*Due to the final nature of the Mediation Agreement and no demonstration of vitiating factors such as misrepresentation, mistake, coercion, undue influence and/or duress, the 1<sup>st</sup> and 2<sup>nd</sup> Administrators did not persuade this court that there was merit in setting aside the Mediation Agreement. This court took the firm view that litigation had to come to an end. This cause is an old matter and ought to be settled without any further delay.*

## **2.2 The Impact of the tripartite Nature of a Mediation Settlement Agreement:**

Contract theory lays emphasis on the bilateral framework within which one party gives another an offer which is accepted and the meeting of the minds at the point where they are *ad idem* is supported by consideration.<sup>16</sup> Considering that mediation is a process whereby parties to a dispute appoint a third party neutral to assist them achieve a resolution acceptable to them,<sup>17</sup> the framework for an MSA automatically mutates into a tripartite formation. The pure bilateral framework then rests upon the parties' agreement to mediate and creates the foundation upon which any emergent MSA will rest. The interplay between the bilateral framework and the tripartite formation is not entirely without inherent friction that sometimes plays out particularly in the arena of enforcement of MSAs.

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<sup>14</sup> Dorcas Quek Anderson, *Litigating over Mediation - How Should the Courts Enforce Mediated Settlement Agreements* (2015) 2015 Sing J Legal Stud 105 Available on Heinonline [Last accessed on 27 September 2021], pg.108

<sup>15</sup> [2021] eKLR

<sup>16</sup> Dorcas Quek Anderson Supra, pg.110

<sup>17</sup> Kariuki Muigua Supra, pg.2

### 2.2.1 Confidentiality & Admissibility:

The glue that holds together the MSA and which distinguishes it from an ordinary contract then becomes confidentiality.<sup>18</sup> Confidentiality for its part is a public policy consideration that enables parties to engage in free, frank and honest discussions without fear of legal repercussions. It therefore promotes candid communications between the parties and it impacts party self-determination and mediator impartiality.<sup>19</sup>

Kenya's confidentiality and inadmissibility provisions are couched in terms of confidentiality and privilege meaning that not only do parties to mediation proceedings have an obligation not to disclose what transpires to third parties but they are further precluded from using material obtained in the mediation in subsequent proceedings except as provided by law.<sup>20</sup> It is useful to note however that none of the statutory Kenyan mediation instruments attempt any definition of the term "confidentiality" and the reality of the promise of confidentiality remains a very fluid concept. It is safe to conclude that as at present we do not have a widely accepted definition of the term.

These confidentiality provisions were first articulated as Rule 12 in the *Mediation (Pilot Project) Rules, 2015*<sup>21</sup> and they outlined that all communication during mediation including the mediator's notes were deemed confidential and were not admissible in evidence in any subsequent or current proceedings.<sup>22</sup> They contain a prohibition against any person present at a mediation using any recording device to record the mediation proceedings<sup>23</sup> and further, neither the mediator nor any person present at the mediation proceedings may be summoned or compelled to testify or produce any records

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<sup>18</sup> Susan Nauss Exon, *California's Opportunity to Create Historical Precedent regarding a Mediated Settlement Agreement's Effect on Mediation Confidentiality and Arbitrability* (2005) 5 Pepp Disp Resol LJ 215 Available on Heinonline [Last accessed on 27 September 2021], pg.216

<sup>19</sup> Susan Nauss Exon Supra

<sup>20</sup> Bobette Wolski, *Confidentiality and Privilege in Mediation: Concepts in Need of Better Regulation and Explanation* (2020) 43 UNSWLJ 1552. Available at Heinonline [Last accessed on 12 October 2021]

<sup>21</sup> Legal Notice No.197 of 2015

Subsequent Practice Directions issued by the Chief Justice have all mirrored this provision without making any amendment to the same though in training sessions for Mediators a great deal of emphasis is laid on the question of confidentiality.

<sup>22</sup> Rule 12(1) *Mediation (Pilot Project) Rules, 2015*

<sup>23</sup> Rule 12(4) *Mediation Rules Supra*

or notes of such proceedings in a court of law.<sup>24</sup> However, though all oral and written materials obtained in the course of mediation are confidential the breach of which amounts to contempt of court,<sup>25</sup> this provision is not absolute as there is a qualification regarding material which one may become obliged to disclose where the law requires it<sup>26</sup> or where the information relates to child abuse, child neglect, defilement, domestic violence or related criminal or illegal purposes.<sup>27</sup> The MSA itself is nevertheless specifically exempt from this provision of confidentiality and inadmissibility.<sup>28</sup> These provisions have remained substantially the same in subsequent Practice Directions issued through the office of the Honourable Chief Justice as court annexed mediation has grown and spread around the country.

Once the mediation proceedings commence a mediator acquires extremely wide latitudes within which to probe for information which may otherwise be governed by constitutional considerations such as the right to privacy, freedom to make intimate decisions about parties' commercial and personal affairs, intimate relationships, their children and their bodies.<sup>29</sup> Parties are then placed in the situation where they have to determine what to disclose, what probing by a mediator they may consider exceeds the bounds of propriety, whom to disclose and the like. Also, what information to reveal to the other party particularly those on the opposing side and what may be disclosed outside of the mediation process.<sup>30</sup> Accordingly, during the proceedings several dimensions of confidentiality may arise (1) between the mediator and the parties in joint sessions; (2) between the mediator and parties in caucus or separate sessions; (3) confidentiality between the lawyer and her client where a party is represented; and (4) what, if any, material or information may be exempt from the confidentiality requirements.<sup>31</sup>

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<sup>24</sup> Rule 12(3) Mediation Rules Supra

<sup>25</sup> Rule 12(5) Mediation Rules Supra

<sup>26</sup> Rule 12(2)(a) Mediation Rules Supra

<sup>27</sup> Rule 12(2)(b) Mediation Rules Supra

<sup>28</sup> Rule 12(6) Mediation Rules Supra

<sup>29</sup> Susan Oberman, *Confidentiality in Mediation: An Application of the Right to Privacy* (2012)

<sup>27</sup> Ohio St J on Disp Resol 539 Available on Heinonline [Last accessed on 9 October 2021]

@pg.557-558

<sup>30</sup> Ibid

<sup>31</sup> Bobette Wolski Supra

### **2.3 The Intersection of the Mediation Settlement Agreement with Litigation:**

The intersection between MSAs and Litigation reveals itself when these agreements are challenged typically within the course of enforcement. The key considerations taken into account in such circumstances can be summarised to include (1) the parties' intentions; (2) the mediation context; (3) relevant statutory requirements; and (4) principles of contract law for purposes of ascertaining the legal status of MSAs.<sup>32</sup> Accordingly any disputes that may arise in the course of enforcement of an MSA will generally be ventilated fundamentally on the basis of contract law. Courts tend to consider evidence to determine whether or not a binding contract was entered into and it will entertain any defences within the context of contract law that may be raised in the process of rendering its final determination.<sup>33</sup>

MSAs have become subject to normal contractual provisions notwithstanding the challenges that confidentiality poses in such circumstances.<sup>34</sup> Australian courts set out the rationale for this to be that the settlement agreement is the output of the mediation process and it only comes into effect after, not during or pursuant to mediation.<sup>35</sup> This approach therefore prevents the mischief of parties later on turning around and claiming that the mediation settlement agreement itself was inadmissible.<sup>36</sup>

### **3. Mediation Settlement Agreements in Kenya**

A cursory look at the Kenyan causelist reveals that even with all the advantages and the consensus of the parties it is evident that MSAs are becoming the subject of challenge to set them aside. Recently, the Honourable Mr. Justice A. Muchelule *In Re Estate of Amos Kabiru Kimemia (Deceased)*<sup>37</sup> dismissed an application to set aside a mediation settlement agreement as it had already been adopted as an order of the Court. He based his finding upon the thinking adopted in *Flora N. Wasike v.*

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<sup>32</sup> Feehily Supra pg.2

<sup>33</sup> Feehily Supra pg.5

<sup>34</sup> Feehily Supra, pg.5

<sup>35</sup> *State Bank of New South Wales v Freeman* unreported 31 January 1996, New South Wales Supreme Court as cited by Boulle and Nestic, supra note 15, p.50 7 quoted with approval by Feehily Supra, pg.5

<sup>36</sup> *Commonwealth Bank of Australia v McDonnell* unreported 24 July 1997, New South Wales Supreme Court as cited by Boulle and Nestic, supra note 15 p.507 quoted with approval by Feehily Supra, pg.5

<sup>37</sup> [2021] eKLR



*Destimo Wamboko*<sup>38</sup> and in *Board of Trustees National Social Security Fund v. Michael Mwalo*<sup>39</sup> and several other decisions to the effect that a consent order entered into by the parties has a contractual effect and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general or for reason which would enable the court to set aside an agreement.

### **3.1 Mediation Settlement Agreements Recognised in Kenya**

Sections 59B and 59C of the Kenyan Civil Procedure Act<sup>40</sup> both address themselves on the question of mediation settlement agreements with 59B canvassing settlement agreements emerging from the court annexed program and 59C considering private mediation.

#### **3.1.1 Court Annexed Mediation: Mediation Settlement Agreements**

Section 59B on the whole outlines (1) the circumstances in which the Court may refer a case to mediation; (2) the qualifications of the mediator who may handle such a mediation; (3) the procedural framework for such a mediation; (4) the mediation settlement agreement; and (5) the question of appeal.

##### **Referral to Mediation:**

Section 59B(1) provides that the Court may refer a matter to mediation where the parties request the Court,<sup>41</sup> where the Court deems it appropriate<sup>42</sup> or where the law requires.<sup>43</sup> In an apparent expansion of the circumstances in which a matter may be referred to mediation the Honourable Lady Justice W.A. Okwany in *Kenya Medical Women's Association v Registered Trustees Gertrude's Gardens; Paul Ngotho, Arbitrator (Interested Party)*<sup>44</sup> tacitly gave the nod to pre-arbitration mediation in a matter that had been referred to arbitration by Court. The court invoked the provisions of Article 159 of the Constitution of

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<sup>38</sup> [1988] eKLR

<sup>39</sup> [2015] eKLR

<sup>40</sup> Chapter 21 of the Laws of Kenya (2012 Edition)

<sup>41</sup> Section 59B(1)(a) Civil Procedure Act

<sup>42</sup> Section 59B(1)(b) Civil Procedure Act

<sup>43</sup> Section 59B(1)(c) Civil Procedure Act

<sup>44</sup> [2021] eKLR



Kenya and found that the mere fact of referral to arbitration did not prevent the appointed arbitrator from recommending mediation where appropriate.<sup>45</sup>

#### **Appointment of Mediator:**

The parties are required to appoint a mediator accredited by the Mediation Accreditation Committee.<sup>46</sup> In *NKM v SMM & another*<sup>47</sup> the Honourable Lady Justice L.A. Achode made a point of noting that there was no apparent limitation on the part of the applicant acting in person or on the authority of the Mediator to adequately assist the parties reach a settlement in that matter. The qualification of the Mediator is therefore a critical block in ensuring that the mediation settlement agreement arrived at is enforceable.

#### **Mediation Rules:**

Section 59B(3) requires a mediation to be undertaken pursuant to the rules which define the process. In *Re Estate of BM (Deceased)*<sup>48</sup> the Court outlined the process to be the *Judiciary of Kenya Practice Directions on Court Annexed Mediation* issued by the Chief Justice under Article 159 of the Constitution and section 59B(1) (a), (b) and (c) of the Civil Procedure Act. The rules provide that once parties file their pleadings in Court the Mediation Deputy Registrar screens the file and informs the parties that their matter has been screened for mediation and duly appoints a mediator. Parties are obliged to attend the mediation sessions organized by the mediator as well as to participate in good faith during the process. The mediation is required to take up to a maximum 70 days and whatever transpires during the mediation requires to be held confidential. A summary of the particular rules guiding this process are summarised in the *Judiciary Mediation Manual*.<sup>49</sup>

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<sup>45</sup> Suprapg.7 para 23

<sup>46</sup> Section 59B(2) Civil Procedure Act

<sup>47</sup> [2019] eKLR @ pg.3 para 21

<sup>48</sup> [2019] eKLR

<sup>49</sup> Supra, pg.2 para 14

**Agreement To be in Writing & Signed by the Parties<sup>50</sup>:**

The parties' agreement is required to be reduced into writing and registered in Court following which it becomes enforceable as an order of the Court.<sup>51</sup> In addition to this as considered *In Re Estate of BM (Deceased)*<sup>52</sup> any mediation settlement agreement ought to have the prevailing date, the terms agreed upon by the parties as well as their respective signatures.<sup>53</sup> This requirement is a policy question which reveals a preference for courts to enforce parties agreements as made and to avoid the undesirability of having courts determine whether there was an oral agreement and if so, what were the terms of the oral agreement where a dispute emerges.<sup>54</sup> A dispute in such circumstances would of necessity create the challenge of otherwise having to provide evidence of what the terms of the MSA were which collides directly with the confidentiality fundamental to any mediation process.

Though Kenyan court mandated mediations are required to be in writing there are no provisions for “magic words”<sup>55</sup> that require to be included to make the MSA effective and enforceable. The requirement is that the prescribed Form 8 be complied with and it is set out thus:

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<sup>50</sup> Kariuki Muigua Supra Ibid Note No.6 considers the prevalence of informal mediators and mediations within the traditional or religious settings and their emergent informal mediation settlement agreements which are not reduced into writing and which arguably excludes the same from implementation through the formal court system. This point of view and its ramifications are an important discussion that requires to be further expounded particularly with the launch of the Alternative Justice Systems Baseline Policy and Policy Framework and in particular its implementation.

<sup>51</sup> Section 59B(4) Civil Procedure Act

<sup>52</sup> Supra

<sup>53</sup> Supra

<sup>54</sup> CPR Institute for Dispute Resolution, *Unwritten and Partially Written Mediation Settlement Agreements: Legal, Ethical, and Practical issues* Alternatives to the High Cost of Litigation - CPR Institute for Dispute Resolution Vol.16 No.7 (July/August 1998) pgs.93 – 111 Available at Wiley Online <https://onlinelibrary.wiley.com/toc/15494381/1998/16/7> [Last accessed on 12 October 2021]

<sup>55</sup> Some jurisdictions particularly in the United States prescribe certain words such as “binding”, “not appealable” or otherwise use of predetermined boilerplate clauses containing warnings without which an MSA is not enforceable. Many authors characterize these as adding additional technicalities that go against the grain of the simplicity of mediation and party autonomy and self-determination.

*Rule 14(2)*

*Form No.8*

*General Heading*

*MEDIATION SETTLEMENT AGREEMENT*

*We the undersigned parties to this action have agreed to settle our dispute/differences as follows:*

*Date*

.....

*Plaintiff*

.....

*Plaintiff's Advocate*

.....

*Mediator*

.....

.....

*Defendant*

.....

*Defendant's Advocate*

.....

*Mediator*

.....

Accordingly, where an MSA is written down and contains the signatures of the parties, their advocates and the mediator and a positive statement that they have agreed to settle their dispute or differences the Courts will construe there to be an effective MSA. The form of writing whether handwritten, typed or even an email can theoretically suffice provided that whatever written document or series of documents that is created will in the final analysis determine what the agreement between the parties will be provided that the parties intention to be bound and the material terms are discernible from the MSA.<sup>56</sup> A consideration of who requires to sign the MSA is important and whether the signatories intend to bind themselves or in the event that the party is a corporate entity whether they bind the organization only or including themselves.<sup>57</sup>

Given the recent development of online mediations it is important to note that international best practice including the provisions of the Singapore Convention further define and outline situations where such agreement is deemed to be signed by the parties and/or mediator via electronic communication.<sup>58</sup>

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<sup>56</sup> Jonah Orlofsky, *Making Sure a Mediated Settlement is Binding* (2014) Available at <https://www.orlofskylaw.com/wp-content/uploads/2014/08/CBA-Record-Making-Sure-a-Mediated-Settlement-Is-Binding-July-2014.pdf> [Last accessed on 12 October 2021]

<sup>57</sup> Ibid

<sup>58</sup> Ahuja Supra, pg.24

Depending on the mediator's, advocates' and parties' access to and comfort with technology the participants in a mediation proceeding may leverage technology to finalise their MSA. This may involve the traditional email, printer and document scanner or more customized electronic signature applications such as Docusign,<sup>59</sup> HelloSign, and Adobe Sign.<sup>60</sup> Due care in using these methods is called for as the advanced electronic signature sanctioned by the Kenyan *Business Laws (Amendment) Act, 2020*<sup>61</sup> which came into force in March 2020 does not include a scanned image of a person's wet-ink signature.<sup>62</sup> Further, in Kenya the Communications Authority is yet to operationalize the licences of the certification service providers per the *Kenya Information and Communications (Electronic Certification and Domain Name Administration) Regulations 2020* and advanced electronic signatures as contemplated by the *Kenya Information and Communications Act*<sup>63</sup> are not yet available.<sup>64</sup>

#### **Mediators Report & Adoption of the MSA in Court:**

Section 59B mediation settlement agreements are further forwarded to the Court by the mediator through a Mediator Report certifying that the parties had reached an agreement. The Court is then required to convene an open court proceeding to hear the parties on the adoption of the mediation settlement agreement as their consent before adopting the same as an order of the Court. In *John Juma & 2 others v Patrick Lihanda & 3 others; Zedekiah Orera & 466 others (Interested Parties)*<sup>65</sup> it was observed that a court can conceivably decline to record the terms of settlement in a matter where the terms are vague, ambiguous and unascertainable.<sup>66</sup>

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<sup>59</sup> Philip Cha, *Signing a Settlement Agreement at a Virtual Mediation* (9 September 2020) Available at <https://www.linkedin.com/pulse/signing-settlement-agreement-virtual-mediation-phillip-cha> [Last accessed on 12 October 2021]

<sup>60</sup> Mac-Arthur Pierre Louis, *E-signing Mediation Agreements & Best Practice Tips* (26 May 2020) Available at <https://instantmediations.com/e-signing-mediation-agreements-best-practice-tips/> [Last accessed on 12 October 2021]

<sup>61</sup> Act No.1 of 2020

<sup>62</sup> William Maema & Imelda Anika, *What it means to use Electronic Signatures* (20 October 2020) Available at <https://www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/what-it-means-to-use-electronic-signatures-2485022> [Last accessed on 12 October 2020]

<sup>63</sup> Act No.2 of 1998 (Amended 2019)

<sup>64</sup> William Maema *Supra*

<sup>65</sup> [2019] eKLR

<sup>66</sup> *Supra*, pg.6 para 24

### **Enforceability & Appeal:**

Section 59C (4) and (5) makes a mediation settlement agreement enforceable as an order of the Court deemed a consent order and from which no appeal lies.

### **3.1.2 Private Mediation: Mediation Settlement Agreements**

Section 59D makes provision for enforcement by the Court of mediations undertaken outside of the court annexed mediation program with the assistance of qualified mediators. Considering that within the context of a private mediation the requirement is for a qualified mediator to be distinguished from the mediators accredited by the Mediation Accreditation Committee conceivably this creates a platform for an even wider range of MSAs that may be enforced through the Kenyan Courts. The onus being on demonstrating that the qualified mediator has recognizable qualifications that the court may take cognizance of and presumably includes international mediators.

### **3.2 Mediation Settlement Agreements in the International Arena**

The *United Nations Convention on International Settlement Agreements Resulting from Mediation*<sup>67</sup> popularly known as the Singapore Convention establishes an effective framework for effective settlement of mediations which is available for different legal, social and economic systems.<sup>68</sup> It is likened to the New York Convention<sup>69</sup> which has enabled arbitral awards to be enforced in different nations and there is now the widely held expectation that state parties who are signatories will enforce international mediation settlement agreements (IMSAs) in accordance with their legal framework.<sup>70</sup> Thus, the real value of the Singapore Convention is that IMSAs will be enforceable efficiently and will not be relegated to arbitration or litigation should a party default.<sup>71</sup> The Convention adopts a

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<sup>67</sup> United Nations Commission on International Trade Law (UNCITRAL), *The United Nations Convention on International Settlement Agreements Resulting from Mediation* (New York, 2018) The Singapore Convention on Mediation. Available at [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements) [Last accessed on 15 August 2021]

<sup>68</sup> V K Ahuja, *The Singapore Convention on Mediation and India* (2020) 11 Indian JL & Just 19 Available on Heinonline [Last accessed on 15 August 2021]

<sup>69</sup> New York Arbitration Convention, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Available at <https://www.newyorkconvention.org/english> [Last accessed on 15 August 2021]

<sup>70</sup> Ahuja *Supra*, pg.23

<sup>71</sup> Ahuja *Supra*, pg.24

functional definition of the term international to encompass an inclusive rather than exclusive approach to which IMSAs may qualify particularly since the concept of “seat” as contemplated within arbitration does not apply to mediation.<sup>72</sup>

Kenya is yet to sign and ratify the Singapore Convention<sup>73</sup> though the Kenyan Institute of Chartered Mediators and Conciliators (ICMC) was engaging with the Office of the Attorney General with the aim of having the Convention ratified.<sup>74</sup> Thus, currently, any IMSAs would of necessity be subject to enforcement solely through the statutory provisions available for private mediations and presuming that the local courts would take an inclusive approach. There is therefore need to adopt the Singapore Convention to enhance our international commercial mediation environment.<sup>75</sup>

In brief a party seeking to enforce an IMSA under the Singapore Convention requires to demonstrate that (1) the mediation was of a commercial and international nature;<sup>76</sup> (2) the agreement was in writing; (3) the agreement was duly executed by the parties; (4) the agreement was arrived at through the process of mediation; and (5) a mediator or an institution administering a mediation has either signed and/or attested the mediation settlement agreement.<sup>77</sup>

Article 5 of the Convention however lists grounds on which an IMSA may not be enforced to include (1) a party to the IMSA was incapacitated in some way; (2) the IMSA is null and void, incapable of being performed, is not final or has been modified; (3) the obligations have been performed or are otherwise ambiguous; (4) the relief sought would offend the MSA itself; (5) mediator standards were

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<sup>72</sup> Shouyu Chong and Felix Steffek, *Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective* (2019) 31 SAclJ 448 Available on Heinonline [Last accessed on 12 October 2021] @pg.45

<sup>73</sup> Kariuki Muigua PHD, *Adopting the Singapore Convention in Kenya: Insight and Analysis* (August 2020) <http://kmco.co.ke/wp-content/uploads/2020/09/Adopting-the-Singapore-Convention-in-Kenya-Insight-and-Analysis-15th-Sept.pdf> [Last accessed on 12 October 2021]

<sup>74</sup> Singapore International Mediation Institute, *Dr Kariuki Muigua and Beryl Ouma - Kenya and the Singapore Convention on Mediation* <https://www.simi.org.sg/News/Singapore-Convention-Seminar-Series/Dr-Kariuki-Muigua-and-Beryl-Ouma-Kenya-and-the-Singapore-Convention-on-Mediation> [Last accessed on 12 October 2021]

<sup>75</sup> Kariuki Muigua Supra

<sup>76</sup> Kariuki Muigua Supra

<sup>77</sup> Ahuja, pg.24

breached; or (6) mediator impartiality and independence is compromised and no disclosure was made.<sup>78</sup>

#### **4. Conclusion**

Considering these emerging trends there is therefore value for Mediation Advocates, parties, stakeholders and Mediators to take the time out to consider what makes a mediation settlement agreement enforceable and ensuring that this is in place before they consider classifying their MSA or IMSA a *fait accompli*.

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<sup>78</sup> Niek Peters Prof, *The Enforcement of Mediation Agreements and Settlement Agreements resulting from Mediation*, Corporate Mediation Journal 2019, No.1-2, based on a presentation by the author at the Global Legal Forum at The Hague, the Netherlands, on 15 August 2019. Available at <https://www.simmons-simmons.com/en/publications/ckhqemkyj1u3u0976wn2s2g2k/the-enforcement-of-mediation-and-settlement-agreements> [Last accessed on 15 August 2021]

## **Bibliography:**

### **Statutory Instruments: Kenya**

Business Laws (Amendment) Act, Act No.1 of 2020

Civil Procedure Act (Cap 21)

Civil Procedure Rules, 2010

Judiciary of Kenya Practice Directions on Court Annexed Mediation

Kenya Information and Communications Act No.2 of 1998 (Amended 2019)

Kenya Information and Communications (Electronic Certification and Domain Name Administration) Regulations 2020

Mediation (Pilot Project) Rules, 2015 Legal Notice No.197 of 2015

Statute Law (Miscellaneous Amendments) Act No.12 of 2012

### **International Conventions:**

New York Arbitration Convention, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Available at <https://www.newyorkconvention.org/english> [Last accessed on 15 August 2021]

United Nations Commission on International Trade Law (UNCITRAL), *The United Nations Convention on International Settlement Agreements Resulting from Mediation* (New York, 2018) *The Singapore Convention on Mediation*. Available at [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements) [Last accessed on 15 August 2021]

### **Case Law:**

#### **Kenya**

*Board of Trustees National Social Security Fund v. Michael Mwalo* (2015) eKLR



*Flora N. Wasike v. Destimo Wamboko*(1988) eKLR

*In re Estate of BM (Deceased)* (2019) eKLR

*In re Estate of Oyosi Oyuoya (Deceased)* (2021) eKLR

*In re Estate of Amos Kabiru Kimemia (Deceased)* (2021) eKLR

*John Juma & 2 others v Patrick Lihanda & 3 others; Zedekiah Orera & 466 others (Interested Parties)* (2019) eKLR

*Kenya Medical Women's Association v Registered Trustees Gertrude's Gardens; Paul Ngotho, Arbitrator (Interested Party)* (2021) eKLR

*NKM v SMM & another* (2019) eKLR

### **Australia:**

*State Bank of New South Wales v Freeman* unreported 31 January 1996, New South Wales Supreme Court as cited by Boulle and Nestic, supra note 15, p.50 7 quoted with approval by Feehily Supra Ibid Note No.7 @pg.5

*Commonwealth Bank of Australia v McDonnell* unreported 24 July 1997, New South Wales Supreme Court as cited by Boulle and Nestic, supra note 15 p.507 quoted with approval by Feehily Supra Ibid Note No.7 @pg.5

### **Monographs:**

Bobette Wolski, *Confidentiality and Privilege in Mediation: Concepts in Need of Better Regulation and Explanation* (2020) 43 UNSWLJ 1552. Available at Heinonline [Last accessed on 12 October 2021]

Bobette Wolski, *Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research* (2014) 7 Contemp Asia Arb J 87 Available on Heinonline [Last accessed on 20 September 2021]

CPR Institute for Dispute Resolution, *Unwritten and Partially Written Mediation Settlement Agreements: Legal, Ethical, and Practical issues* Alternatives to the High Cost of Litigation - CPR Institute for Dispute Resolution Vol.16 No.7 (July/August

1998) pgs.93 – 111 Available at Wiley Online <https://onlinelibrary.wiley.com/toc/15494381/1998/16/7> [Last accessed on 12 October 2021]

Dorcas Quek Anderson, *Litigating over Mediation - How Should the Courts Enforce Mediated Settlement Agreements* (2015) 2015 Sing J Legal Stud 105 Available on Heinonline [Last accessed on 27 September 2021] @pg.108

Jonah Orlofsky, *Making Sure a Mediated Settlement is Binding* (2014) Available at <https://www.orlofskylaw.com/wp-content/uploads/2014/08/CBA-Record-Making-Sure-a-Mediated-Settlement-Is-Binding-July-2014.pdf> [Last accessed on 12 October 2021]

Jonathan C. Hamilton & Michele Grando, *The Rise of Global Mediation: A New Treaty Portends Growth* (28 June 2021) White & Case. Available at <https://www.whitecase.com/publications/alert/rise-global-mediation-new-treaty-portends-growth> [Last accessed on 20 September 2021]

Kariuki Muigua PHD, *Court Sanctioned Mediation in Kenya-An Appraisal (March 2015)* Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf> [Last accessed on 19 September 2021]

Kariuki Muigua PHD, *Enhancing The Court Annexed Mediation Environment in Kenya: A Paper Presented at the 2nd NCIA International Arbitration Conference held from 4th to 6th March 2020 in Mombasa, Kenya.* Available at <http://kmco.co.ke/wp-content/uploads/2020/03/Enhancing-The-Court-Annexed-Mediation-Environment-in-Kenya-00000002.pdf> [Last accessed on 20 September 2021]

Kariuki Muigua PHD, *Adopting the Singapore Convention in Kenya: Insight and Analysis* (August 2020) <http://kmco.co.ke/wp-content/uploads/2020/09/Adopting-the-Singapore-Convention-in-Kenya-Insight-and-Analysis-15th-Sept.pdf> [Last accessed on 12 October 2021]

Kenneth R. Feinberg *Mediation - A Preferred Method of Dispute Resolution*, 16 Pepp. L. Rev. 5 (1989) Available at: <http://digitalcommons.pepperdine.edu/plr/vol16/iss5/2> [Last accessed on 14 August 2021]

*Navigating Emerging Trends to Craft an Enforceable Mediation Settlement Agreement: Jacqueline Waihenya*

(2021)9(4) *Alternative Dispute Resolution*

Kenneth Wyne Mutuma, *COVID 19: Construction Projects, Contracts and Disputes*, (2021)9(1) *CIARB Alternative Dispute Resolution Journal* 52 @pg.66

Mac-Arthur Pierre Louis, *E-signing Mediation Agreements & Best Practice Tips* (26 May 2020) Available at <https://instantmediations.com/e-signing-mediation-agreements-best-practice-tips/> [Last accessed on 12 October 2021]

Niek Peters Prof, *The Enforcement of Mediation Agreements and Settlement Agreements resulting from Mediation*, *Corporate Mediation Journal* 2019, No.1-2, based on a presentation by the author at the Global Legal Forum at The Hague, the Netherlands, on 15 August 2019. Available at <https://www.simmons-simmons.com/en/publications/ckhqemkyj1u3u0976wn2s2g2k/the-enforcement-of-mediation-and-settlement-agreements> [Last accessed on 15 August 2021]

Philip Cha, *Signing a Settlement Agreement at a Virtual Mediation* (9 September 2020) Available at <https://www.linkedin.com/pulse/signing-settlement-agreement-virtual-mediation-phillip-cha> [Last accessed on 12 October 2021]

Ronan Feehily, *The Legal Status and Enforceability of Mediated Settlement Agreements* (2013) 12 *Hibernian LJ* 1 Available on Heinonline [Last accessed on 19 September 2021]

Shouyu Chong and Felix Steffek, *Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective* (2019) 31 *SAC LJ* 448 Available on Heinonline [Last accessed on 12 October 2021] @pg.45

Singapore International Mediation Institute, *Dr Kariuki Muigua and Beryl Ouma - Kenya and the Singapore Convention on Mediation* <https://www.simi.org.sg/News/Singapore-Convention-Seminar-Series/Dr-Kariuki-Muigua-and-Beryl-Ouma-Kenya-and-the-Singapore-Convention-on-Mediation> [Last accessed on 12 October 2021]

Susan Nauss Exon, *California's Opportunity to Create Historical Precedent regarding a Mediated Settlement Agreement's Effect on Mediation Confidentiality and Arbitrability* (2005) 5 *Pepp Disp Resol LJ* 215 Available on Heinonline [Last accessed on 27 September 2021] @pg.216

*Navigating Emerging Trends to Craft an Enforceable Mediation Settlement Agreement:*  
*Jacqueline Waihenya*

(2021)9(4) *Alternative Dispute Resolution*

Susan Oberman, *Confidentiality in Mediation: An Application of the Right to Privacy* (2012) 27 Ohio St J on Disp Resol 539 Available on Heinonline [Last accessed on 9 October 2021] @pg.557-558

V K Ahuja, *The Singapore Convention on Mediation and India* (2020) 11 Indian JL & Just 19 Available on Heinonline [Last accessed on 15 August 2021]

William Maema & Imelda Anika, *What it means to use Electronic Signatures* (20 October 2020) Available at <https://www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/what-it-means-to-use-electronic-signatures-2485022> [Last accessed on 12 October 2020]

## **Dispute Resolution in Construction: Why Arbitration Lost the First Port of Call Status in Many Standard Forms of Contracts to Adjudication**

*By: Hazron Maira \**

### **Abstract**

*This paper examines why arbitration lost the first port of call status in many standard forms of construction contracts in several countries, and why adjudication continues to be adopted as the first tier procedure in contracts with multi-tiered dispute resolution clauses. In its search for an alternative to litigation, the construction industry found arbitration as the “perfect fit” mechanism for resolution of disputes because it was fast, cost-effective, subject-matter experts driven process, and with decisions that were final. However, during the second half of the Twentieth Century, the character of arbitration started to change, and procedures started becoming more detailed and increasingly resembling styles of court proceedings. This led to the perception that arbitration had become complex, slow and expensive. The adverse effects of the slowness of the arbitral process were aggravated by withholding of payments by employers to contractors pending resolution of disputes, thus causing cash flow difficulties to both contractors and the contractual chain. Consequently, it was important that sums to which a contractor was found due should be enforceable without lengthy or complicated dispute-resolution procedures, and inclusion of adjudication as the first tier in settlement of disputes clauses was found to avoid the problem.*

### **1.0 Introduction**

For the better part of the Twentieth Century, resolution of construction disputes was synonymous with arbitration, and the following short discussion illustrate how contented the industry was with the mechanism.

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In Kenya, the Joint Building and Construction Council (JBCC), the publishers of the “Agreement and Conditions of Contract for Building Works” (1999 Edition) (hereinafter referred to as the JBC Standard Form (1999 Ed.) and its predecessors appeared to have been in a comfort zone with arbitration as the only mechanism in the standard form because it was not until 2017 when a review of the standard form was initiated.<sup>1</sup> From the United States, the first national standard form of construction contract issued in 1888 and revised in 1905 empowered the architect of record with initial dispute resolution authority subject to arbitration. As late as 1967, a study on the role of lawyers in England and the United States concluded: “[T]he system works so well that [US] lawyers and courts will probably remain relatively unimportant in this sphere of conflict resolution.”<sup>2</sup> In the UK, a working party made proposals in 1993 to the Joint Contracts Tribunal (the producers of the leading suite of contracts for building works in the country) for clauses in the contract providing for mediation and/or adjudication, in addition to arbitration which was the sole dispute resolution mechanism. It spelt out how those clauses should work, and what form of disputes they should include, but there was lack of agreement within the JCT.<sup>3</sup>

Arbitration is an alternative mechanism for dispute resolution, and one cannot have recourse to both arbitration and the court for the same dispute.<sup>4</sup> Therefore, when parties conclude a construction contract with a one tier dispute resolution clause with arbitration as the mechanism, they consent for all questions affecting their rights and obligations under the contract to be determined by an arbitral tribunal. In such circumstances, if a complex dispute with technical or legal issues is referred for arbitration and a third party appointed or nominated as arbitrator has expertise in his/her own field but has no requisite technical expertise in construction or substantive construction law, it is possible for a party to suffer injustice and unnecessary costs from the outcome of the arbitral proceedings. Unlike in civil litigation where a right to appeal may be available, there are

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<sup>1</sup> See discussion under “The Standard Forms of Construction Contracts currently in use in Kenya” why “Amicable Settlement” provision in the standard form is not a legally effective precondition to arbitration.

<sup>2</sup> Philip L. Bruner, Rapid Resolution ADR, *The Construction Lawyer*, Volume 31, Number 2, Spring 2011

<sup>3</sup> Sir Michael Latham, Constructing the Team, *Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry*, Final Report, July 1994, at p.87

<sup>4</sup> *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251, at para 1

limited grounds for appeal in arbitration,<sup>5</sup> and an aggrieved party may have to live with an undesirable outcome. This proposition is vindicated by the common law case of *H. Dakin & Co., Limited v. Lee*<sup>6</sup> that concerned defective and uncompleted construction works. At the court of appeal, the Master of the Rolls exposed his lack of requisite construction knowledge by agreeing with a lower court's view that a reduction of the depth of underpinning works from four to two feet was an insignificant variation. Regarding another dispute on rolled steel joists that had not apparently been bolted together in some particular way, he confessed to not understanding the precise nature.

On the hand, if the parties agree for a multi-tiered dispute resolution clause and agree for adjudication to be the first tier procedure, it does not definitively resolve the parties' rights and obligations under a contract, and all it does is result in a decision that has the status of what has been described as "temporary finality".<sup>7</sup> In the context of this proposition, by having adjudication as the first tier, parties are free to agree whether their rights and obligations would finally be determined in arbitration or by litigation, and an aggrieved party would have a chance for "a second bite at the cherry."

In the Final Report with the title of "Constructing The Team" that was published in 1994 by Sir Michael Latham following the United Kingdom Government / Industry Review of Procurement and Contractual Arrangements in the country's Construction Industry ("Constructing The Team" Final Report),<sup>8</sup> one of the styles of operations identified by the Report as having significantly contributed to the adversarial attitudes and litigious environment that had become inherent in the industry of the 1980s was the one tier dispute resolution process with arbitration as the only mechanism in most standard forms of construction contracts. To bring this problem to an end, the Report "recommended that a system of adjudication should be introduced within all the Standard Forms of Contract ... and that this should be underpinned by legislation."<sup>9</sup> The Government accepted the Report and enacted legislation giving the parties to a construction contract the right to refer a dispute arising under the contract for adjudication.<sup>10</sup>

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<sup>5</sup> Kariuki Muigua, Arbitration Law and the Right of Appeal in Kenya, (2021)9(2) *Alternative Dispute Resolution*, 21- 43, 22

<sup>6</sup> [1916] 1 K.B. 566

<sup>7</sup> *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWHC 227 (TCC), at para 19

<sup>8</sup> Sir Michael Latham, Constructing the Team Final Report, (*supra* fn. 3)

<sup>9</sup> *ibid*, at 91

<sup>10</sup> Housing Grants, Construction and Regeneration Act 1996, Section 108 (1)

A number of countries followed the measures adopted by the UK Government by enacting legislation that led to the inclusion of adjudication as the first tier in dispute resolution clauses in construction contracts.<sup>11</sup> For countries that incorporated adjudication in standard forms without statutory backing, the procedure is incorporated through contractual provisions<sup>12</sup> or by a separate *ad hoc* agreement.<sup>13</sup> The main features of statutory adjudication provisions are, first, referral of a dispute arising under the contract is a right for the parties, and second, there is legal framework for enforcement of decisions by adjudicators. On the other hand, where adjudication is provided by contractual provisions or by a separate *ad hoc* agreement, referral of a dispute is an obligation and there is no legal regime for enforcement of adjudication decisions.

The objective of this paper is to examine why several countries and several publishers of standard forms across the globe chose not to continue with construction contracts with arbitration as the sole disputes resolution mechanism but opted for multi-tiered settlement of dispute clauses with adjudication as the first tier. To that end, the discussion is in five parts. Following this introduction, part two briefly reviews the settlement of dispute clauses in the main standard forms of contracts used in Kenya. Part three examines why the construction industry settled on arbitration as the dispute resolution mechanism, why the change in the character of arbitration led to a change in the perception about the mechanism and how the industry responded. Part four discusses adjudication and why it became the preferred first tier procedure in multi-tiered dispute resolution clauses in standard forms, and part five is the conclusion.

## **2.0 The Standard Forms of Construction Contracts currently in use in Kenya**

The infrastructure sector has been using the FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (the Red Book) since the 1980s. In 1996, FIDIC published its Supplement to the Fourth Edition

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<sup>11</sup> See examples; New South Wales Building and Construction Industry Security of Payment Act 1999; New Zealand's Construction Contracts Act 2002; Singapore's Building and Construction Industry Security of Payment Act 2004 and Malaysia's Construction Industry Payment and Adjudication Act 2012.

<sup>12</sup> See Maritz MJ, Hattlingh V. Adjudication in South African construction industry practice: towards legislative intervention. *J. S. Afr. Inst. Civ. Eng.* Vol 57 No 2, June 2015, 45–49, 46, Paper 1042, <http://dx.doi.org/10.17159/2309-8775/2015/v57n2a6>. [Accessed on 20 December 2020]. The authors cite two South African Standard Contract Forms with contractual adjudication provisions.

<sup>13</sup> *ibid*



of the Red Book by which it provided for the establishment of a Dispute Adjudication Board (DAB) to replace the then engineer's traditional role of a decision maker or quasi-arbitrator in the settlement of disputes.<sup>14</sup> The change was put into effect in September 1999 and the DAB included as the first tier in the dispute settlement procedure for the new suite of FIDIC's standard forms of contracts.<sup>15</sup> It is a fact that adjudication comes in different forms including as a DAB,<sup>16</sup> and based on this proposition, it is reasonable to say that the FIDIC Red Book was among the first standard form of construction contract to include contractual adjudication as the first tier in its multi-tiered dispute resolution clause.

For the building sector, the Joint Building and Construction Council (then referred to as the Joint Building Council) revised its main standard form in 1999 and produced a document with the title of "Agreement and Conditions of Contract for Building Works" (1999 Edition) (hereinafter referred to as the JBC Standard Form (1999 Ed.)). The relevant provisions in the Settlement of Disputes Clause 45 are in the following terms:

Sub-clause 45.1 prescribes in part that: *"In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, ... such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration .... Failing agreement to concur in the appointment of an Arbitrator ...."*

Sub-clause 45.4 provides in full that: *"Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without the assistance of third parties."*

Sub-clause 45.10 prescribes that: *"The award of such Arbitrator shall be final and binding upon the parties."*

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<sup>14</sup> Nael G. Bunni (2005), *The FIDIC Forms of Contract*. Third Edition, Oxford, Blackwell Publishing, p. 604.

<sup>15</sup> *ibid*

<sup>16</sup> Rashda Rana, Is Adjudication Killing Arbitration? (2009) 75 *Arbitration*, Issue 2, 223 – 230, 223

The publishers of the JBC Standard Form (1999 Ed.) may argue that the contract document has a multi-tiered dispute resolution clause with amicable settlement and arbitration as the mechanisms. In support of their argument, they may cite the case of *Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited*,<sup>17</sup> where the Kenyan high court referred to sub-clause 45.4 cited above and held that attempting “*an amicable settlement was a condition precedent before the dispute was referred to arbitration.*”<sup>18</sup> However, for referral of a dispute to a first tier procedure to be a condition precedent to the commencement of the next tier, the parties’ rights and obligations should be defined with sufficient certainty for the mechanism to be enforceable.<sup>19</sup> In *Wah (Aka Alan Tang) v Grant Thornton International Ltd*,<sup>20</sup> an English Court dealt with a question of whether an alternative dispute resolution (ADR) procedure was defined with sufficient certainty, and having reviewed the authorities said that the “*test is not whether a clause is a valid provision for a recognised process of ADR: it is whether the obligations and/or negative injunctions it imposes are sufficiently clear and certain to be given legal effect.*”<sup>21</sup> In the context of an obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings, the test is whether the provision prescribes, without the need for further agreement,

“(a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the Court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach.”<sup>22</sup>

Viewed objectively, it can be discerned that the only obligation sub-clause 45.4 imposes on the parties is to “... *attempt.... to settle such dispute or difference amicably with or without the assistance of third parties.*” Applying the principles in the *Wah (Aka Alan*

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<sup>17</sup> [2014] eKLR

<sup>18</sup> *ibid*, at para 22

<sup>19</sup> *Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 at para 35

<sup>20</sup> [2012] EWHC 3198 (Ch)

<sup>21</sup> *ibid*, at para 59

<sup>22</sup> *ibid*, at para 60

*Tang*) case to the sub-clause, some gaps are noticeable, for example, no information on when or how the process will be exhausted or properly terminable without breach. Therefore, for sub-clause 45.4 to be enforceable, these gaps would require to be filled with a further agreement for the parties' rights and obligations to be defined with sufficient certainty.<sup>23</sup> The formulation in sub-clause 45.4 therefore means the JBC Standard Form (1999 Ed.), like its predecessors, has a one tier dispute resolution clause with arbitration as the only mechanism. For the reason cited in the "Constructing The Team" Final report and already noted, this is a reasonable explanation on why the Kenyan building sector has adversarial attitudes which are reflected by the number of reported court cases that concern disputes arising during or after the arbitral process.

In August 2020, the Joint Building and Construction Council (JBCC) released the final draft of a new standard form with the title of, "Conditions of Contract for Construction Works (With Priced Bills of Quantities)" (2020 Edition). It is expressly stated in the draft standard form that its drafting was based on research and benchmark with industry best practice and other widely used standard forms of contracts. The document has a multi-tiered settlement of disputes clause comprising of adjudication, amicable settlement and arbitration (with expedited arbitration as an arbitration "tier"). A review of the clause gives indications that the parties rights and obligations have been defined clearly with sufficient certainty. The final copy has not been released and if the settlement of disputes clause is adopted as it is, it will be a change for the better to the dispute resolution process in the Kenyan building sector.

### **3.0 Arbitration**

Private Arbitration has been defined as a "consensual, generally adversarial, method of dispute resolution, with support from the court, conducted in accordance with tailor made procedures determined by the tribunal in the context of agreed or statutory rules."<sup>24</sup> Arbitration is concerned with disputes and differences, in practice, with legal rights and remedies,<sup>25</sup> and its object is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.<sup>26</sup>

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<sup>23</sup> See also *UYCF Ltd v Forrester & Anor* [2000] EWCA Civ 317, at para 10: "...questions of uncertainty may arise where the terms of the contract require further agreement between the parties in order to implement them."

<sup>24</sup> Aeberli, Peter., *Nature and Laws of Arbitration*, An Msc in Construction Law & Dispute Resolution paper, King's College London, September 2011.

<sup>25</sup> *ibid*

<sup>26</sup> England & Wales Arbitration Act 1996, Part 1, S.1(a).

The benefits of resolving commercial disputes by arbitration are widely published.<sup>27</sup> For the construction industry, it has been explained that in its search of dispute resolution procedures that were aimed at avoiding or minimising relational conflicts, minimising the temporal and financial costs of dispute resolution, preserving parties' working relationships and ensuring continued performance pending resolution of disputes, and bringing to operation the practical and technical insights of dispute resolvers and advisers from within the industry,<sup>28</sup> the industry found arbitration as the perfect fit for resolving time sensitive construction disputes such as extra works or delay claims because, in addition to its many benefits, it had embraced the virtues of resolving disputes speedily, economically, with subject matter experts driven process, and with decisions that were final.<sup>29</sup>

### **3.1 The Diminishing of Arbitration**

During the second half of the Twentieth Century, the character of arbitration started to change and observations from both sides of the Atlantic on the mechanism's direction of travel were similar. From the UK, Lord Mustill identified three reasons that led to a change in the character of arbitration; first, the emergence of the non-expert arbitrator – arbitrators who have high expertise in their own fields, but not in the field which is the subject-matter of the dispute, secondly, increasing domination of procedures by lawyers thus making arbitrations to increasingly “resemble parodies of proceedings in court,” and thirdly, the “banalisation” of arbitration which he said “perfectly describes what has happened to arbitration in the second half of the Twentieth Century.... The defendant in many proceedings does not look for the prompt and speedy resolution of the dispute by economical means, in as harmonious a manner as possible. He would prefer it not to be resolved at all, or if it is resolved for this to happen at as distant a date as possible.” He went on and said it was regrettable the tacit assumption that an award will be honoured is not always present, both parties set about making life as difficult as possible for their opponents, with every point, good, bad and indifferent is taken, and every procedural

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<sup>27</sup> See examples: Muigua, K., Arbitration Law and the Right of Appeal in Kenya, (2021)9(2) *Alternative Dispute Resolution*, 21- 43, 22; Sir Peter Cresswell, The Future of Arbitration in the Changing World of Dispute Resolution, (2013) 79 *Arbitration*, Issue 3, p.289

<sup>28</sup> Stipanowich, Thomas, Beyond Arbitration: Innovation and Evolution in the United States Construction Industry (1996). *Wake Forest Law Review*, Vol. 31, No. 1, 1996, at p.67. Available at SSRN: <https://ssrn.com/abstract=2060438>. [Accessed on 11 June 2021]

<sup>29</sup> Jeremy Winter, *Resolving Time Sensitive Construction Disputes: Are Attorneys Just Getting in the Way?*, 16 *Pepp. Disp. Resol. L.J.* 463 (2016), at p.483. Available at: <https://digitalcommons.pepperdine.edu/drlj/vol16/iss3/4>. [Accessed on 11 June 2021].

device is employed.”<sup>30</sup> Sir Thomas Bingham, The Master of The Rolls and the President of the Chartered Institute of Arbitrators concise summation was in the following terms:

“And at almost every gathering of arbitrators I attend I hear a constant refrain: that the arbitral process, by mimicking the processes of the courts, and becoming over-legalistic and over-lawyered, has betrayed its birthright by allowing itself to become as slow, as expensive and almost as formal as the court proceedings from which it was intended to offer an escape.”<sup>31</sup>

From the other side of the pod, Thomas Stipanowich identifies, among others, two significant developments, that subjected commercial arbitration processes to unprecedented stress and strain and exposing it to increasing criticisms: first, as the number of commercial disputes that are referred to arbitration increased, the mechanism increasingly took more features of court proceedings. To avoid charges of procedural injustice, hearings could be extended and there is evidence that the much-vaunted finality of arbitral awards is declining. The high costs associated with these events became the leading cause of complaints about arbitration. With elements of civil litigation having been introduced into the arbitral process, a number of lawyers are seeking to eliminate the remaining differences between arbitration and court proceedings, most notably through contractual provisions for expanded judicial review of arbitration awards. Secondly, the explosion of mediation and other competing dispute resolution alternatives have dramatically altered the environment of private dispute resolution. There is perception these procedures are doing a better job of accomplishing many of the benefits traditionally associated with arbitration, and often better serve and resonate with various commercial objectives.<sup>32</sup> With specific reference to construction, it has been argued that the perceived “judicialization” of arbitration, combined with lack of confidence in arbitrators selected from provider lists, who on occasion demonstrated

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<sup>30</sup> The Rt. Hon. Lord Mustill, Comments on Fast-Track Arbitration, (1994) 60 *Arbitration*, Issue 4, 233-235, 235

<sup>31</sup> Sir Thomas Bingham, Arbitral Tribunals and the Courts: standards, training and supervision, (1994) 60 *Arbitration*, Issue 3, 151-155, 153. (Extract from the speech to conference sponsored by Singapore Institute of Arbitrators, Chartered Institute of Arbitrators and London Court of International Arbitration. Singapore, Thursday 7 April 1994)

<sup>32</sup> Stipanowich, Thomas, Arbitration: The 'New Litigation' (November 7, 2008). University of Illinois Law Review, Vol. No. 1, 2010, Pepperdine University Legal Studies Research Paper No. 2009/15. Available at SSRN: <https://ssrn.com/abstract=1297526>. [Accessed on 11 June 2021].

among others, inadequate requisite expertise in substantive construction law, industry practice, and arbitral process hearing management heightened the industry's dissatisfaction with arbitration.<sup>33</sup>

In the construction industry, there was considerable dissatisfaction with arbitration because of its perceived complexity, slowness and expense,<sup>34</sup> and these factors were seen to have deprived the mechanism of its principal advantages over litigation.<sup>35</sup> With disputes becoming more complex with escalating disputed sums, the emergence and greater use of computer technology in arbitration did not help in mitigating the speed of resolution and cost-effectiveness.<sup>36</sup> In addition, the adverse effects of the slowness of the arbitral process were aggravated when a dispute was referred for arbitration as it was common for employers to withhold payments to contractors until the issues in dispute were determined, thus causing cash flow difficulties to both the contractors and contractual chain.<sup>37</sup>

### **3.2 The Response by the Construction Industry**

The industry responded to the challenges of arbitrating a dispute by looking for ways of improving the arbitral process, exploring other ADR procedures, and in the UK, some clients started crossing out the arbitration clause from their contracts on the "basis that in a major dispute they might as well go straight to court because the lawyers will find a way of getting there eventually."<sup>38</sup> This type of amendment continues to the present times and is facilitated by the fact that almost all dispute resolution clauses in standard

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<sup>33</sup> Philip L. Bruner, *Rapid Resolution ADR* (*supra* fn. 2)

<sup>34</sup> Sir Michael Latham, *Constructing the Team Final Report*, (*supra* fn. 3), at p.90

<sup>35</sup> See Jeremy Winter (*supra* fn. 29), at p.467/8. "The basic premise for arbitration's decline in the construction industry is its apparent transformation to litigation, prompting some legal scholars to label arbitration as the "new litigation." Essentially, arbitration lost its triple crown of cost, speed and procedural flexibility – three alternative dispute resolution ingredients that are of upmost importance to the construction industry."

<sup>36</sup> See Nael G. Bunni, *What Has History Taught Us in ADR? Avoidance of Dispute!* (2015) 81 *Arbitration*, Issue 2, 176 – 179, 177. "The emergence of computerized programming; the critical path programmes and their analysis; the various methods of delay analyses, prospective and retrospective; global claims and their acceptability under different legal systems; and issues of fitness for purpose, imposed or implied, added to the cost of arbitrations."

<sup>37</sup> See *Ellis Mechanical Services v Wates Construction Limited* (1976) 2 BLR 57. "The Courts are aware of what happens in these building disputes; cases go...to arbitration ...; they drag on and on; the cash flow is held up.... that sort of result is to be avoided if possible".

<sup>38</sup> Richard D. S. Bloore, *Flip Flop Costs - A Tonic to Revive Arbitration?* (1995) 61 *Arbitration*, Issue 2, 92-100, 93

forms of contracts in the country permit the parties to make a choice of finally arbitrating a dispute or escalating it to the Technology and Construction Court, and almost all the employers choose the later. In 2007, the construction industry in the United States discontinued arbitration as the industry's contractually mandated dispute resolution method from standard contract forms, and parties were required to henceforth affirmatively elect arbitration or go to court.<sup>39</sup>

Before some of the above events occurred, formal reviews of dispute resolution processes in the construction industry were carried out in different parts of the world,<sup>40</sup> and in broad terms, four different outcomes have been reflected in the current standard forms of contracts, scholarly papers and International Arbitration Institutions Rules.

First, most standard forms incorporate multi-tiered dispute resolution clauses that provide for parties, in the event of a dispute, to first refer or attempt to get it resolved through fast and cost-effective procedures, and the most common ones are adjudications and DABs. An assessment report and data for these two first tier procedures showed both had enormous success in resolving disputes and only a small number were escalated to the courts or arbitration.<sup>41</sup> In some jurisdictions with statutory adjudications, there are legal provisions on the eligibility criteria for adjudicators. For example, in New South

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<sup>39</sup> Philip L. Bruner, *Rapid Resolution ADR* (*supra* fn. 2); Stipanowich, Thomas, *Arbitration: The 'New Litigation'* (*supra* fn. 32)

<sup>40</sup> See examples; Sir Michael Latham, *Constructing the Team Final Report* (*supra*, fn. 3); From the USA, the 1978 Report entitled: *Better Management of Major Underground Construction Projects* (cited in Kathleen M. J. Harmon, "To Be or Not to Be – That is the Question: Is a DRB Right for Your project?" *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, Vol 3 No 1 (February 2011)); Hazron Maira, *The Evolution, Role and Effects of Dispute Boards in Construction Contracts: (2018) 6(1) Alternative Dispute Resolution*. "In 1995, the World Bank produced the first edition of its standard bidding documents for the procurement of works of civil Engineering construction, 'SBDW', and included as one of its mandatory provisions the use of a DRB for the resolution of disputes between the employer and the contractor."

<sup>41</sup> See Joey Gardiner, *Latham's report: Did it change us?* Published in the Building Magazine on 27 June 2014. An assessment done in the UK twenty years after publication of Sir Michael Latham Final Report showed that only around 2% of adjudication decisions had been challenged in the courts. Christopher R. Seppälä, *FIDIC and Dispute Adjudication Boards (DAB(s)): A Webinar Presentation slides*, 18 March 2015. Available at: <https://fidic.org/sites/default/files/webinar/PresentationCSeppFIDICandDisputeAdjudicationBoards.pdf>. [Accessed on 31 May 2021]. "According to the DRBF, over 98% of disputes referred to DBs conclude the matter in issue, either directly or as a result of the parties using the DAB's decision or DRB's recommendation as a basis for settlement."



Wales, Australia, it is provided in law that a person is eligible to be an adjudicator in relation to a construction contract “if the person has such qualifications, expertise and experience as may be prescribed by the regulations ...”<sup>42</sup> Similar provisions are prescribed in the relevant counterpart law of New Zealand<sup>43</sup> and Singapore.<sup>44</sup>

Secondly, for disputes not resolved in lower tiers, most standard forms of contracts continued to provide for arbitration as the preferred final dispute resolution mechanism. The mechanism is also perceived as the best procedure for resolving disputes in international construction contracts,<sup>45</sup> mainly due to the additional advantage over litigation in relation to recognition and enforcement of awards.<sup>46</sup> In international construction contracts, irrespective of whether the contract is bespoke, or is on a standard form of contract, the dispute resolution clauses are multi-tiered and only disputes that are not resolved in lower tiers are escalated to arbitration.<sup>47</sup>

Thirdly, the creation of “tiers” of arbitration procedures for construction disputes of varying size and complexity, including expedited procedures formulated for low-value cases and more extensive process for so-called “large, complex” cases at both national

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<sup>42</sup> Building and Construction Industry Security of Payment Act 1999 No 46, Section 18.

<sup>43</sup> New Zealand Construction Contracts Act 2002, S. 34(1)

<sup>44</sup> Singapore Building and Construction Industry Security of Payment Act 2004, Section 29 (1)

<sup>45</sup> See Queen Mary University of London / Pinsent Masons (2019), International Arbitration Survey – Driving Efficiency in International Construction Disputes. Available at: <https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey>. [Accessed on 18 April 2021].

<sup>46</sup> Nael G. Bunni, Construction Disputes on the Eve of the New Millennium, (1999) 65 *Arbitration*, Issue 4, p.309.

<sup>47</sup> See examples: In *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal & Anor* [2011] EWHC 1842 (Comm), a bespoke contract had a dispute resolution clause providing that: “Arbitration of the Issue not resolved by Mediation ... shall be finally settled by international arbitration.” For a contract on standard form, see *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30, a case that was on the FIDIC “Red Book” standard form of contract.



construction dispute resolution rules,<sup>48</sup> and International Arbitration Institutions Rules.<sup>49</sup> “Expedited Arbitration” is a common “tier” and has been described as “a form of arbitration that is carried out in a shortened time frame and at reduced cost by accelerating and simplifying key aspects of the proceedings so as to reach a final decision on the merits in a cost and time effective manner.”<sup>50</sup> In some standard forms of contracts with multi-tiered dispute resolution clauses, specific types of disputes are identified and are referable directly to expedited arbitration because of potential harm such disputes would cause if not urgently resolved with finality.

Fourthly, in some countries, proposals included introduction of contractual terms that promote partnering, collaborative working relationship and integrated teams with the aim of among others, “to avoid conflict and disputes by increasing levels of co-operation and developing organisational trusting relationships”<sup>51</sup>

#### **4.0 Adjudication**

Adjudication has been described as “... a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration,

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<sup>48</sup> Stipanowich, Thomas, *Managing Construction Conflict: Unfinished Revolution, Continuing Evolution* (2014). 100 YEARS: CHARTERED INSTITUTE OF ARBITRATORS, SELECTED TOPICS IN INTERNATIONAL ARBITRATION LIBER AMICORUM, THE CONSTRUCTION LAWYER, Vol. 34, No. 4, Fall 2014 (Special “Crystal Ball” Issue), Pepperdine University Legal Studies Research Paper No. 2014/22, at p.6. Available at SSRN: <https://ssrn.com/abstract=2484598>. [Accessed on 20 June 2021]

<sup>49</sup> See examples: International Chamber of Commerce Arbitration (ICC) Rules, Article 30. Available at [https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article\\_30new](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_30new). [Accessed on 31 May 2021], and Singapore International Arbitration Centre (SIAC) Rule 5. Available at [https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac\\_rule5](https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule5). [Accessed on 31 May 2021]

<sup>50</sup> UNCITRAL Working Group II (Dispute Settlement), Issues relating to expedited arbitration, Note by the Secretariat, Doc. A/CN.9/WG.II/WP.207 of 16 Nov. 2018, p.2. Available at [https://uncitral.un.org/sites/uncitral.un.org/files/207-e\\_advance\\_copy.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/207-e_advance_copy.pdf). [Accessed on 20 June 2021]

<sup>51</sup> Jason Challender *et al*, Partnering in practice: an analysis of collaboration and trust. In: *Management, Procurement and Law*. Volume 167 Issue 6, December 2014, pp. 255-264, 257. <https://doi.org/10.1680/mpal.14.00002>. [Accessed on 19 June 2021]. See a useful guidance on conflict avoidance and dispute resolution in a partnering construction contract at: <https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/sector-standards/construction/black-book/conflict-avoidance-and-dispute-resolution-in-construction-1st-edition-rics.pdf>. [Accessed on 20 June 2021]

litigation or agreement”<sup>52</sup>. The speedy outcome is an objective, and this is best achieved by adherence to strict time limits for adjudicators to issue a decision.<sup>53</sup> As a direct corollary of speed, the adjudication process is very much cheaper than arbitration or litigation. This is because the scope for expenditure on a dispute increases with the time available to argue about it, adjudicators are not confined to a purely passive role, but may investigate both fact and law as they think fit, within the time constraints imposed, and it is unusual for there to be an oral hearing.<sup>54</sup> Another reason that has been identified on why the industry is content with adjudication is that the process may in some cases amount to a dress rehearsal for subsequent litigation or arbitration, which enables the parties to identify what is really in issue, and to test the strengths and weaknesses of their case.<sup>55</sup>

An adjudicator derives his or her jurisdiction from the terms of the notice of adjudication, and any jurisdictional issues are considered by reference to the nature, scope and extent of the dispute identified in that notice,<sup>56</sup> and subsequently "amplified" by the referral notice.<sup>57</sup> Unlike in arbitration where the statutes and Institution Rules confer to the arbitrators power to determine their own jurisdiction, third parties appointed as adjudicators do not have jurisdiction to determine their own jurisdiction unless it is agreed by the contracting parties for them to do so.<sup>58</sup>

Another principle that makes adjudication a fast and cost-effective ADR mechanism is the requirement for referral of a single dispute at a time.

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<sup>52</sup> *Macob Civil Engineering Ltd v. Morrison Construction Ltd* [1999] BLR 93, at para 14. (Although the statement was made with reference to the UK's Parliament's intention in enacting the 1996 Construction Act that led to introduction of statutory adjudication in the country, the same description applies for contractual adjudication provisions in standard contract forms)

<sup>53</sup> *Ritchie Brothers (Pwc) Ltd v. David Philp (Commercials) Ltd* [2005] BLR 384, at para 46

<sup>54</sup> *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, at para 24

<sup>55</sup> Her Honour Judge Frances Kirkham, *The Future of Adjudication*, A paper based on a speech given to the Society of Construction Law in London on 27 February 2004, p.1.

<sup>56</sup> *Penten Group Ltd v Spartafield Ltd* [2016] EWHC 317 (TCC) at para 16

<sup>57</sup> *Ballast Plc v. The Burrell Company (Construction Management) Ltd* [2002] ScotCS 324, at para 19

<sup>58</sup> See *Dacy Building Services Ltd v IDM Properties LLP* [2017] BLR 114, at para 26. The parties may also confer jurisdiction on the Adjudicator other than by express agreement, for example, where a party fails to take objection to the adjudicator's jurisdiction or where both parties argue the case on jurisdiction within the adjudication and ask the adjudicator to determine the point.

#### **4.1 Single Dispute**

The standard practice in adjudications is that only a single dispute may be in a referral. A comprehensive judicial analysis of the term “single dispute” was considered in *Witney Town Council v Beam Construction (Cheltenham) Ltd*,<sup>59</sup> and having reviewed the authorities, among the conclusions the court drew were the following:

- 1) A dispute can comprise a single issue or any number of issues within it.<sup>60</sup> However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so.
- 2) Where on a proper analysis, there are two separate and distinct disputes, only one can be referred to one adjudicator unless the parties agree otherwise. An adjudicator who has two disputes referred to him or her does not have jurisdiction to deal with the two disputes.
- 3) Whether there are one or more disputes again involves a consideration of the facts. It may well be that, if there is a clear link between two or more arguably separate claims or assertions, that may well point to there being one dispute. A useful if not invariable rule of thumb is that, if disputed claim No 1 cannot be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute.

For item (2), the court noted the justification was at least partly upon the basis that, given the limited time available for an adjudicator to issue a decision, it is more expedient and fairer for all concerned if the adjudicator only has to deal with a single dispute. This pronouncement distinguishes adjudication from arbitration which has no restrictions on the number of disputes that can be in a referral.

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<sup>59</sup> [2011] BLR 707, at para 38

<sup>60</sup> An example of a dispute with more than one issue is if there is a disputed prolongation claim, it cannot be resolved without deciding what if any extension of time is due to the contractor because it is only if and to the extent that there was an entitlement to extension that the prolongation entitlement can be established (para 40 item h).

Regarding Item (3), a common example in construction is when a disputed claim No 2 or cross claim is formulated by the respondent as a defence to the claimant's disputed claim No 1. The formulation would be on the basis that "when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of material supplied or work executed under the contract."<sup>61</sup> This principle is equally applicable in adjudication and it was affirmed in the case of *Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd*,<sup>62</sup> where one of the questions before the court was whether the adjudicator's decision was enforceable following a failure by the adjudicator to consider the employer's defence cross claim that could potentially had extinguished the contractor's claim. It was held that where the adjudication is concerned with a party's entitlement to be paid money, then a defence which would if successful remove that entitlement or diminish the sum to be paid would potentially be an issue in the adjudication.<sup>63</sup> This type of cross-claim amounts to (or is pleaded as) a set-off and may be advanced by way of defence to the exclusion of the claim referred to adjudication, but not as an independent claim for a monetary award in favour of the respondent to the reference.<sup>64</sup>

Due to the clear link between the claim and cross claim, the two cannot be decided without taking into account the other, and the time limits imposed on both the parties and the adjudicator by the "single dispute rule" are not affected.

## 4.2 Objectives of Adjudication

The objectives of adjudication are summarised in the New Zealand Construction Contracts Act 2002 as, (a) to facilitate regular and timely payments between the parties to a construction contract; and (b) to provide for the speedy resolution of disputes arising under a construction contract. The discussions in this paper are based on principles from English case law which discusses the same objectives under different terms; for item (a) the objective is discussed under the sub-heading "cash flow" and for item (b) the objective is discussed under the sub-heading "adjudication as an alternative dispute resolution mechanism."

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<sup>61</sup> *Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd.* [1974] A.C. 689,718.

<sup>62</sup> [2021] EWHC 2441 (TCC)

<sup>63</sup> *ibid*, at para 54

<sup>64</sup> *Bresco Electrical Services Ltd (supra fn. 54)*, at para 44

### **1) Cash flow**

One of the main findings in the “Constructing The Team” Final Report was that contractors and sub-contractors were experiencing considerable difficulties getting payment certificates honoured by employers. Attempts to resolve the disputes often resulted in lengthy dispute resolution procedures that caused serious difficulties for contractors’ cash flow. Noting the importance of cash flow to any business, the Final Report observed that in the construction industry, failures by employers to release payments caused shortage of liquid funds to both the contractors and the contractual chain. To bring this problem to an end, the Report recommended that payments due to contractors should be enforceable without lengthy or complicated dispute resolution procedures, and as already noted, it recommended adjudication.

The adverse effects of not maintaining steady cash flow in the construction industry was considered in the Singapore Court of Appeal case of *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation*<sup>65</sup> which concerned a dispute about payment awarded by a DAB. Two notable adverse effects were identified; first, if the contractor is owed large sums of money and is experiencing financial difficulties, he may also have difficulties pursuing the claim in arbitration and the economic pressure may force him to concede to the employer. Secondly, a cash flow disruption can have serious and sometimes permanent consequences for the contractor. Mutti *et al* considered the latter effect and argue that cash flow problems and shortage of working capital can, in extreme circumstances, push efficient and profitable construction firms into insolvency. It is also possible that a firm is pulled into insolvency by the failure of another firm and this “domino theory” may apply if a main contractor’s firm collapses while owing large sums of money to one or more of its subcontractors.<sup>66</sup>

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<sup>65</sup> *supra* fn. 47

<sup>66</sup> Mutti, C d N and Hughes, W. (2002) Cash flow management in construction firms. In: Greenwood, D (Ed.), *18th Annual ARCOM Conference*, 2-4 September 2002, University of Northumbria. Association of Researchers in Construction Management, Vol. 1, 23-32, 26. See also Business Daily (25 June 2021). Available at: <https://www.businessdailyafrica.com/bd/economy/stalled-projects-in-uhuru-kibaki-eras-cross-sh9-trillion-3449926>. [Accessed on 25 June 2021]. *Stalled projects in Uhuru, Kibaki eras cross Sh9trn*. “The huge number of stalled projects, which comes with delayed payments to contractors, is a major contributor to the cash crunch in the private sector that has ultimately precipitated job losses and closure of businesses.”

A decision of an adjudicator is enforced under the rubric of “*pay now, argue later*” and this phrase is formulated with the intention of having the parties comply with it to facilitate the realisation of the cash flow aspiration. This is achieved by having time limits for the conduct of the adjudication, the interim binding nature of the adjudicator’s decision, and by having a speedy enforcement process of the adjudication decision, leaving any continuing disagreement about the merits of the underlying dispute to be resolved at a later date, by settlement agreement, arbitration or litigation.<sup>67</sup>

The adjudication approach of “*pay now, argue later*” was considered in *J Tomlinson Ltd v Balfour Beatty Group Ltd*<sup>68</sup> and the court said:

““Pay now argue later” is a phrase which ... refers to the fact that an adjudicator's decision has a curious status ..., being one of so-called "temporary finality". By temporary finality it is meant that the paying party, dissatisfied with an adjudicator's decision, may embark upon a substantive resolution of the dispute either by litigation (or by arbitration, where there is an arbitration Sub-clause), but is expected to comply with the adjudicator's decision in the meanwhile, in order that the winner in the adjudication process effectively has the use of the funds.”

Further guidance on the “*pay now, argue later*” approach in adjudication is in *Anglo Swiss Holdings Ltd v Packman Lucas Ltd*<sup>69</sup> where it was held that a party is contractually required to pay now on the adjudication decision and then as was always agreed argue later, and there is an element of policy in this, that if a party is permitted to disregard an adjudicator’s decision and seek to pursue the final resolution of the underlying dispute, the adjudication clause or its impact would be seriously undermined.<sup>70</sup>

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<sup>67</sup> See discussion in *Bresco Electrical Services Ltd (supra fn. 54)*, at para 12.

<sup>68</sup> [2020] EWHC 1483 (TCC), at para 10

<sup>69</sup> [2010] BLR 109, at para 26

<sup>70</sup> The same principle was espoused in *Perusahaan Gas Negara (Persero) (supra fn. 47)*, at para 71. The Court said: “The intention underlying [the Dispute Adjudication Board Clause] would be completely undermined if the receiving party were restricted to treating the paying party’s non-compliance as a breach of contract that sounds only in damages and must be pursued before the available domestic courts.”

## 2) Adjudication as an Alternative Dispute Resolution Mechanism

Solving the cash flow problem should not be regarded as the sole objective of adjudication, but it is also designed, and has proved to be, a mainstream dispute resolution mechanism in its own right, producing *de facto* final resolution of most of the disputes referred to an adjudicator.<sup>71</sup> In *John Doyle Construction Ltd v Erith Contractors Ltd (Rev 1)*<sup>72</sup> the court identified three ways that a decision of an adjudicator on a dispute, intended to be one of interim finality, can become final; first, by positive agreement of the parties, secondly, by lack of any challenge from the losing party, and thirdly, by a subsequent final decision in litigation or arbitration.

It has been argued that the two crucial components in the acceptance of an adjudication decision as final include, first, confidence in the appointed adjudicator and, secondly, the parties have had a fair chance to present their case to an independent tribunal.<sup>73</sup>

### 4.3 Why adjudication and not mediation/conciliation?

One other important take from the “Constructing The Team” Final Report was the rejection of mediation/conciliation as a route for resolution of construction disputes. Describing mediation/conciliation as a voluntary, non-binding process, intended to bring the parties to agreement, the Final Report noted a mediator has no powers of enforcement or of making a binding recommendation. Sir Michael Latham made a personal remark in the following terms:

“Most disputes on site are, I believe, better resolved by speedy decision - i.e. adjudication - rather than by a mediation procedure in which the parties reach their own settlement.”<sup>74</sup>

Most construction disputes are known to be acrimonious and Sir Michael Latham’s statement finds support from Prof. Dr. Nael G. Bunni who says that “[a]micable dispute resolution methods are... less successful when emotions are running high...”<sup>75</sup>

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<sup>71</sup> *Bresco Electrical services Ltd (supra* fn. 54), at para 13

<sup>72</sup> [2020] EWHC 2451 (TCC), at para 139

<sup>73</sup> Dr Robert Gaitskell QC, *Trends in Construction Dispute Resolution*, A paper based on talks given to the Society of Construction Law in London on 5 July 2005, p.11.

<sup>74</sup> Sir Michael Latham, *Constructing the Team Final Report (supra*, fn. 3), at p.89

<sup>75</sup> Nael G. Bunni (2005), *The FIDIC Forms of Contract (supra* fn. 14), at p.440



#### **4.4 Adjudication and the “rough justice” characterisation**

It has been explained that construction adjudications provide "rough justice" mainly because within a very short period of time the adjudicator has to receive submissions and evidence from the parties and produce his or her decision. The justice that is meted out may therefore not be as well prepared for as cases which proceed to a full trial in a court or to a substantive hearing before an arbitrator.<sup>76</sup> Inevitably, from time to time, mistakes do occur and if an adjudicator's decision on an issue referred to him or her is wrong, whether because he or she erred on the facts or the law or the procedure, the decision remains binding on the parties.<sup>77</sup> In *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*<sup>78</sup>, Lord Justice Chadwick sum up was in the following terms:

“The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case.... The need to have the "right" answer has been subordinated to the need to have an answer quickly.”

The “rough justice” characterisation is not a benefit of using adjudication but has been included in the discussion in order to clarify the reasoning behind the formulation of the term.

#### **5.0 Conclusion**

The benefits that led construction industry to prefer arbitration as the dispute resolution mechanism included speedy resolution of disputes, flexibility in the arbitral process, the lower costs incurred by the parties compared to litigation, and subject-matter experts driven process. However, during the second part of the Twentieth Century, these benefits started to be eroded due to; the involvement of lawyers who introduced elements of civil litigation into the arbitral processes, and which came with procedural complexities similar to those of court proceedings, and which resulted in increases of time it was taking to resolve disputes, the appointments/nominations by appointing bodies of qualified arbitrators with no requisite expertise in construction matters, and delaying

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<sup>76</sup> See John A Tackaberry QC, *Flexing the Knotted Oak – English Arbitration's Task and Opportunity in the First Decade of the New Century*. A paper for the Worshipful Company of Arbitrators Presented on 7 March 2002 at Kings College, London, at p.6, and *Gipping Construction Ltd v Eaves Ltd* [2008] EWHC 3134 (TCC), at para 8.

<sup>77</sup> *Macob Civil Engineering Ltd (supra fn. 52)*, at para 19.

<sup>78</sup> [2006] BLR 15, at para 86



tactics by the defaulting party with the intention of dragging the proceedings. These factors led to the perception that arbitration had become slow, expensive and complex. In addition, as the proceedings dragged and pending resolution of disputes, many employers withheld payments to contractors thus causing cash flow difficulties to both contractors and the contractual chain. This led to the industry becoming adversarial and it responded by among others, including other alternative dispute resolution methods into standard forms of contracts.

Adjudication was one of the mechanisms that was identified by the industry as appropriate for use in standard forms as a first procedure in multi-tiered dispute resolution clauses. This was based on the principle that adjudications are concluded within set time limits, and as a direct corollary of the time limitations, the process is much cheaper than arbitration. In most adjudications, decisions are based on documents only, thus avoiding procedural complexities that have become part of arbitration. In addition, the interim binding nature of the adjudicator's decision, and by requiring parties to comply with an adjudication decision without delay, leaving any continuing disagreement about the merits of the underlying dispute to be resolved at a later date, by settlement agreement, arbitration or litigation, facilitates the enforcement of adjudication decisions under the rubric of "*pay now, argue later*" to facilitate the realisation of the cash flow aspiration. Most parties accept adjudication decisions as final, and this has led to the acceptance of the mechanism as a mainstream dispute resolution procedure in its own right.

*Dispute Resolution in Construction: Why Arbitration Lost the First Port of Call Status in Many Standard Forms of Contracts to Adjudication: Hazron Maira*

**(2021)9(4) Alternative Dispute Resolution**

## References

England & Wales Arbitration Act 1996

Housing Grants, Construction and Regeneration Act 1996

New South Wales Building and Construction Industry Security of Payment Act 1999 No 46.

New Zealand Construction Contracts Act 2002

Singapore Building and Construction Industry Security of Payment Act 2004

Nael G. Bunni (2005), *The FIDIC Forms of Contract*. Third Edition, Oxford, Blackwell Publishing

Sir Michael Latham, *Constructing the Team, Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry*, Final Report, July 1994.

Aeberli, Peter. Kings College London, *Nature and Laws of Arbitration*, An MSc in Construction Law and Dispute Resolution paper, September 2011.

Dr Robert Gaitskell QC, *Trends in Construction Dispute Resolution*, A paper based on talks given to the Society of Construction Law in London on 5 July 2005

Hazron Maira, *The Evolution, Role and Effects of Dispute Boards in Construction Contracts: (2018) 6(1) Alternative Dispute Resolution*.

Her Honour Judge Frances Kirkham, *The Future of Adjudication*, A paper based on a speech given to the Society of Construction Law in London on 27 February 2004

Joey Gardiner, *Latham's report: Did it change us?* Published in Building Magazine on 27 June 2014.

*Dispute Resolution in Construction: Why Arbitration Lost the First Port of Call Status in Many Standard Forms of Contracts to Adjudication: Hazron Maira*

(2021)9(4) *Alternative Dispute Resolution*

John A Tackaberry QC, Flexing the Knotted Oak – English Arbitration's Task and Opportunity in the First Decade of the New Century. A paper for the Worshipful Company of Arbitrators Presented on 7 March 2002 at Kings College, London

Kariuki Muigua, Arbitration Law and the Right of Appeal in Kenya, (2021)9(2) *Alternative Dispute Resolution*, 21- 43

Kathleen M. J. Harmon, “To Be or Not to Be – That is the Question: Is a DRB Right for Your project?” *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, Vol 3 No 1 (February 2011)

Nael G. Bunni, Construction Disputes on the Eve of the New Millennium, (1999) 65 *Arbitration*, Issue 4

Nael G. Bunni, What Has History Taught Us in ADR? Avoidance of Dispute! (2015) 81 *Arbitration*, Issue 2

Philip L. Bruner, Rapid Resolution ADR, *The Construction Lawyer*, Volume 31, Number 2, Spring 2011

Rashda Rana, Is Adjudication Killing Arbitration? (2009) 75 *Arbitration*, Issue 2

Richard D. S. Bloore, Flip Flop Costs - A Tonic to Revive Arbitration? (1995) 61 *Arbitration*, Issue 2

Sir Peter Cresswell, The Future of Arbitration in the Changing World of Dispute Resolution, (2013) 79 *Arbitration*, Issue 3

Sir Thomas Bingham, Arbitral Tribunals and the Courts: standards, training and supervision, (1994) 60 *Arbitration*, Issue 3

The Rt. Hon. Lord Mustill, Comments on Fast-Track Arbitration, (1994) 60 *Arbitration*, Issue 4

Christopher R. Seppälä, FIDIC and Dispute Adjudication Boards (DAB(s)): A Webinar Presentation slides, 18 March 2015. Available at:

<https://fidic.org/sites/default/files/webinar/PresentationCSeppFIDICandDisputeAdjudicationBoards.pdf>. [Accessed on 31 May 2021].

International Chamber of Commerce Arbitration (ICC) Rules. Available at: [https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article\\_30new](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_30new). [Accessed on 31 May 2021]

Jason Challender *et al*, Partnering in practice: an analysis of collaboration and trust. In: *Management, Procurement and Law*. Volume 167 Issue 6, December 2014, pp. 255–264, 257. <https://doi.org/10.1680/mpal.14.00002>. [Accessed on 19 June 2021].

Jeremy Winter, *Resolving Time Sensitive Construction Disputes: Are Attorneys Just Getting in the Way?*, 16 Pepp. Disp. Resol. L.J. 463 (2016). Available at: <https://digitalcommons.pepperdine.edu/drlj/vol16/iss3/4>. [Accessed on 11 June 2021].

Maritz MJ, Hattingh V. Adjudication in South African construction industry practice: towards legislative intervention. *J. S. Afr. Inst. Civ. Eng.* Vol 57 No 2, June 2015, 45–49, 46, Paper 1042, <http://dx.doi.org/10.17159/2309-8775/2015/v57n2a6>. [Accessed on 20 December 2020].

Mutti, C d N and Hughes, W. (2002) Cash flow management in construction firms. In: Greenwood, D (Ed.), *18th Annual ARCOM Conference*, 2-4 September 2002, University of Northumbria. Association of Researchers in Construction Management, Vol. 1, 23-32.

Queen Mary University of London / Pinsent Masons (2019), International Arbitration Survey – Driving Efficiency in International Construction Disputes. Available at: <https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey>. [Accessed on 18 April 2021].

Singapore International Arbitration Centre (SIAC) Rule 5. Available at: [https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac\\_rule5](https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule5). [Accessed on 31 May 2021]

*Dispute Resolution in Construction: Why Arbitration Lost the First Port of Call Status in Many Standard Forms of Contracts to Adjudication: Hazron Maira*

(2021)9(4) *Alternative Dispute Resolution*

Stipanowich, Thomas, Arbitration: The 'New Litigation' (November 7, 2008). University of Illinois Law Review, Vol. No. 1, 2010, Pepperdine University Legal Studies Research Paper No. 2009/15. Available at SSRN: <https://ssrn.com/abstract=1297526>. [Accessed on 11 June 2021].

Stipanowich, Thomas, Beyond Arbitration: Innovation and Evolution in the United States Construction Industry (1996). Wake Forest Law Review, Vol. 31, No. 1, 1996. Available at SSRN: <https://ssrn.com/abstract=2060438>. [Accessed on 11 June 2021]

Stipanowich, Thomas, Managing Construction Conflict: Unfinished Revolution, Continuing Evolution (2014). 100 YEARS: CHARTERED INSTITUTE OF ARBITRATORS, SELECTED TOPICS IN INTERNATIONAL ARBITRATION LIBER AMICORUM, THE CONSTRUCTION LAWYER, Vol. 34, No. 4, Fall 2014 (Special "Crystal Ball" Issue), Pepperdine University Legal Studies Research Paper No. 2014/22. Available at SSRN: <https://ssrn.com/abstract=2484598>. [Accessed on 20 June 2021]

UNCITRAL Working Group II (Dispute Settlement), Issues relating to expedited arbitration, Note by the Secretariat, Doc. A/CN.9/WG.II/WP.207 of 16 Nov. 2018. Available at: [https://uncitral.un.org/sites/uncitral.un.org/files/207-e\\_advance\\_copy.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/207-e_advance_copy.pdf). [Accessed on 20 June 2021]

*Anglo Swiss Holdings Ltd v Packman Lucas Ltd* [2010] BLR 109

*Ballast Plc v. The Burrell Company (Construction Management) Ltd* [2002] ScotCS 324

*Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25

*Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2006] BLR 15

*Dacy Building Services Ltd v IDM Properties LLP* [2017] BLR 114

*Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd* [2021] EWHC 2441 (TCC)

*Ellis Mechanical Services v Wates Construction Limited* (1976) 2 BLR 57

*Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd.* [1974] A.C. 689

*Gipping Construction Ltd v Eaves Ltd* [2008] EWHC 3134 (TCC)

*Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWHC 227 (TCC)

*H. Dakin & Co., Limited v. Lee* [1916] 1 K.B. 566

*J Tomlinson Ltd v Balfour Beatty Group Ltd* [2020] EWHC 1483 (TCC)

*John Doyle Construction Ltd v Erith Contractors Ltd (Rev 1)* [2020] EWHC 2451 (TCC)

*Macob Civil Engineering Ltd v. Morrison Construction Ltd* [1999] BLR 93

*Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited* [2014] eKLR

*Penten Group Ltd v Spartafield Ltd* [2016] EWHC 317 (TCC)

*PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30

*PT Thiess Contractors Indonesia v PT Kaltim Prima Coal & Anor* [2011] EWHC 1842 (Comm)

*Ritchie Brothers (Pwc) Ltd v. David Philp (Commercials) Ltd* [2005] BLR 384

*Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2020] SGHC 251

*Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638

*UYCF Ltd v Forrester & Anor* [2000] EWCA Civ 317

*Wah (Aka Alan Tang) v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch)

*Witney Town Council v Beam Construction (Cheltenham) Ltd* [2011] BLR 707

## **Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation**

*By: Kariuki Muigua\**

### **Abstract**

*In light of the ongoing efforts to enhance the place of mediation in Kenya as a choice mechanism for access to justice across various sectors, this paper offers some thoughts on some viable ways through which the efficiency of mediation can be promoted and realized. The paper looks at law related as well as attitude issues that may affect the effectiveness of mediation as a tool for access to justice.*

### **1. Introduction**

This paper offers some reflections on the use of mediation and other traditional conflict resolution mechanisms that have been used by Kenyan communities since time immemorial in conflict management and enhancing access to justice. This is informed by the renewed drive to enhance the use of ADR mechanisms including mediation, as a result of their formal recognition under the current Constitution of Kenya 2010<sup>1</sup> and subsequent statutes.

Ongoing discussions on the role of mediation and other traditional conflict management mechanisms have now been spiced up by the enactment of laws recognizing the role of these mechanisms in enhancing access to justice and peaceful coexistence.<sup>2</sup> The author looks at where we have been, where we are now and the prospects for the future. The prospects for the future include

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<sup>1</sup> See Art. 60, 67, 159 of the Constitution of Kenya, 2010.

<sup>2</sup> See sec. 5(1) (f), *National Land Commission Act*, No. 5 of 2012; sec. 4, *Land Registration Act* 2012; Part x, Sec. 68, *Marriage Act* 2014; sec. 15, *Industrial Courts Act*, 2011; sec. 8(f), *Commission on Administrative Justice Act*, 2011; sec. 20, *Environment and Land Court Act*, 2011; sec. 5(1), *Legal Aid Act*, 2016; sec. 40, 41, *Community Land Act*, 2016.

recommendations and urgent reforms that should be undertaken to reap the benefits presented by mediation and other ADR mechanisms in enhancing access to justice and fostering peaceful co-existence among people in Kenya.

This comes at a time when Judiciary's Court Annexed Mediation Project has been completed and a report by an independent evaluation of the same released and even more recently, the project was extended to stations outside Nairobi on pilot basis.<sup>3</sup>

## **2. Use of Mediation for Access to Justice in Kenya**

Most communities in Kenya have used mediation and other ADR and Alternative Justice Systems in resolving their conflicts for centuries.<sup>4</sup> It was customary and an everyday affair to see people sitting down informally and agreeing on certain issues, such as the allocation of resources in traditional African societies.<sup>5</sup> Since conflicts have the potential to break down the economic, social and political organization of a people, most Kenyan communities had certain principles and religious beliefs that they observed and that fostered unity and peaceful coexistence.

It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.<sup>6</sup>

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<sup>3</sup> See Muigua, K., *Resolving Conflicts through Mediation in Kenya*. (Glenwood Publishers Ltd, Nairobi, 2012), Chap.10, pp. 123-134.

<sup>4</sup> Muigua, K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 1, (2017), pp. 74-104.

<sup>5</sup> Ibid.

<sup>6</sup> Mkangi, K., *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at [www.payson.tulane.edu](http://www.payson.tulane.edu). [Accessed on 14/10/2017].



In this way conflicts were shunned and where they arose, there were mechanisms and institutions that were in place to effectively resolve those conflicts. It is for this reason that the author opines that the plethora of principles, mechanisms and institutions that were used and have continued to be used (though rarely) be employed as envisaged in the constitution to enhance access to justice and foster peaceful coexistence. Traditional conflict management mechanisms were resolution mechanisms. Even where mediation was practised, it was in the political process where it was a resolution mechanism. It is imperative that traditional conflict management mechanisms be harnessed in managing conflicts as they are resolution rather than settlement mechanisms<sup>7</sup>.

Mediation, if carried out correctly leads to outcomes that are enduring. The parties have autonomy over the process and the outcome. Parties who have a conflict may decide to negotiate. When negotiations hit a deadlock they get a third party to help them continue with the negotiations. The mediator's role in such a process is to assist the parties in the negotiations. He or she does not dictate the outcomes of the negotiations. Parties must have the autonomy of the process and of the outcome.<sup>8</sup>

Mediation is a voluntary process. However, Kenya has introduced court mandated mediation. Although it is a good step, once the voluntariness to go for

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<sup>7</sup> Resolution of conflicts gives rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power-based outcomes (K. Cloke, *The Culture of Mediation: Settlement vs. Resolution*, The Conflict Resolution Information Source, Version IV, December 2005). A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power (Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), p. 42). Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings (J. Bercovitch, *Mediation Success or Failure: A Search for the Elusive Criteria*, *Cardozo Journal of Conflict Resolution*, Vol.7.289, p.296). Settlement is an agreement over the issue(s) of the conflict which often involves a compromise (D. Bloomfield, *Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland*, *Journal of Peace Research*, vol. 32 no. 2 May 1995, pp. 151-164).

<sup>8</sup> Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), p. 42.

mediation is lost then the process of mediation is negatively affected. The parties are expected to report back the outcome of their negotiations to court for it to endorse it. It is however important to ensure that the process is not exposed to the vagaries that bedevil the court system including delays, bureaucracy and inefficiency.

Traditional societies have used mediation to resolve conflicts for hundreds of years. It was used informally where disputants could just sit with a third party such as the council of elders who could facilitate the negotiations. The formal legal system has failed to recognize that mediation is not a new concept in Kenya and has thus tried to classify mediation as part of the Alternative Dispute Resolution mechanisms. It views mediation as an alternative to litigation. This view of mediation is flawed as it gives mediation a second place in the conflict settlement continuum. Mediation can stand alone as a method of resolving conflicts. However, care has to be taken to ensure that the parties enter mediation voluntarily, the outcome of the process is respected and the solutions reached are acceptable and enduring.

In order to enhance access to justice, foster peace coexistence, promote the cultural aspects of the Kenyan people and enhance cohesion among communities, traditional concepts of conflict management as envisaged in the law should be applied in that regard. All these can be achieved through resolution of conflicts, including those ones that are caused either by scarcity or abundance of natural resources. In a nutshell, there is a need to enhance the conflict resolution mechanisms and the existing institutional capacity, if resolution of conflicts rather than settlement is to be achieved. A lot of resources and time is expended dealing with conflicts. They hamper the economic advancement of a nation since people are not fully engaged in economic activities but have to spend time in court defending suits. Resolution of conflicts removes all underlying causes of the conflict and hence once resolved it cannot flare up again later. This is not the time to procrastinate. The time to search for and adopt an effective conflict resolution mechanism is now.

Mediation is essentially negotiation with the assistance of a third party. Human beings have not lost the capacity to negotiate. Resolution as opposed to settlement of conflicts can assist in healing the wounds caused by conflicts. Mediation can deal with the psychological dimensions of the conflicts. As Martin Luther King Junior said:

*“The time for healing of wounds has come. The time to bridge the chasms that divide us has come. The time to build is upon us”.*<sup>9</sup>

Resolving conflicts in Kenya through mediation is indeed an imperative.

### **3. Opportunities for Mediation in Kenya**

#### ***3.1 Mediation and Access to justice***

Access to justice is considered to be more than just about presence of formal courts in a country but also entails the opening up of those formal systems and legal structures to the disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.<sup>10</sup>

Realization of the right of access to justice can only be as effective as the available mechanisms to facilitate the same. For the constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies* (emphasis added).<sup>11</sup>

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<sup>9</sup> Martin Luther King: Excerpt from acceptance Speech by the 1993 Nobel Peace Laureate, Inaugural Celebration address 1994, sources from, <http://www.goote.htm>, (accessed on 5/08/2012).

<sup>10</sup> Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> (Accessed on 13/10/ 2017).

<sup>11</sup> See Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) —Conflict Information Consortium, *Beyond Intractability*, University of Colorado, Boulder (July 2003).

Marginalised individuals and groups often possess limited influence in shaping decision-making processes that affect their well-being.<sup>12</sup> It is contended that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.<sup>13</sup>

It is often difficult for Kenyans to seek redress from the formal court system especially owing to numerous challenges<sup>14</sup>. The end result is that the disadvantaged people may harbour feelings of bitterness, marginalization, resentment and other negative feelings that also affect the stability and peace of the country. Such scenarios have been cited as some of the causes of ethnic or clan animosity in Kenya.<sup>15</sup>

In litigation, the dispute settlement coupled with power struggles will usually leave broken relationships and the problem might recur in future or even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think best. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed.<sup>16</sup>

Recognition of ADR and traditional dispute resolution mechanisms is predicated on the above cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the

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<sup>12</sup> Gibson, C., et. al., 'Empowerment and Local Level Conflict Mediation in Indonesia: A Comparative Analysis of Concepts, Measures, and Project Efficacy,' *Policy research working papers*, Vol. 3713, World Bank Publications, 2005, p.1.

<sup>13</sup> United Nations Development Programme, 'Access to Justice and Rule of Law,' available at [http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_justice\\_law/](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/) [Accessed on 14/10/2017]

<sup>14</sup> Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), p. 29.

<sup>15</sup> *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, (the 'Akiwumi Commission') (Government Printer, Nairobi, 1999).

<sup>16</sup> Muigua, K., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 3, No. 2, 2015, pp. 64-108 at p.80.

court system.<sup>17</sup> Access to justice should thus include the use of informal conflict management mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable.<sup>18</sup>

### ***3.2 Mediation, Environmental Democracy, Public Participation and Community Empowerment***

The process of managing natural resource-based conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy. The right of access to justice is essential as it affords the means by which the public challenge application of and implementation of environmental laws and policies.<sup>19</sup>

Environmental democracy which involves giving people access to information on environmental rights, easing access to justice in environmental matters and enabling public participation in environmental decision making, inter alia, is desirable in the Kenyan context.<sup>20</sup>

With regard to public participation in natural resource management, it has been argued that since most resource issues today are less dependent on technical matters than they are on social and economic factors, if a state is to maintain the land's health, they must learn to balance local and national needs.<sup>21</sup> It is argued

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<sup>17</sup> Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, p. 6.

<sup>18</sup> See Muigua, K. & Kariuki F., 'ADR, Access to Justice and Development in Kenya,' Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd & 4th July, 2014 at Strathmore University Law School, Nairobi.

<sup>19</sup> FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

<sup>20</sup> See generally, Hazen, S., *Environmental Democracy*, (<<http://www.ourplanet.com>>). [Accessed on 18/01/2016]. Washington DC. Csaba Kiss and Michael Ewing (eds), "Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries." European Regional Report (published by The Access Initiative Europe.) available at <http://www.accessinitiative.org> [Accessed on 18/01/2016]; See also Art. 69(1) (d) of the Constitution of Kenya, 2010. The Constitution supports the notion of environmental democracy by providing that one of the obligations of the State in relation to the environment is to encourage public participation in the management, protection and conservation of the environment.

<sup>21</sup> Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' p. 2.

that the state must learn to better work with the people who use and care about the land while serving their evolving needs.<sup>22</sup>

*In The Matter of the National Land Commission [2015] eKLR*, the Supreme Court observed that the dominant perception at the time of constitution-making was that the decentralization of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people thus giving more fulfilment to the concept of democracy.<sup>23</sup>

The Constitution of Kenya outlines the national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.<sup>24</sup> These values and principles include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and *participation of the people*; human dignity, equity, social justice, *inclusiveness*, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development (emphasis added).<sup>25</sup>

The Rio Declaration in principle 10 emphasises the importance of public participation in environmental management through access to justice thus: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.... Effective access to judicial and administrative

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Available at <http://dev.mtnforum.org/sites/default/files/publication/files/260.pdf> [Accessed on 3/01/2016].

<sup>22</sup> Ibid; Haysom, N. & Kane, S., ‘Negotiating natural resources for peace: Ownership, control and wealth-sharing,’ Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 5.

<sup>23</sup> In the Matter of the National Land Commission [2015] eKLR, para. 21; See also Muigua, K., *et al*, (2015) *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, 2015, Nairobi).

<sup>24</sup> Constitution of Kenya 2010, Art. 10(2).

<sup>25</sup> Constitution of Kenya 2010, Art. 10(3).

proceedings, including redress and remedy, shall be provided.<sup>26</sup> Participatory approaches have been increasingly advocated as effective decision-making processes to address complex environment and sustainable development issues.<sup>27</sup>

The provision of effective avenues for resolution of natural resource-based conflicts is thus far one of the most practical ways of ensuring access to justice, and by extension adhering to public participation principle. Scholars have asserted that participatory approaches should be thought of as located somewhere on a continuum between consensus-oriented processes in the pursuit of a common interest and compromise-oriented negotiation processes aiming at the adjustment of particular interests.<sup>28</sup>

It has been suggested that government policies can create opportunities for use of mediation during disputes.<sup>29</sup> However, they must include mechanisms for judging the prospects of success at the outset and adopting contingencies to ensure the mediators' security if situations deteriorate.<sup>30</sup>

ADR mechanisms, and particularly negotiation and mediation, have intrinsic advantages that can facilitate effective management of natural resource-based conflicts. They have the potential to be expeditious, cost effective, participatory and all-inclusive and thus, can be used to manage natural resource-based conflicts in way that addresses all the underlying issues affecting the various parties.

Empowerment is aimed at achieving the following: developing the ability to access and control material and non-material resources and to effectively mobilize them in order to influence decision outcomes; developing the ability to

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<sup>26</sup> United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.

<sup>27</sup> Hove, S.V.D., 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, p.10.

<sup>28</sup> *Ibid*, p.16.

<sup>29</sup> Castro, A.P. & Nielsen, E. (eds), 'Natural resource conflict management case studies: an analysis of power, participation and protected areas,' *op cit*, p. 272.

<sup>30</sup> *Ibid*.

access and influence decision-making processes on various levels (household, community, national, global) in order to ensure the proper representation of one's interests (also described as getting a voice); gaining an awareness of dominant ideologies and of the nature of domination that one is subjected to in order to discover one's identity, and ultimately to develop the ability to independently determine one's preferences and act upon them; and developing the ability to trust in one's personal abilities in order to act with confidence.<sup>31</sup>

It has rightly been noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.<sup>32</sup>

Political empowerment requires inclusion in democratic decision-making processes which is equated to mainly gaining a voice within the local and/or central state.<sup>33</sup> Mediation has been used successfully to manage and resolve conflicts in Kenya. It has been seen, for example, that it was and has been efficacious in resolving environmental conflicts and lately in resolving family disputes. Because of the myriad causes of these conflicts a mechanism that addresses the underlying causes and that lends a mutually acceptable outcome is the most appealing to the parties. Such a mechanism is mediation.

Arguably, mediation is the best option for resolution of conflicts such as those involving natural resources. The process has to involve all the parties who have an interest in the matter. The mediation process would have to be voluntary and bear all the positive attributes of mediation. The parties have to be autonomous: Autonomy of the process and of the outcome is a prerequisite. A mediation

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<sup>31</sup> Oladipo, S.E., 'Psychological Empowerment and Development', *African Journals Online*, Vol. 2, No 1, 2009, p.121.

<sup>32</sup> The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen), p. 4. Available at <http://www.jimmenick.com/henhud/hhldph.pdf> [Accessed on 15/10/2017].

<sup>33</sup> Miller, B., 'Political empowerment, local—central state relations, and geographically shifting political opportunity structures: Strategies of the Cambridge, Massachusetts, Peace Movement', *Political Geography*, (Special Issue: Empowering Political Struggle), Volume 13, Issue 5, September 1994, pp. 393–406.



agreement that can be respected by all the parties would lead to enduring outcomes for the present and future generations.

As such, ADR mechanisms such as negotiation and mediation provide an opportunity for empowering the Kenyan people through saving resources such as time and money, fostered relationships and mutually satisfying outcomes.<sup>34</sup> It is however noteworthy that adopting a community-based approach to empowerment does not automatically translate into greater participation and inclusion. This is because some of the traditional practices have negative impacts such as discrimination of women and disabled persons.<sup>35</sup> In fact, it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.<sup>36</sup> This is where the Courts come in as the legal guardians of the Bill of Human rights as envisaged in the Constitution.<sup>37</sup>

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<sup>34</sup> Muigua, K., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' op cit. p. 84.

<sup>35</sup> See generally, Muigua, K., —Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya. Available at <http://www.kmco.co.ke/attachments/article/1117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf>; See also generally Human Rights Watch, *World Report 2013*, available at [http://www.hrw.org/sites/default/files/wr2013\\_web.pdf](http://www.hrw.org/sites/default/files/wr2013_web.pdf) [Accessed on 15/10/2017].

<sup>36</sup> Constitution of Kenya 2010, Art. 159(3).

<sup>37</sup> Constitution of Kenya 2010, Art.23. Article 23 of Constitution of Kenya deals with Authority of courts to uphold and enforce the Bill of Rights:

- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
  - (a) a declaration of rights;
  - (b) an injunction;
  - (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
  - (e) an order for compensation; and
  - (f) an order of judicial review.

### ***3.3 Mediation and Conflict Management for Sustainable Development***

Conflicts do not occur in vacuum, and to a large extent, they are dependent on the context. Indeed, it has been argued that the governance of natural resources is especially important in the context of divided societies because control over the benefits from local natural resources is often a chief motivator of ethnic or identity-based conflicts.<sup>38</sup> Natural resource based conflicts also are, directly and indirectly connected to and/or impact human development factors and especially the quest for social-economic development.<sup>39</sup>

Natural resource-based conflicts continue to negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. It is noteworthy that most of the sectoral laws mainly provide for conflict management through the national court system.

National legal systems governing natural resource management are based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.<sup>40</sup> Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.<sup>41</sup> In Kenya, where these conflicts may be clan-based or community based, courts offer little help in terms of achieving lasting peace due to the settlement nature of the outcome. Thus, conflicts are likely to flare up later.<sup>42</sup>

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<sup>38</sup> Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' op cit, p. 5.

<sup>39</sup> Wilson, C. & Tisdell, C., 'Conflicts over Natural Resources and the Environment: Economics and Security,' *Working Papers on Economics, Ecology and the Environment, Working Paper No. 86*, September 2003; Lumerman, P., et al, 'Climate Change Impacts on Socio-environmental Conflicts: Diagnosis and Challenges of the Argentinean Situation,' (Initiative for Peacebuilding 2011).

<sup>40</sup> FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

<sup>41</sup> Ibid.

<sup>42</sup> See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

The Sustainable Development Goals (SDGs) recognise the connection between peace and development and thus provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.<sup>43</sup> The SDGs Agenda also recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peace building and state building.<sup>44</sup>

The SDGs Agenda also calls for further effective measures and actions to be taken, in conformity with international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.<sup>45</sup> Thus, conflicts management should be one of the key issues that should be addressed in the quest for sustainable development.

Sustainable development is not possible in the context of unchecked natural resource-based conflicts. In recognition of this fact, Sustainable Development Goal (SDGs) 16 aims to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.<sup>46</sup> It is also noteworthy that SDGs seek to promote participation of local communities in natural resource management.<sup>47</sup>

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<sup>43</sup> United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

<sup>47</sup> *Ibid.*, Goal 6b.

Indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.<sup>48</sup> Negotiation and mediation have more value to the local communities than just being means of conflict management. At least, they are means of sharing information and participating in decision-making. The two mechanisms have the unique and positive attributes which include their participatory nature that can be used to manage natural resource-based conflicts and ensure that Kenyans achieve sustainable development.

Furthermore, the affected communities, in cases of decision making, can have guaranteed and meaningful participation in the decision-making process by presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.<sup>49</sup>

However, even where the use of ADR and TDR mechanisms is contemplated, there barely exists effective framework to oversee their utilisation. There is need to actualise the use of ADR and particularly negotiation and mediation in managing natural resource-based conflicts as envisaged in the Constitution. ADR is not fully utilised in the Kenyan context. Therefore, the attributes of cost effectiveness, party autonomy, flexibility, amongst others, are hardly taken advantage of in the environmental arena. There is need to ensure that there is put in place a framework within which communities are actively involved in achieving peace for sustainable development.

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<sup>48</sup> Preamble, *United Nations Declaration on the Rights of Indigenous Peoples*. UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.

<sup>49</sup> Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at [https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/\\$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf](https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf) [ Accessed on 08/01/2016].

The Government efforts as evidenced by bodies such as the National Cohesion and Integration Commission<sup>50</sup> should actively involve communities in addressing natural resource-based conflicts in the country. While acknowledging that negotiation and mediation may not provide holistic solutions to the problem, they can still be used in tandem with other methods of conflict management to address problem of natural resource-based conflicts in Kenya.

Natural resource-based conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs. The use of ADR in the resolution of natural resource-based conflicts is viable and should be exploited to its fullest. ADR is not a panacea to all the natural resource-based conflicts and environmental problems as it has many limitations and is also faced with numerous challenges. However, ADR is worth working with in the environmental arena. The benefits accruing from ADR processes should be fully utilised in the Kenyan context to minimise or at least manage natural resource-based conflicts and ensure Kenya realises its goals of sustainable development and the Vision 2030.

#### **4. The Future of Mediation in Kenya: Making Mediation Work for All**

##### ***4.1 Facilitative Policy, Legal and Institutional Framework***

In the short term, there should be ongoing efforts to identify and use mediation in ways that create a bridge between traditional conflict resolution mechanisms and the more formal mechanisms like the courts as recognized in Article 159 (2) (c) of the constitution.

Before the advent of contemporary conflict resolution mechanisms, traditional communities developed and refined, over time, their own mechanisms for resolving local level disputes, both within their communities and with others.

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<sup>50</sup> This is a Commission established under s. 15 of the National Cohesion and Integration Act, 2008, No. 12 of 2008, Revised Edition 2012 [2008]. One of the functions of the Commission is to promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace (s.25 (2) (g)).

These were based on solid traditional institutions such as mediation through a Council of Elders. These institutions were respected by community members and hence those affected generally complied with their decisions.<sup>51</sup>

Development, in order to be authentic, must respond to the traditions, attitudes, organisations and goals of the people whose society is under consideration.<sup>52</sup> Elders are traditionally regarded as experienced, expert custodians of knowledge, diplomacy and the judicial system of their specific society grouping.<sup>53</sup> At independence in many African countries (including Kenya) most disputes were resolved using traditional/informal justice. Despite their popularity, these justice systems were regarded as obstacles to development. It was assumed that as the countries became more and more modernized TJS would naturally die but this, according to a study by Penal Reform International (PRI) has not been the case.<sup>54</sup> The current land mediation system in East Timor for example, creates a bridge between traditional dispute-resolution mechanisms and the courts.<sup>55</sup> The need for greater connectivity between the traditional and formal systems has been widely acknowledged and to this end, we must consider the social and economic benefits of incorporating traditional institutions and mediation mechanisms, within the formal mechanisms, to bridge the gap in conflict resolution.

Secondly, mediation should be embedded in administration as seen in Article 189 (4) of the constitution where alternative dispute resolution mechanisms including negotiation and mediation are to be used in settling disputes between the two systems of government. Mediation systems should reduce burdens on the

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<sup>51</sup> Chapman, C. & Kagaha, A., “Resolving Conflicts Using Traditional Mechanisms in The Karamoja and Teso Regions of Uganda”, Northern Uganda Rehabilitation Programme (NUREP) Briefing, *Minority Rights Group International*, August 2009, p.1.

<sup>52</sup> Brainch, B., *ADR/Customary Law*, a paper presented at the World Bank Institute for Distance Learning for Anglophone Africa, November 6, 2003.

<sup>53</sup> Ibid.

<sup>54</sup> See Penal Reform International, “Access to justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems”, *PRI*, (2000), pp. 1 – 196. Sourced from <http://www.gsdrc.org/docs>, [Accessed on 03/06/2012].

<sup>55</sup> Fitzpatrick, D., “Dispute Resolution; Mediating Land Conflict in East Timor”, in AusAID’s *Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific*, (2008), Case Study No. 9, p. 175. Sourced from <http://www.ausaid.gov.au/publications/pdf>, [Accessed on 24/5/2012].

court system and broaden the options available to deal with conflicts. Conflict resolution mechanisms such as mediation should be embedded in the devolved administration and in the judiciary. This allows remedies unavailable in the courts and also alleviates problems associated with a lack of capacity in the court system, including minimal facilities in rural areas.<sup>56</sup> Multi-Door Courtrooms like those in Lagos, Nigeria, which provides a comprehensive approach to dispute resolution within the administrative structure of the court offering a range of options other than litigation should also be considered.

Thirdly, parties should take advantage of no-violence agreements. Due to their very nature conflicts such as the ones involving use of and access to natural resources usually have multiple causes, some proximate, others underlying or merely contributing. The legal and institutional mechanisms in Kenya advocate mostly for settlement procedures dealing with issues only and not the underlying causes of the conflicts and can thus not be suitable in resolving natural resource-based conflicts. Mediation is better suited to deal with conflicts involving groups or individuals from different groups. Where mediation involves interim no-violence and resource-use agreements, it can successfully manage a number of potentially violent conflicts, pending resolution through agreement or adjudication.<sup>57</sup>

Apart from the above, there are medium term strategies recommended towards achieving resolution of conflicts in Kenya. The mediation of conflicts should be backed by an appropriately comprehensive and effective legislative and administrative infrastructure capable of resolving more stubborn cases and cases that fall outside the jurisdiction of the mediation process. The current institutional and legal framework for the resolution of conflicts in Kenya, which mainly consists of tribunals and courts, has not been very effective in resolving conflicts, for example, those touching on the environment. It should be overhauled after careful scrutiny and after extensive consultation with all stakeholders including communities involved, to provide for mediation.

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<sup>56</sup> Ibid.

<sup>57</sup> Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", op cit.

There may be a need for the drafting of a policy to inform the contents of a legal and institutional framework for mediation. The framework should not be “top-down”. It should be a framework that recognizes traditional norms, laws, customs and institutions that deal with mediation and grants them an equal place in line with the constitution. The way to go is institutionalization of mediation for resolution of all conflicts, to ensure an element of effectiveness in enforcement of the agreed positions/decisions.

A comprehensive Mediation guide would provide for the setting up of an institutional framework within which mediation would be carried out. Care has to be taken, however, to ensure that parties engage in mediation voluntarily, the autonomy of the process is respected and the solutions reached are acceptable and enduring. Reforms to the current system of conflict resolution would effectively address weaknesses such as delays, costs, backlog of cases and bureaucracy.

Another medium-term measure would be establishment of mediation boards and training of mediators. Judges and courts are used to presiding over disputes and rendering verdicts on the disputes brought before them. Equally, lawyers are trained to argue out cases with the best interest of their client at heart and to the best of their ability. These institutions are not best suited to mediate certain conflicts.

A balance needs to be struck between using mediators with local expertise and ensuring objectivity in resolution of conflicts. In striking this balance, important issues need to be addressed such as providing appropriate training and building transparency and accountability into the mediation system.<sup>58</sup> Local administration officials involved in peace committees, for example, have local knowledge and expertise but they are more susceptible than outsiders to allegations of bias and partisanship, thus the need to have independent members of the public as commissioners in the mediation boards. There should also be more resources devoted to capacity building programs for mediators.

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<sup>58</sup> Fitzpatrick, D., “Dispute Resolution; Mediating Land Conflict in East Timor”, op. cit., p. 196.



A code of conduct to regulate the mediation practice should be put in place. The code should set out principles relating to competence, appointment, independence, neutrality and impartiality, mediation agreements, fairness of the process, the end of the process, fees and confidentiality, which mediators should commit to.<sup>59</sup> The Mediation boards and community mediators as well, should have a feedback mechanism on the measures they take to support respect for the code through training, evaluation and monitoring of the mediators. Standards of training, practice and codes of ethics should be set and mediators should be trained through a strategy of participation. Capacity-building requires the transfer of quality skills and knowledge tailored to the needs of a specific group, which is adapted to local practice and benefits from existing capacity, for instance an established NGO network of community-based paralegals.<sup>60</sup>

The role of women in mediation of conflicts should be institutionalized. The place of women in our society puts them in the most proximate contact. Within the African traditional setting, they played a primary role in resolving conflicts as negotiators. Conflict mediation systems should require specifically that gender issues are given adequate weight and should include some requirement for inclusion of female mediators when appropriate, like when land rights are involved.<sup>61</sup> The constitution now requires gender parity in almost all commissions or organs of government.<sup>62</sup>

If mediation is to work well in Kenya, there are some long-term strategies that should be considered. There is need for maintenance of political support in the long term. For the proposed reform measures to be effective, there is a need to have political support for them. This shall require monitoring at the local level and goodwill from all state actors to maintain it. The government should for example, pledge use of mediation clauses in all government contracts and to resort to mediation in the first instance.<sup>63</sup> All other contracts should also make

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<sup>59</sup> See generally, The European Code of Conduct for Mediators and Directive 2008/52 [2008] OJL 136/3.

<sup>60</sup> See Brainch, B., *ADR/Customary Law*, op. cit.

<sup>61</sup> Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", op. cit., p. 196.

<sup>62</sup> See Constitution of Kenya 2010-Art. 10; Art. 27; Art. 90; 97.

<sup>63</sup> Brainch, B., *ADR/Customary Law*, op. cit.

mediation as the first port of call whenever a dispute arises so as to reduce backlog in courts and to arrive at acceptable outcomes that could otherwise not be realized in a court of law.

Further, facilitation of more international links, particularly Pan African and those of jurisdictions with successful mediation regimes, to exchange ideas and experiences will help further the growth of mediation as a conflict resolution mechanism especially in relation to transboundary environmental conflicts. Such links and collaborations will support and conduct research and disseminate information to maintain development of mediation.

Further to the above, there is a need to create awareness and sensitize members of the public how to resolve conflicts using amicable means. Until Kofi Annan appeared on the scene to mediate over the post-election crisis in Kenya, most Kenyans had no clue what mediation was and to date, very few are aware of how it works. Yet, mediation is not alien in Kenya or Africa for that matter as it has been practised for generations. There is a need therefore to create mediation awareness through public education and training of community mediators. This can only be achieved if there is dedicated funding by development partners and public-private sector partnerships, for a continuous training programme.

It is only by training the public, government officials including judicial officers on how to resolve conflicts that occur, that the economic wellbeing of Kenya, access to justice and peace can be guaranteed. Kenya can learn from Malawi whose economic backbone, like Kenya's, is equally agriculture, where the Danish Institute for Human Rights (DIHR) initiated a pilot project to create a community-based mediation scheme aimed at empowering the poor and vulnerable people to access justice.<sup>64</sup>

Mediation is essentially negotiation with the assistance of a third party. The mediator's role in such a process is to assist the parties in the negotiations and he

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<sup>64</sup> Sweeney, B., *Training Villagers To Resolve Disputes in Malawi*, an article published on Danish Institute of Human Rights website <<http://www.humanrights.dk/news/training>, (Accessed on 21/5/2010).

cannot dictate the outcomes of the negotiation. Resolution as opposed to settlement of conflicts can assist in healing the wounds caused by a conflict.<sup>65</sup>

Article 159 (2) (c) of the constitution now provides for the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Research should be geared towards giving parties in mediation autonomy over the process and the outcome. This will be achieved through the enactment of legislation that provides for mediation in the political perspective, which is the true mediation. Such legislation should not kill mediation by annexing it to the court system and making it a judicial process.

#### ***4.2 Composition of Mediation Accreditation Committee and Training of Mediators***

The Constitution of Kenya 2010 requires that communities be encouraged to settle land disputes through recognised local community initiatives consistent with the Constitution.<sup>66</sup> If there is a dispute filed in Court by such affected communities and the Court decides to refer the same for ADR and specifically mediation, it is not clear from the law what criteria would be used to decide whether the Community initiative is well equipped to handle the matter and then file their report back to Court. It is also not clear who would handle such cases.

It is commendable that the Mediation Accreditation Committee membership consists of experienced ADR practitioners. However, considering that true mediation also incorporates informal mediation, this composition excludes the real informal mediation practitioners who conduct mediation everyday outside court. The list is arguably elitist and it locks out the mediators at the grassroots level. This is especially reinforced by the encouragement for formal qualifications for mediators.

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<sup>65</sup> Mwangiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 39-43.

<sup>66</sup> Constitution of Kenya, Article 60 (1) (g); 67(2) (f).

With the pre-determined qualifications of who can act as a mediator, this effectively bars those mediators who may be untrained in formal mediation, but are experts in informal mediation from being recognised as mediators. It is important to remember that some of the conflicts especially those with a cultural aspect to them may benefit from the vast experience and knowledge of these informal mediators. However, they may not be able to participate citing lack of the formally acceptable qualifications as mediators. Accreditation becomes tricky considering that the current membership of the Committee<sup>67</sup> may not be well versed with particular traditional knowledge and may therefore leave out those who hold such knowledge when it comes to accrediting mediators. Such mediators may not need any formal training as they may have gained expertise and experience from long practice and their knowledge of traditions and customs of a particular community. Again, if they are to be considered untrained in certain aspects of that community, the question that comes up is whether the Mediation Accreditation Committee has the expertise or capacity to set the relevant level of requisite expertise or even offer training for subsequent accreditation. These issues may require to be comprehensively addressed by policy makers in order to determine how to create a bridge between formal and informal mediation, especially where the two conflict in application.

The use of ADR mechanisms as contemplated under Article 159 of the Constitution of Kenya should be interpreted in broader terms that not only involve the Court sanctioned mediation but also informal ADR mechanisms especially mediation, negotiation and reconciliation, amongst others.

These are some of the concerns that might need to be addressed if the Judiciary ADR Pilot Scheme is to succeed. Mediation conducted within the community

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<sup>67</sup> The membership consists of: Representatives from the Office of the Attorney General; Law Society of Kenya; Chartered Institute of Arbitrators (Kenya Branch); Kenya Private Sector Alliance; Institute of Certified Public Accountants of Kenya (ICPAK); Institute of Certified Public Secretaries of Kenya; Kenya Bankers Association; Federation of Kenya Employers; International Commission of Jurists (Kenyan Chapter); and the Central Organizations of Trade Unions. ( See Kenya Gazette, Vol. CXVII-No. 17, *Gazette Notice No. 1088*, Nairobi, 20th February, 2015, p. 348..)

context as contemplated under Article 60<sup>68</sup> of the Constitution of Kenya may necessitate incorporation of the informal mediators into the Committee as the carry with them invaluable experience and expertise that the formal mediators may not possess or even obtain through the formal training.

#### **4.3 Enforcement of Mediation Outcomes**

While the formal mediation processes require written mediation agreement or outcome, this may be problematic for informal approaches where these may not take these forms. An informal mediation outcome may take the form of shaking hands, slaughtering a bull or goat, taking solemn oath to keep the promises or just confidential agreements especially between spouses.<sup>69</sup> Arguably, it should be possible under the legal framework to report back to court albeit orally such informal mediation outcome for purposes of terminating the conflicts or even enforcing the outcome where such was the agreement between the parties.

This may create difficulties in recognition, enforcement or even execution of such mediation agreements. The question is, therefore, how broadly a mediation agreement can be defined in order to accommodate informally brokered mediation agreements. It is important to assess whether it is possible to accommodate the issues as perceived in informal ADR practice especially informal mediation. The Judiciary could also review the framework as it is and decide whether a mere recording that the matter has been settled can suffice.<sup>70</sup>

### **5. Conclusion**

The constitution now recognizes in Article 48 that realising access to justice for all Kenyans by the enhanced application of the traditional forms of dispute resolution is essential. Access to justice imperatives to wit: expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies are present in

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<sup>68</sup> One of the principles of land management in Kenya is encouragement of communities to settle disputes through ADR.

<sup>69</sup> See generally J. Kenyatta, *Facing Mount Kenya, The Tribal Life of the Kikuyu*, (Vintage Books Edition, October 1965); See also H.O. Ayot, *A History of the Luo-Abasuba of Western Kenya From A.D. 1760-1940*, (Kenya Literature Bureau, 1979, Nairobi).

<sup>70</sup> See *Republic v Mohamed Abdow Mohamed*, [2013] eKLR, *Criminal Case 86 of 2011*.

mediation in the political perspective. Reforming the judiciary to conform to the spirit of the constitution is also timely and vital. As indicated earlier, Kenyans as a people have not lost the capacity to coexist peacefully, commune together, respect one another, negotiate, forgive and reconcile in resolving their conflicts.

This is essential in not only ensuring access to justice but more importantly in promoting peace. We should bear in mind that justice may not necessarily bring peace and coexistence to a people. Traditional dispute resolution mechanisms can achieve both. They are still a part of the Kenyan society and hence their constitutionalisation. Cultural, kinship and other ties that have always tied as together as one people have not died out. In many parts of the country Kenyans still believe in the principles of reciprocity, common humanity, respect for one another and to the environment. This explains why we still have the cooperative movement, *harambee* and other schemes that are a communal in nature.

Negotiation, mediation and reconciliation have been practiced for many years by traditional African communities'. They are not alien concepts. It is thus correct to say that mediation in the African context was and has been an informal process. Informality of mediation as a conflict resolution mechanism makes it flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable. Similarly, mediation addresses the underlying causes of conflicts preventing them from flaring up later on. Mediation is no longer on trial. It has come of age and has the capacity to resolve conflicts in the Kenyan context. Resolving conflicts through mediation in Kenya is possible. It is a goal that should be harnessed and realized.

## References

Ayot, H.O., *A History of the Luo-Abasuba of Western Kenya from A.D. 1760-1940*, (Kenya Literature Bureau, 1979, Nairobi).

Bercovitch, J., *Mediation Success or Failure: A Search for the Elusive Criteria*, *Cardozo Journal of Conflict Resolution*, Vol.7, p.289.

Bloomfield, D., *Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland*, *Journal of Peace Research*, vol. 32 no. 2 May 1995, pp. 151-164).

Brainch, B., *ADR/Customary Law*, a paper presented at the World Bank Institute for Distance Learning for Anglophone Africa, November 6, 2003.

Chapman, C. & Kagaha, A., "Resolving Conflicts Using Traditional Mechanisms in The Karamoja and Teso Regions of Uganda", Northern Uganda Rehabilitation Programme (NUREP) Briefing, *Minority Rights Group International*, August 2009.

Cloke, K., *The Culture of Mediation: Settlement vs. Resolution*, The Conflict Resolution Information Source, Version IV, December 2005.

Commission on Administrative Justice Act, No. 23 of 2011, Laws of Kenya. (Government Printer, Nairobi, 2011).

Community Land Act, 2016, No. 27 of 2016, Laws of Kenya. Government Printer, Nairobi, 2016).

Constitution of Kenya, 2010 (Government Printer, Nairobi, 2010).

Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches.' Available at 15/10/2017]. Available at <http://dev.mtnforum.org/sites/default/files/publication/files/260.pdf> [Accessed on 3/01/2016].

Environment & Land Court Act, No. 19 of 2011, Laws of Kenya, Revised Edition 2015 [2012]. (Government Printer, Nairobi, 2011).

**Reflections on the Use of Mediation for Access to in Kenya: Maximising on the Benefits of Mediation: Kariuki Muigua** (2021)9(4) *Alternative Dispute Resolution*

Fitzpatrick, D., “Dispute Resolution; Mediating Land Conflict in East Timor”, in AusAID’s *Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific*, (2008), Case Study No. 9. Sourced from <http://www.ausaid.gov.au/publications/pdf>, [Accessed on 24/5/2012].

Gibson, C. and Woolcock, M., ‘Empowerment and Local Level Conflict Mediation in Indonesia: A Comparative Analysis of Concepts, Measures, and Project Efficacy,’ *Policy research working papers*, Vol. 3713, World Bank Publications, 2005.

Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/>(Accessed on 13/10/ 2017).

Haysom, N. & Kane, S., ‘Negotiating natural resources for peace: Ownership, control and wealth-sharing,’ Centre for Humanitarian Dialogue, Briefing Paper, October 2009.

Hazen, S., Environmental Democracy, (<<http://www.ourplanet.com>). [Accessed on 18/01/2016]. Washington DC. Csaba Kiss and Michael Ewing (eds), “Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries,” European Regional Report (published by The Access Initiative Europe.) available at <http://www.accessinitiative.org> [Accessed on 18/01/2016].

Hove, S.V.D., ‘Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,’ *Land Use Policy*, Vol. 23, Issue 1, January 2006, p.10.

<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf>

Human Rights Watch, *World Report 2013*, available at [http://www.hrw.org/sites/default/files/wr2013\\_web.pdf](http://www.hrw.org/sites/default/files/wr2013_web.pdf)[Accessed on

In the Matter of the National Land Commission [2015] eKLR.

Industrial Courts Act, No. 20 of 2011, Laws of Kenya (Government Printer, Nairobi, 2011).



Kenya Gazette, Vol. CXVII-No. 17, *Gazette Notice No. 1088*, Nairobi, 20th February, 2015.

Kenyatta, J., *Facing Mount Kenya, The Tribal Life of the Kikuyu*, (Vintage Books Edition, October 1965).

Land Registration Act, No. 3 of 2012, Laws of Kenya.

Legal Aid Act, No. 6 of 2016, Laws of Kenya (Government Printer, Nairobi, 2016).

Lumerman, P., Psathakis, J., & Ortiz, M., 'Climate Change Impacts on Socio-environmental Conflicts: Diagnosis and Challenges of the Argentinean Situation,' (Initiative for Peacebuilding, Brussels, 2011).

Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) —Conflict Information Consortium, *Beyond Intractability*, University of Colorado, Boulder (July 2003).

Marriage Act, No. 4 of 2014, Laws of Kenya.

Martin Luther King: Excerpt from acceptance Speech by the 1993 Nobel Peace Laureate, Inaugural Celebration address 1994, sources from, <http://www.goote.htm>, (accessed on 5/08/2012).

Mediation (Pilot Project) Rules, 2015, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9<sup>th</sup> October, 2015, (Government Printer, Nairobi, 2015).

Miller, B., 'Political empowerment, local—central state relations, and geographically shifting political opportunity structures: Strategies of the Cambridge, Massachusetts, Peace Movement', *Political Geography*, (Special Issue: Empowering Political Struggle), Vol. 13, Issue 5, September 1994, pp. 393–406.

Mkangi, K., *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at [www.payson.tulane.edu](http://www.payson.tulane.edu). [Accessed on 14/10/2017].

Muigua, K. & Kariuki F., 'ADR, Access to Justice and Development in Kenya,' Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd & 4th July, 2014 at Strathmore University Law School, Nairobi.

Muigua, K., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 3, No. 2, 2015, pp. 64-108.

Muigua, K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 1, (2017), pp. 74-104.

Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, 2015, Nairobi).

Muigua, K., *Resolving Conflicts through Mediation in Kenya*. (Glenwood Publishers Ltd, Nairobi, 2012).

Muigua, K., —Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya. Available at <http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf>

Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*. Available at

Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006).

National Cohesion and Integration Act, 2008, No. 12 of 2008, Revised Edition 2012 [2008].

*National Land Commission Act*, No. 5 of 2012, Laws of Kenya.

Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007).

Oladipo, S.E., 'Psychological Empowerment and Development', *African Journals Online, Vol. 2, No 1, 2009*, p.121.

Penal Reform International, "Access to justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems", *PRI*, (2000), pp. 1 – 196. Sourced from <http://www.gsdr.org/docs>, [Accessed on 03/06/2012].

Republic of Kenya, *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya'*, (the 'Akiwumi Commission') (Government Printer, Nairobi, 1999).

*Republic v Mohamed Abdow Mohamed, [2013] eKLR, Criminal Case 86 of 2011.*

Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at [https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/\\$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledge.pdf](https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledge.pdf) [ Accessed on 08/01/2016].

Sweeney, B., *Training Villagers To Resolve Disputes in Malawi*, an article published on Danish Institute of Human Rights website <<http://www.humanrights.dk/news/training>, (Accessed on 21/5/2010).

The European Code of Conduct for Mediators and Directive 2008/52 [2008] *OJL* 136/3.

The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen). Available at <http://www.jimmenick.com/henhud/hhldph.pdf> [Accessed on 15/10/2017].

United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.

United Nations Development Programme, 'Access to Justice and Rule of Law,' available at [http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_justice\\_law/](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/) [Accessed on 14/10/2017]

*Reflections on the Use of Mediation for Access to in Kenya: Maximising on the Benefits of Mediation: Kariuki Muigua*

[\(2021\)9\(4\) Alternative Dispute Resolution](#)

United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295*.

Wilson, C. & Tisdell, C., 'Conflicts over Natural Resources and the Environment: Economics and Security,' *Working Papers on Economics, Ecology and the Environment, Working Paper No. 86*, September 2003.

## **Arbitration for Construction Disputes in Kenya. Kind Master or Errant Servant?**

*By: Alex Kamau \**

### **Abstract**

*Sustained efforts have and are being made to sustain the effectiveness of Arbitration as a dispute resolution mechanism in Kenya and internationally. Its centrality as the most effective consensual mechanism that delivers final and binding decisions that have the capability of enforcement by local and international courts across different jurisdictions is not in doubt. Arbitration has additional onerous duties to take into consideration, observe and respect party autonomy, rules of natural justice, public policy and in some jurisdictions components of civil procedure rules. In this quest, real and perceived inefficiencies and bottlenecks are bound to be apparent. This paper traces the journey to prominence of arbitration as the preferred construction dispute resolution mechanism in Kenya, its effectiveness and challenges. It further proposes possible interventions to enhance resolution of construction disputes.*

### **1.0. Introduction**

Kerley, Hames and Sukys in their book ‘Civil litigation’<sup>1</sup> shortly define Alternative Dispute Resolution (ADR) as any means of settling a dispute other than through a decision of the court. ADR advantages outweigh its disadvantages in comparison to traditional litigation, hence its ordination as an alternative to litigation or no less as being more appropriate<sup>2</sup>. Propositions such as the those contained in the Woolf report<sup>3</sup> or the Roscoe pound<sup>4</sup> and Owen fiss<sup>5</sup> discourses lay the case for or against the promotion of

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<sup>1</sup> Kerley, P., Hames, J.B., Suyks, P.A., (2009) *Civil Litigation*. Fifth Edition. Delmar, Cengage Learning – pp. 11

<sup>2</sup> Fenn, P., (2002) *Introduction to Civil and Commercial Mediation*. Workbook on Mediation, Chartered Institute of Arbitrators, London. pp. 50-52

<sup>3</sup> Woolf, H. (1996)., *Access to justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales*. London, HMSO

<sup>4</sup> Pound, R. (1906), *The causes of popular dissatisfaction with the Administration of Justice* – Presented at the annual Convention of the American Bar Association, 29 ABA Report 1 395 – 417.

<sup>5</sup> Owen, F. (1984), *Against Settlement*, 93 Yale L.J. 1073

ADR and thus a sound reference point to contextualize domestic efforts to promote ADR through Constitutional, legislative and institutional frameworks. Theoretically at least, ADR is touted as a panacea to counteract the perhaps unintended, inherent demerits associated with litigation such as being too costly, prone to formalities and procedural technicalities, lack of privacy, delays, lack of party control as the courts sets the timetable and lack of technical expertise in disputes of specialized nature – such as in construction<sup>6</sup>.

## **2.0. Construction Industry in Kenya**

With a contribution of about 6% to Kenya's Gross domestic Production<sup>7</sup>, the construction industry plays a critical role in the greater macroeconomic model for the country. With a steady population growth and the Kenya's government quest to transition into a developed country status, there is increased need for infrastructure and building construction. This has been demonstrated with recent projects such as the Standard Gauge Railway, the Lamu port project, Nairobi expressway and numerous road projects across the country. The recent Big 4 Agenda economic blueprint must also be supported directly and indirectly through construction activities. There is thus a strong link between the country's economic performance and the state of the construction industry. A layman's quick pulse check of the performance of the economy is sometimes checking container port traffic for how many TEU's<sup>8</sup> of clinker and steel are imported into the country.

## **3.0. Disputes in the Construction industry**

Construction projects are riddled with an intricate combination of activities and stakeholders. They also play host to a labyrinth of opposing commercial interests between the parties. It is as a result, reputed for its proclivity to generate disputes requiring third party resolution. Disputes arise when conflicts become altercations<sup>9</sup>. Conflict itself is expected in all situations where different parties are incompatible<sup>10</sup>. Disputes in the industry range from determination of whether parties have a contract, defective works and standard of workmanship, quality of materials used, clarification of

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<sup>6</sup> Muigua K., and Kariuki F., (June 2015) *Alternative Dispute Resolution, Access to Justice and Development in Kenya*. Strathmore Law Journal. p. 9 - 10

<sup>7</sup> Kenya National Bureau of Statistics, (2020). *Economic Survey 2020*. Nairobi, KNBS

<sup>8</sup> Twenty-foot Equivalent Unit used to determine cargo capacity for containers ships and terminals

<sup>9</sup> Hughes W., Champion R. and Murdoch J., *Construction Contracts: Law and Management*, 5<sup>th</sup> Edn, Routledge, 2015

<sup>10</sup> Tjosvold, D., *The Conflict-Positive Organization*. Addison-Wesley, Massachusetts, 1992

duties and responsibilities, dishonoured and or mis-timed applications for extension of time, uncertified claims for direct loss and or expense, project delays and diligent progress, contested deductions and or disputed amounts of liquidated damages, dishonoured or disputed or delayed payments and overall interpretation of contract terms<sup>11</sup>. Other factors contributing to the proliferation of disputes in the construction industry include behavioural aspects of intransigent parties, pride, ignorance, preconceptions and misconceptions about roles amongst project teams as well as the idiosyncratic nature of technology and techniques used in construction and the occasional *sui generis* points of law requiring interpretation.<sup>12</sup> Once disputes have crystalized, often times the construction contract will stipulate the resolution mechanism. Parties are expected to explore amicable settlement before reference to a resolution mechanism. Future business interests and long term relationships are a catalyst resolution before reference.

#### **4.0. Construction Contracts and Standard Forms in Kenya**

Simply put, a Contract is a promise enforceable by law<sup>13</sup>. In Construction Contracts, obligations and responsibilities of the contracting parties can be extremely complex but to a large extent remain unchanged from one project to another. Standard Forms of Contract were thus developed in order to increase familiarity, consistency, certainty and to help make the contracts fair, just and equitable<sup>14</sup>. In Europe, and the United Kingdom Standard forms were produced as early as the nineteenth century. For instance, the RIBA<sup>15</sup> form was produced towards the end of the nineteenth century and that was followed by the RIAI<sup>16</sup> Articles of Agreement and Schedule of Conditions of Building Contract. In civil engineering works, the ICE<sup>17</sup> form was first issued in the United Kingdom in 1945<sup>18</sup>.

In Kenya, there are three commonly used standard forms of contract. They are The Agreement and Conditions for Building Works used by private sector players in building

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<sup>11</sup> Adriaanse, J., *Construction Contract Law*, 4<sup>th</sup> Edn, Palgrave, 2016

<sup>12</sup> Hughes W., Champion R. and Murdoch J., *Construction Contracts: Law and Management*, 5<sup>th</sup> Edn, Routledge, 2015

<sup>13</sup> Peel, E. and Treitel, G., (2015). *The law of Contract*. 14<sup>th</sup> ed. London: Sweet & Maxwell/Thomson Reuters, para 1-001

<sup>14</sup> Bunni, N.G., *Risk and Insurance in Construction*, 2<sup>nd</sup> edn, Spon Press, 2003, at Pg. 8

<sup>15</sup> Royal Institute of British Architects

<sup>16</sup> Royal Institute of the Architects of Ireland

<sup>17</sup> Institution of Civil Engineers

<sup>18</sup> Bunni, N.G., *Risk and Insurance in Construction*, 2<sup>nd</sup> edn, Spon Press, 2003, at Pg. 8

construction projects produced by the JBC<sup>19</sup>; The FIDIC conditions, dating back to 1987, produced by the International Federation of Consulting Engineers, used for civil engineering projects and projects involving multilateral development banks and international players; the Standard Tender Documents Suite<sup>20</sup> (STD), produced by the Public Procurement Regulatory Authority (PPRA) for use by government agencies within the Republic of Kenya<sup>21</sup>.

### **5.0. Contractual Dispute Resolution Framework in Kenya**

The 1999 version of the JBC standard form of contract has been widely used in the private sector. The form is currently undergoing a revision and a revised version is expected in the near future. Part 9 of this paper reviews the dispute resolution proposals contained in the draft version released in 2020. This part reviews the dispute resolution framework of the 1999 version. Arbitration is the primary mode of dispute resolution on this standard form as per the provisions of its clause 45. The standard form however at clause 45.4 imposes a mandatory requirement for parties to attempt to settle the dispute(s) amicably, with or without the assistance of third parties, before commencing any arbitral proceedings. Arbitral proceedings commence only after practical completion, disputed or otherwise, or abandonment of the works<sup>22</sup>. It also makes exceptions for few instances where the proceedings can be commenced before practical completion in what can be interpreted as emergency arbitration<sup>23</sup>.

The rationale for provisions requiring proceedings at the end of the projects is to allow works to continue without the progress being bogged down by the rigors or arbitral proceedings. The corollary effect is that if a dispute arises too early in the project, and unless the dispute warrants abandonment of the works, then parties are forced to continue working together and collaborating until practical completion in order to refer their matter for resolution, however strained their relationship as a result of the dispute. The STD suite has also undergone substantial revisions as contained in the February 2021 version. Part 9 of this paper reviews the dispute resolution framework contained in the February 2021 version. This part reviews the dispute resolution framework of the

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<sup>19</sup> The Joint Building Council, a registered Company founded by The Architectural Association of Kenya (AAK) and the Kenya Association of Building and Civil Engineering Contractors (KABCEC) in 1980.

<sup>20</sup> Refers to the 2021 revised edition which contains 23 Standard Forms for various categories of work.

<sup>21</sup> February 2021 revision

<sup>22</sup> Joint Building Council, Kenya (1999), *Agreement and conditions of contract for building works*. Clause 45.7

<sup>23</sup> *Ibid* Clause 45.6



January 2007 which has been in use. The STD standard form also had Arbitration as the default dispute resolution mechanism as provided at its clause 37. This provision was largely similar to the JBC provision in most respects except in few instances. The notable differences are while the JBC restricts the nominating body for appointment of arbitrators to the Architectural association of Kenya, the STD includes other nominating bodies such as the CIArb<sup>24</sup>, IQSK<sup>25</sup>, ACEK<sup>26</sup> and IEK<sup>27</sup> and also that the STD framework could go further to require proof that amicable settlement was attempted.

Finally, the paper considers the framework of the FIDIC 1999 edition (red book) standard form which has had wider use in Kenya than its successor the 2017 edition. Primarily, as provided at clause 20, the 1999 version utilized a pre-appointed Dispute Resolution board (DAB) as the first port of call to resolve disputes. The DAB renders its reasoned decisions within 84 days of reference that are binding (*not final*) and must be given effect by the parties. In the event of any dissatisfaction, properly notified, parties then attempt amicable settlement with the option of referring the matter to arbitration for final determination. The envisaged Arbitration does not have to wait for project completion, termination or abandonment. In the 2017 edition, the FIDIC suite shifts its focus to a more proactive mechanism that promotes dispute avoidance than resolution and provides for a transformed Dispute Adjudication/Avoidance Board (DAAB) that has wider powers to provide informal assistance to the parties to avoid disputes.

## **6.0. Significance of Arbitration in Construction Disputes in Kenya**

The existing contractual framework place Arbitration at the centre of construction dispute resolution in Kenya. Construction projects are usually capital intensive and their successful completion is critical in order to realize consequential financial and economic returns for the stakeholders involved. As a result, the need for an effective dispute resolution mechanism that is timely and effective is inviolable. In the 2020 ease of doing business<sup>28</sup> ranking, Kenya was ranked position 56 worldwide and 3<sup>rd</sup> in Africa behind Rwanda and Morocco. Two key parameters evaluated in the report under two thematic areas namely “getting a location” and “operating in a secure business environment” were *dealing with construction permits* and *enforcing contracts* respectively. The latter

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<sup>24</sup> Chartered Institute of Arbitrators (Kenya branch)

<sup>25</sup> Institute of Quantity Surveyors of Kenya

<sup>26</sup> Association of Consulting Engineers of Kenya

<sup>27</sup> Institution of Engineers of Kenya

<sup>28</sup> World Bank Group. (2020) *Doing Business 2020: Comparing business regulations in 190 economies*

parameter considers time and costs involved in resolving commercial disputes and the quality of judicial processes; further emphasizing the need for a robust dispute resolution mechanism.

Arbitration is a tried and tested age-old mechanism that pre-dates even the roman times, the *Woolly Mammoth Steak dispute* in the story of Ug and Ig bearing witness. Its centrality as an alternative dispute resolution perhaps stems from the sound legislative grounding it has gained over time. This makes its practice across jurisdictions certain, uniform and legitimate. In Kenya, the legal regime governing arbitration was introduced with the advent of colonialism through the arbitration ordinance 1914, a reproduction of the English arbitration act 1887<sup>29</sup>. This was replaced by Arbitration Act 1968 which was a replica of the English arbitration Act 1950. Kenya later adopted the UNCITRAL model arbitration law leading up to the repealing of the 1968 Act and enactment of Arbitration Act 1995 and the arbitration rules of 1997 (Arbitration Rules), which are currently in force in Kenya. the 1995 Act was almost a mirror copy of the model law but was amended in 2009 to encompass recent developments in arbitration practice and procedure. Arbitration is also backed by a number of multilateral and bilateral conventions such as the Geneva Protocol on Arbitration Clauses<sup>30</sup>, the Geneva Convention on the execution of foreign Arbitral Award<sup>31</sup> and the New York convention<sup>32</sup>

Other factors informing the centrality of arbitration include party autonomy, confidentiality, privacy, its consensual, less expensive, semi-formal, faster than litigation, limited grounds of appeal and interference by the courts, minimum emphasis on procedural formalities, finality of arbitral awards, binding nature of arbitral awards, less adversarial thus preserving relationship, flexibility in filings and choice of the tribunal<sup>33</sup>.

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<sup>29</sup> Muigua, K., (March 2014) *Emerging Jurisprudence in the law of Arbitration in Kenya : Challenges and Promises*

<sup>30</sup> *Geneva Protocol on Arbitration Clauses*, Geneva, September 24, 1923

<sup>31</sup> *Geneva Convention on the execution of foreign Arbitral Awards*, Geneva, September 26, 1927

<sup>32</sup> *Convention on the Recognition and Enforcement of foreign Arbitral Awards*, New York, June 10, 1958

<sup>33</sup> Muigua K., (March 2014), *Emerging Jurisprudence in the law of Arbitration in Kenya : Challenges and Promises*.

## **7.0. Performance of Arbitration in construction dispute resolution. An Assessment.**

The proof of the pudding is in the eating hence the necessity for a review of how arbitration has served the settlement of construction disputes in Kenya. Is it still fit for purpose? Is it still attended by the advantages that historically made it the suitable alternative? Arbitral effectiveness is the extent to which arbitration fulfils disputants' aspirations in terms of the time efficiency, cost-effectiveness, and quality of the award<sup>34</sup>. A core tenet in arbitration is privacy of the process. While suitable for the parties, privacy also makes it difficult to assess the performance and effectiveness of arbitration.

It is a worthwhile consideration for concerted efforts to encourage parties without a premium on privacy, to 'lift their veil' and allow accessibility to useful data capable of review. Indeed, various institutions arbitral rules<sup>35</sup> incorporate this nudge among the items parties can agree on, in order to waive confidentiality and allow the arbitral institution to publish their awards preferably while retracting identification and other sensitive information. As a result, a credible account of the performance of arbitration has been lacking save for reliance on anecdotal recounts from parties and their representatives. Notwithstanding this constraint, a recent study by Abwunza (2020)<sup>36</sup> on the development of a framework for effective construction arbitration in Kenya proffers insightful feedback, on the status of construction disputes arbitration. Some of the key findings are highlighted below.

### **7.1. Time**

That arbitration of construction disputes in Kenya takes inordinately long to be concluded has been a general postulation, hitherto unproven but nevertheless undeniable. This is exacerbated by the contractual imperative for proceedings to commence only after practical completion or abandonment of the works. Granted, time overrun has not been a unique problem neither to Kenya nor to Arbitration of construction disputes. International studies have indicated that Arbitration generally takes much longer than other ADR mechanisms. It was shown that whilst other mechanisms take days or weeks, arbitration can last several months or years (Cheung et

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<sup>34</sup> Abwunza A.A., (2020) *Development of a framework for effective construction Arbitration: A Comparative Study of Construction Disputes in Kenya*, PhD thesis, Jomo Kenyatta University of Agriculture and Technology, Nairobi, at p.15

<sup>35</sup> See : - International Center for Dispute Resolution (40.4); Chartered Institute of Arbitrators (34[5]); London Center for international Arbitration (30.3); Nairobi Center for international Arbitration (34); Singapore International Arbitration Center (39.2)

<sup>36</sup> Abwunza A.A., (2020) *Development of a framework for effective construction Arbitration: A Comparative Study of Construction Disputes in Kenya*, PhD thesis, Jomo Kenyatta University of Agriculture and Technology, Nairobi

al., 2002 cited in Abwunza, 2020)<sup>37</sup>. A 2010 world bank survey<sup>38</sup>, found that in Kenya, arbitration takes an average of one year and seven months from the filing of an application of enforcement to the final writ of execution attaching assets, a timeline significantly higher than a world average of 179 days, noting that mediation cases on average are settled within thirty days. It further noted that on average, it takes about 35 weeks to enforce an arbitration award rendered in Kenya, from the time of filing an application to the time a writ of execution attaching assets (assuming there is no appeal), and 43 weeks for a foreign award. Muigua (2012)<sup>39</sup> notes that litigious parties exacerbate the situation through challenging awards in court.

Without doubt other factors such as the complexity of a dispute, disputed amounts, number and diversity of parties influence the amount of time it takes to resolve a dispute. Time efficiency must however be measured in reference to time taken to resolve similar disputes using other dispute resolution techniques<sup>40</sup>. Parties have confirmed that in general terms the duration taken to resolve their disputes exceeded their expectations<sup>41</sup> with some parties indicating that they felt no difference between arbitration and litigation as regards time.<sup>42</sup>

## 7.2. Costs and Expenses

Costs and expenses of an arbitration include the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration<sup>43</sup>. With time related charges and expenses such as the tribunal's fees and costs of the venue, it follows that there is a proportional relationship between costs and

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<sup>37</sup> Cheung, S. O., Suen, H. C. H., & Lam, T. I. (2002). *Fundamentals of Alternative Dispute Resolution Processes in Construction*. Journal of Construction Engineering and Management, 128(5), 409-417. doi:10.1061/(ASCE)0733-9364(2002)128:5(409), Quoted in: Abwunza A.A., *Development of a framework for effective construction Arbitration: A Comparative Study of Construction Disputes in Kenya*, PhD thesis, Jomo Kenyatta University of Agriculture and Technology, Nairobi, 2020 p. 4

<sup>38</sup> The World Bank Group. (2010). *Investing Across Borders: Indicators of foreign direct investment regulation in 87 economies* [http://web.worldbank.org/archive/website01354/WEB/IMAGES/IAB\\_INVE.PDF](http://web.worldbank.org/archive/website01354/WEB/IMAGES/IAB_INVE.PDF) p.121

<sup>39</sup> Muigua, K. (2012). *Settling Disputes Through Arbitration in Kenya* (2nd ed.). Nairobi: Glenwood Publishers Ltd

<sup>40</sup> Abwunza A.A., (2020) *Development of a framework for effective construction Arbitration: A Comparative Study of Construction Disputes in Kenya*, PhD thesis, Jomo Kenyatta University of Agriculture and Technology, Nairobi, at p.29

<sup>41</sup> *Ibid*, at p.144

<sup>42</sup> *Ibid*, at p.145

<sup>43</sup> Laws of Kenya, *Arbitration Act No. 4*, 1995. Sec. 32B

expenses of an arbitration to the time taken to reach a settlement. Abwunza (2020)<sup>44</sup> notes for equity and arbitral effectiveness, there should be a balance between costs incurred and the arbitral process. Arbitration is intended as a cheaper alternative to litigation. Litigation being an expensive judicial process fraught with institutionalized formalities, multiple layers of party representation and other public sector rigidities. Ironically, Arbitration has become increasingly too formal and has adopted processes and procedures akin to the judicial process. A corollary to this practice is an increased involvement of lawyers and as a result increase in cost and expenses. Cost-effectiveness as an attribute of arbitral effectiveness generated a considerably higher ratio of negative-positive sentiments when pitted against other attributes<sup>45</sup>.

### **7.3. Quality of awards.**

Abwunza (2020)<sup>46</sup> states that a satisfactory award is one that is valid within the juridical context and is fair and acceptable to both parties. In his study, quality of awards generated the most negative sentiments amongst the respondents<sup>47</sup>. It was evident in the findings that there was dissatisfaction relating to the quality of the awards. This parameter is nonetheless a subjective one, since invariably the losing party will incline to criticising the quality of the award, while the winning party may ignore glaringly poor quality awards. This dichotomy in reception is however no reprieve to the quest to ensure tribunals deliver quality awards. Without underestimating the role of the process, the tribunal's award is the most important outcome that the parties look forward to. It determines the parties' rights in a final and binding nature, assuming no party challenges the award in accordance with Act<sup>48</sup>. An award as such should be of good quality to be able to withstand any challenges to it but more importantly to settle a dispute fairly. Poor quality awards stem from erroneous understanding of facts, unconvincing and stereotypical reasoning for conclusions reached, incorrect interpretation of applicable legal aspects, poor grasp of presented evidence and awards slovenly drafted.

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<sup>44</sup> Abwunza A.A., (2020) *Development of a framework for effective construction Arbitration: A Comparative Study of Construction Disputes in Kenya*, PhD thesis, Jomo Kenyatta University of Agriculture and Technology, Nairobi, at p.27

<sup>45</sup> Abwunza A.A., *Development of a framework for effective construction Arbitration: A Comparative Study of Construction Disputes in Kenya*, PhD thesis, Jomo Kenyatta University of Agriculture and Technology, Nairobi, 2020, at p.140

<sup>46</sup> *Ibid* at p.32

<sup>47</sup> *Ibid* at p.139

<sup>48</sup> Laws of Kenya, *Arbitration Act No. 4*, 1995. Sec. 35

## **8.0. Has Arbitration been effective in resolving construction disputes?**

Inferences from the foregoing observations support a conclusion that arbitration as a means of resolving construction disputes in Kenya has plenty of room for improvement. To its credit, participants in the research expressed their confidence and likelihood to still prefer arbitration for future settlements<sup>49</sup>. This is an interesting take from parties who concede that the proceedings were not effective in cost, time and quality. The view is consistent with general global sentiments that the attractiveness of arbitration as an effective dispute resolution mechanism has been waning; bedevilled by increased judicialization and erosion of its historical core advantages. The discourse then shifts to how arbitration can be reinvigorated to achieve its core objectives and make it great again.

## **9.0. Moving forward**

This section explores some proposals for possible ways that arbitration of construction disputes in Kenya can be enhanced to meet its objectives and serve the industry better. It first proposes development of an industry-specific set of arbitral rules, promotion of fast-track arbitration as a default style of construction dispute resolution and adoption of a multi-layered contractual dispute resolution framework. Although not canvassed within its scope, this paper suggests a possibility of legal reform to inculcate the requirements of time and cost efficiency as an overriding duty to both the parties and the tribunal, akin to the revered ‘Section 33 duty’ of the English Act<sup>50</sup>.

### **9.1. Industry Specific Arbitral rules**

As elsewhere noted, arbitration of construction disputes in Kenya is grounded in the contractual framework of the two widely used standard forms of contract, the JBC (*now JBCC*) and the public sector STD. In the former, where parties fail to agree on an arbitrator, the applying party can request the appointment to be made by the chairman or vice chairman of the Architectural Association of Kenya (AAK)<sup>51</sup>. In the latter standard form, the appointing authorities are in addition to the AAK, CIArb<sup>52</sup>, IQSK<sup>53</sup>,

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<sup>49</sup> Abwunza A.A., (2020) *Development of a framework for effective construction Arbitration: A Comparative Study of Construction Disputes in Kenya*, PhD thesis, Jomo Kenyatta University of Agriculture and Technology, Nairobi, at p.149

<sup>50</sup> Arbitration Act 1996 (c.23) London: HMSO

<sup>51</sup> The 2020 draft standard form adds to this the CIArb, IQSK, IEK, Nairobi Center for International Arbitration and the Institution of Construction Project Managers of Kenya.

<sup>52</sup> Chartered Institute of Arbitrators, Kenya branch.

<sup>53</sup> Institute of Quantity Surveyors of Kenya.

ACEK<sup>54</sup> and IEK<sup>55</sup>. The dominant arbitral rules used to administer proceedings are the CIArb rules. The rules are continuously updated and revised to capture changing requirements and improvements to the administration of arbitral proceedings. The latest version of the rules came to force in October 2020 to replace the 2012 version. The 2020 version marks a significant shift from the 2012 version, the update introduces a framework for fast-track arbitration, provisions for virtual hearings as well as consolidation and stay of proceedings by the parties to allow for settlement. These deserved updates somewhat align with this paper's proposals to alleviate the challenges of time and cost in arbitration of construction disputes.

Construction is an esoteric field with unique features and characteristics. Resultant disputes often lock up huge amounts of money and capital. As such stakeholders in this industry are obligated to develop arbitral rules that aptly considers all the unique nooks and crannies that would ensure arbitration of construction disputes proceed smoothly and efficiently. It is the trend other construction industries have embraced. In the United States, the American Arbitration Association in conjunction with a diverse group of leading construction industry and related organizations developed the Construction Industry Arbitration Rules and Mediation Procedures to specifically govern procedures for construction industry disputes. In England, the society of construction arbitrators in conjunction with the joint contracts tribunal publishes the construction industry model arbitration rules, christened the CIMAR rules, that streamlines the uniqueness of construction disputes with the English arbitration act 1996. Development of similar customized rules will boost and create a dispensation that focusses arbitration of construction disputes towards a direction that tightens loose ends that create time and cost inefficiency. They can also be optimized to improve the quality of awards. Rules have no statutory basis and depend on voluntary adoption and inclusion into contracts to be effective. The proposed rules should confer the tribunal additional process control and limit avenues for parties to engage in practices that could render the proceedings to time and cost inefficiencies, bearing in mind that there's always the possibility that it may be in the interest of one of the parties that the proceedings are delayed or are costly.

The rules must observe the fundamental tenets of arbitration such as party autonomy. While care should be taken to ensure that all parties get a reasonable opportunity to be heard and respond to their counterparty, rules that deliberately address areas of popular

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<sup>54</sup> Association of Consulting Engineers of Kenya.

<sup>55</sup> Institution of Engineers of Kenya.



dissatisfaction with the current arbitration shall certainly be consented to by parties and stakeholders in the industry.

## **9.2. Adoption and Normalization of Fast-track arbitration**

Lord Denning in a series of court of appeal decisions<sup>56</sup> claimed that “cashflows is the life blood of the building industry”. In a rejoinder Lord Diplock insisted this in fact was not special to the building industry by stating that “Cashflow is the life blood of the village grocer too<sup>57</sup>”. It is settled however that substantial resources are tied up in disputes and timely resolution is paramount not less in construction disputes. A world bank feature on mediation<sup>58</sup> showed that the average time taken to settle cases through mediation was noted as 66 days and projected the monetary value of cases lodged in mediation to Kenya Shillings 10.7 billion, it noted that each time a dispute was resolved it effectively released money back to the economy, and in such a manner mediation had helped release Kenya shillings 770 million locked up in disputes. In a 2015 Queen Mary University Survey<sup>59</sup> speed and cost were ranked as the worst characteristics of international arbitration. The survey sought to establish the acceptability of simplified procedures as a way of addressing the time and cost issues for claims under a certain value in institutional rules. 92% of respondents were in favor of introduction of such rules while 33% of them preferred such rules be mandatory and 59% preferred them to be optional. The desire for timely resolution seems to persist in the international scene as in 2019, the same Queen Mary University Survey found that the highly held characteristic of an efficient arbitrator remained issuing an award within a reasonable time<sup>60</sup>. Over time, many arbitral institutions have introduced the mechanism of expedited or fast track arbitration to provide parties the choice to adopt a mechanism that guarantees them faster resolution of their disputes. The American Arbitration Association’s International Center for Dispute Resolution provides for expedited procedures at Article 1(4) for claims not exceeding US\$500,000 requiring delivery of award under this procedure to be rendered within 30 days of closing of the hearing or time of final submission. The rules further mandate all claims under US\$100,000 to be dispensed with by way of written submissions only. The China International Economic

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<sup>56</sup> See *Dawnays Ltd v F.G. Minter Ltd, and Trollope & Colls Ltd* [1971] 2 Lloyd’s Rep. 192

<sup>57</sup> See *Gilbert-Ash v Modern Engineering (Bristol) Ltd.* [1973] 3 WLR 421 at page 444D

<sup>58</sup> <https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> Accessed on 20th August 2021

<sup>59</sup> Queen Mary University of London and White & Case, *International Arbitration Survey, Improvements and Innovations in International Arbitration*, 2015.

<sup>60</sup> Queen Mary University of London and Pinsent Masons, *International Arbitration Survey – Driving Efficiency in International Construction Disputes*, 2019.



and Trade Arbitration Commission provides for summary procedure at Article 56 to 64 for claims not exceeding RMB5,000,000 requiring delivery of an award under this procedure to be rendered within 90 days of the date the tribunal was formed. The Hong Kong International Arbitration Center also provides for expedited procedures at Article 42 for claims not exceeding US\$50,000 requiring delivery of an award under this procedure within one month of the hearing or, in the case of documents only arbitrations, within one month of the receipt of the last document or the holding of an informal hearing whichever is later. The International Chamber of Commerce rules also allow for expedited procedures for claims below US\$3,000,000 requiring delivery of award under this procedure to be rendered within 6 months from the date of the case management conference. The Singapore International Arbitration Centre provides for expedited procedures at Article 5 for claims below S\$6,000,000 requiring delivery of award under this procedure to be rendered within six months from the date when the Tribunal is constituted. The Vienna International Arbitral Center rules also allow for expedited procedures without a limit as to the amounts but requires delivery of award under this procedure to be rendered within 6 months of the transmission of the file. Notable arbitral institutions yet to adopt expedited procedures in their rules include the Kigali International Arbitration Centre, the London Centre of International Arbitration and the Nairobi Centre for International Arbitration.

This paper proposes adoption and normalization of fast-track arbitration in arbitration of construction disputes in Kenya. The proposition cannot be made at a better time. As noted, the dominant arbitral rules used in Kenya are the Chartered Institute of Arbitrators rules. These rules did not until the 2020 revision provide for a fast-track arbitration framework. In the 2020 revision, parties can now agree to adopt expedited procedures for their dispute. They also provide for opt-in fast-track arbitration option to which the claimant can apply to be adopted for claims not exceeding Kshs.10,000,000. The longest proposed timelines for resolution under these procedures amounts to approximately 87days from the date of application for appointment of the tribunal. In exceptional circumstances the timelines may be extended but, in any case, the rules emphasize that the tribunal and the parties should act in spirit of the rules governing Expedited Procedures and make every effort to expedite the process. Adoption and Application of these rules by parties and tribunals involved in construction disputes will be a game changer. However, the building industry involves capital intensive ventures and the monetary limits set out for the opt-in fast track arbitration may not widen the net wide enough to capture majority of the disputes in the building industry. As argued in part 9.1, customized construction industry arbitral rules can consider and propose amounts that widen this net, tighter timelines and cost-effective procedures.

### **9.3. Multi-tier dispute resolution mechanism**

It is proposed an introduction of a multi-tiered mechanism. This will aim to have a preliminary dispute resolution mechanism that produces binding decisions in a faster and cost-effective manner. Dissatisfied parties can later seek final reviewing in arbitration. Parties will have an opportunity to overcome the cost and time shortcomings inherent in the current regime of construction dispute resolution. As if on cue, the two main standard forms of contract administering building projects in Kenya, except those contracted through FIDIC, have recently undertaken major revisions to the dispute resolution mechanism clauses that are aligned to this proposal.

The JBCC standard conditions (*draft, 2020*) proposes introduction of adjudication as the first port of call for arising disputes. Construction adjudication can be defined as an interim dispute resolution procedure by which parties submit their dispute to an independent third party for a decision<sup>61</sup>. The requirement proposed at clause 44 is mandatory for parties to the contract and applicable for all disputes that arise under or in relation to their contract. Only matters earmarked as ‘arbitration events’ under clause 45 shall be exempted from adjudication. An adjudicator’s decision shall be binding (*not final*) on the parties. It is only when a party shall be dissatisfied with a decision that the dispute can subsequently be referred to arbitration and even then, only after a mandatory intermediary attempt to settle the matter amicably. The longest proposed timeline before referral of a dispute to arbitration is approximately 104 days from the date of the dispute notice. Save for matters relating to emergency arbitrations, this standard form still prefers arbitration proceedings to be commenced after practical completion or termination of the contract unless the parties agree otherwise in writing. Thus, in the event a party is dissatisfied with an adjudicator’s decision, they are nonetheless bound by it and must comply with it until it is revised by the arbitrator.

The STD standard conditions on its part, has adopted a format that draws a distinction between claims and disputes; the former being entitlements under a contract and the latter as only arising after the former has been rejected, disputed or ignored. The STD therefore outlines at clauses 20.1 and 20.2 how the contractor’s and procuring entity’s claims should be considered. In the event a dispute arises, the desired initial procedure is an attempt for amicable settlement. The referring party is also given the liberty to institute arbitration proceedings either when the amicable settlement fails or in any case after 60days from the day on which a notice for claim was given. Parties can agree to

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<sup>61</sup> Pickavance J., *A Practical Guide to Construction Adjudication*, 2<sup>nd</sup> Edition, Wiley Blackwell

deactivate the latter option. Unlike its predecessor the revised STD standard form allows arbitration to be commenced prior to or after completion of the works.

The effectiveness of the above provisions, specifically the proposed adjudication mechanism, is yet to be seen, leave alone implemented. Players will have to quickly learn the required processes and procedure to achieve the overall intention to introduce a speedy mechanism for settling disputes in construction on a binding albeit provisional basis that supplements and co-exists with the existing more final arbitration.

### **10.0. Conclusion**

The search for a framework for the most effective arbitration has become the industry's holy grail. As the dragnet closes in on such a framework in the construction industry, robust rules, fast-track arbitration, interim adjudication are indeed low hanging fruits that ought to be latched upon, advocated and rigorously promoted. Finally, ways of improving quality of awards can be achieved by improvement of the quality of the pool of specialists populating various panels. Adequate training, practical exposure and monitoring should be strived for. Provisions<sup>62</sup> in arbitral rules requiring tribunals to submit their awards for scrutiny as to form and substance without affecting the tribunals liberty of decisions should be considered to improve general quality of awards.

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<sup>62</sup> Such as International Chamber of Commerce rules, Art. 34; Kigali International Arbitration Center, Art. 38; Singapore International Arbitration Center, Art. 32

## References

Abwunza A.A., (2020). *Development of a framework for effective construction Arbitration: A Comparative Study of Construction Disputes in Kenya*, PhD thesis, Jomo Kenyatta University of Agriculture and Technology, Nairobi

Adriaanse, J., (2016) *Construction Contract Law*, 4<sup>th</sup> Edn, Palgrave

Arbitration Act 1996 (c.23) London: HMSO

Bunni, N.G., (2003) *Risk and Insurance in Construction*, 2<sup>nd</sup> edn, Spon Press

Cheung, S. O., Suen, H. C. H., & Lam, T. I. (2002). *Fundamentals of Alternative Dispute Resolution Processes in Construction*. *Journal of Construction Engineering and Management*, 128(5), 409-417. doi:10.1061/(ASCE)0733-9364(2002)128:5

*Dawnays Ltd v F.G. Minter Ltd, and Trollope & Colls Ltd* [1971] 2 Lloyd's Rep. 192

Fenn, P., (2002) *Introduction to Civil and Commercial Mediation*. Workbook on Mediation, Chartered Institute of Arbitrators, London.

*Gilbert-Ash v Modern Engineering (Bristol) Ltd*. [1973] 3 WLR 421

<https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> Accessed on 20th August 2021

Hughes W., Champion R. and Murdoch J., (2015) *Construction Contracts: Law and Management*, 5<sup>th</sup> Edn, Routledge

Joint Building Council, Kenya (1999), *Agreement and conditions of contract for building works*.

Kenya National Bureau of Statistics, (2020). *Economic Survey 2020*. Nairobi, KNBS

Kerley, P., Hames, J.B., Suyks, P.A., (2009) *Civil Litigation*. Fifth Edition. Delmar, Cengage Learning

Laws of Kenya, *Arbitration Act No. 4*, 1995

*Arbitration for Construction Disputes in Kenya. Kind Master or Errant Servant? Alex Kamau*

(2021) 9(4) *Alternative Dispute Resolution*

Muigua K., (March 2014) *Emerging Jurisprudence in the law of Arbitration in Kenya : Challenges and Promises.*

Muigua, K. (2012). *Settling Disputes Through Arbitration in Kenya* (2nd ed.). Nairobi: Glenwood Publishers Ltd

Muigua, K., and Kariuki, F., (June 2015) *Alternative Dispute Resolution, Access to Justice and Development in Kenya.* Strathmore Law Journal.

Owen, F. (1984), *Against Settlement*, 93 Yale L.J. 1073

Peel, E. and Treitel, G., (2015). *The law of Contract.* 14<sup>th</sup> ed. London: Sweet & Maxwell/Thomson Reuters

Pickavance J., (2016) *A Practical Guide to Construction Adjudication*, 2<sup>nd</sup> Edition, Wiley Blackwell

Pound, R. (1906), *The causes of popular dissatisfaction with the Administration of Justice – Presented at the annual Convention of the American Bar Association*, 29 ABA Report 1 395 – 417.

Queen Mary University of London and Pinsent Masons, (2019) *International Arbitration Survey – Driving Efficiency in International Construction Disputes*

Queen Mary University of London and White & Case, (2015) *International Arbitration Survey, Improvements and Innovations in International Arbitration*

The World Bank Group. (2010). *Investing Across Borders: Indicators of foreign direct investment regulation in 87 economies*  
[http://web.worldbank.org/archive/website01354/WEB/IMAGES/IAB\\_INVE.PDF](http://web.worldbank.org/archive/website01354/WEB/IMAGES/IAB_INVE.PDF)  
accessed on 20th August 2021

Tjosvold, D., (1992) *The Conflict-Positive Organization.* Addison-Wesley, Massachusetts

United Nations. (June 1958) *Convention on the Recognition and Enforcement of foreign Arbitral Awards*, New York

*Arbitration for Construction Disputes in Kenya.  
Kind Master or Errant Servant? Alex Kamau*

(2021) 9(4) *Alternative Dispute Resolution*

United Nations. (September 1923) *Geneva Protocol on Arbitration Clauses*, Geneva

United Nations. (September 1927) *Geneva Convention on the execution of foreign Arbitral Awards*, Geneva

Woolf, H. (1996)., *Access to justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales*. London, HMSO

World Bank Group. (2020) *Doing Business 2020: Comparing business regulations in 190 economies*

## **The Implication of Disclosure Obligations of Arbitrators for Arbitration Practice in Zambia**

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Zambia has adopted the UNCITRAL Model Law (1985) as the basis for its Arbitration Act. The requirement for disclosure is provided in mandatory terms in Article 12 (1) of the First Schedule of the Act, which is the Model Law text.

- (1) *“When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.”*<sup>1</sup>

The recourse against such justifiable doubts is ostensibly a challenge to the arbitrator under Article 12 (2).

- (2) *“An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an*

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<sup>1</sup> Zambia Arbitration Act No. 19 of 2000

*arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made”*

The procedure for challenging an arbitrator provided under Article 13 of Schedule 1 of the Arbitration Act, is the Model law provision which provides a time limit of fifteen days after becoming aware of any circumstances referred to in Article 12(2) to provide a written challenge. There is also the possibility of referring the challenge to a court within thirty days of receiving the arbitrator’s decision on the challenge, with the resulting court decision being final and not subject to appeal. One would therefore expect that “justifiable doubts” as to the arbitrator’s impartiality and independence would not be raised after an award is issued. Unfortunately, this possibility is alive and kicking in Zambia.

There have been numerous challenges that implicate doubts about impartiality and independence of arbitrators that have come to courts in Zambia, but often not in an application under Article 12, but after an award has been rendered in the form of a setting aside application under Section 17 of the Act.

Section 17 of the Arbitration Act No. 19 of 2000, which is a slight modification of Article 34 of the Model Law, reads as follows:<sup>2</sup>

17. (1) *Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3).*
- (2) *An arbitral award may be set aside by the court only if*
  - a) *the party making the application furnishes proof that-*
    - (i) *a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Zambia;*
    - (ii) *the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;*

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<sup>2</sup> Ibid, Section 17



- (iii) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;*
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with this Act or the law of the country where the arbitration took place; or*
- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or*
- (b) if the court finds that-*
  - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zambia ; or*
  - (ii) the award is in conflict with public policy; or*
  - (iii) the making of the award was induced or effected by fraud, corruption or misrepresentation.*
- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request has been made under articles 33 of the First Schedule, from the date on which that request had been disposed of by the arbitral tribunal.*
- (4) The court, when asked to set aside an award may, where appropriate and if so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.*

The grounds and requirements under Section 17 are clear enough, and so much in tandem with the Model Law, that one would consider that insofar as the finality of the Award is concerned, Zambia is a safe seat.

However, the Act in Section 29, provides for the Minister, in consultation with the Chief Justice, to make regulations, by way of Statutory Instrument to regulate the code of conduct for arbitrators and standards of arbitration, which regulations have now become a route by which Section 17 of the Act is invoked to set aside an Award.

**The Arbitration (Code of Conduct and Standards) Regulations of 2007** provides in Part I the requirements of Professional Conduct and in Part II, a description of activities considered to be Unprofessional conduct and a procedure for reporting misconduct. Of particular interest to date has been the obligation under Regulation 2 concerning disclosure. The relevant parts of the Regulation read as follows:

2. *(1) An arbitrator shall disclose at the earliest opportunity any prior interest or relationship that may affect impartiality and or independence or which might reasonably raise doubts as to the arbitrator's impartiality and or independence in the conduct of the arbitral proceedings.*
- (2) If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of an appointment or at the commencement of the arbitral proceedings, disclosure shall be made when such circumstances become known to the arbitrator.*
- (3) The burden of disclosure rests on the arbitrator and the duty to disclose is a continuing duty which does not cease until the arbitration has been concluded.*
- (4) After appropriate disclosure, the arbitrator may serve if both parties so desire, provided that if the arbitrator believes or perceives that there is a clear conflict of interest, the arbitrator should withdraw, irrespective of the expressed desires of the parties.*

Such regulations are important for the protection of the parties, and are very common in the rules of most international arbitral institutions. One would normally expect that the implications would be to the arbitrator, being deemed unable to serve. However, the relationship between these regulations, as far as the Zambian courts are concerned, extend to recourse against an Award as a matter of public policy.

An early case in which public policy and disclosure obligations were discussed, in the Supreme Court in 2008, in the case of *Zambia Telecommunications Co. Limited and*

*Celtel Zambia Limited*<sup>3</sup>. Here, the court had the opportunity to consider whether the failure by the Chairman of the arbitral tribunal to disclose his appointment by one of the advocates as Arbitrator in another matter rendered the award in this case to be in conflict with public policy. The Court, noting that Public Policy has not been defined in the Arbitration Act 19 of 2000, held that it is public policy that a person ought to be tried by an impartial tribunal. The Court stated that “..*the learned Chairman’s involvement in this case without disclosing his interest in the other arbitral tribunal could easily be perceived as being contrary to public policy because the perceptions from the objective test, would have been that a likelihood of bias or possible conflict of interest could not be ruled out.*”<sup>4</sup> The Supreme Court upheld the lower court’s decision to set aside the Award. It is interesting to note the factual matrix. The appointment which was not disclosed came two days before the date of issue of the Award in the matter. The Court considered that the possibility existed that the Chairman had been approached over the second arbitration at an earlier date. This was sufficient reason for the Court to consider that a challenge on the Award on perceived bias on the part of the Chairman was reasonable. It is noted that there was no discussion of the Code of Conduct regulations in this judgment.

In 2014, the High Court had opportunity to consider the disclosure obligation in the light of notorious facts and the possibility of waiver of disclosure obligations in the case of Mpulungu Harbour Management Limited and Attorney General and Mpulungu Harbour Corporation<sup>5</sup>. In that case, the Chairman of the Tribunal was the Speaker of the National Assembly. After the Award was rendered, an application for setting aside was made based, among other things, on non-disclosure of this fact and a perception of bias. On the question of bias, the Court held that “*The Speaker of the National Assembly sitting as a Presiding Arbitrator in a compensation claim in which the Government is a Respondent and interested in the outcome would not only raise one but both eyebrows.*”<sup>6</sup> The Court also interrogated the requirements of the Arbitration (Code of Conduct and Standards) Regulations, Statutory Instrument No. 12 of 2007 to hold that “.. *the duty to disclose was not a mere regulation but a Mandatory Statutory requirement.*”<sup>7</sup> On the issue of waiver, as the Applicant was fully aware throughout the process of the position of the Chairman, the Court stated that “*The issue of waiver*

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<sup>3</sup> SCZ Judgment No. 34 of 2008

<sup>4</sup> Ibid, pg J15

<sup>5</sup> 2010/HPC/ARB/0589

<sup>6</sup> Ibid, pg. J46

<sup>7</sup> Ibid, pg. J47

*cannot arise here, in the absence of disclosure by the Arbitrator as required of him by the law.*<sup>8</sup>” This again raised the spectre of public policy as the Court held that “*the failure by the Arbitrator to disclose to the parties the circumstances known to him, by itself without going any further could easily be perceived as being contrary to public policy and is therefore a ground for setting aside an arbitral Award.*”<sup>9</sup>”

The High Court in 2018, in the case of National Pension Scheme Authority and Sherwood Greene Limited<sup>10</sup>, again had to consider whether an arbitrator’s failure to disclose amounts to being contrary to public policy to set aside an arbitrator’s award. In this case, the arbitrator’s law firm had an active court matter representing a party in the arbitration, although the arbitrator herself was not involved in the case. The arbitrator was asked to address the parties on this at the Preliminary Meeting and she did so, and considered herself to be impartial and able to proceed. Neither party took any other step until the Award was rendered. The Court noted that “*although the Arbitrator considered herself impartial notwithstanding the existence of a prior relationship between her firm and the Applicant, there is no record of an enquiry as to whether her continued service as arbitrator was desired by both parties*<sup>11</sup>.” The Court therefore was looking for positive confirmation from the parties that having heard the arbitrator’s position, they were both happy to proceed. This missing step convinced the court that the arbitrator had failed to discharge her obligation to make disclosure. The Court highlighted that non-disclosure was “*at the heart of inconsistency with Zambian public policy*<sup>12</sup>”, and the Award was set aside.

In the 2019 Supreme Court case of Tiger Limited and Engen Petroleum (Z) Limited<sup>13</sup>, the Appellant applied to set aside an arbitral award on the basis of a personal friendship between the arbitrator and the respondent. This was an appeal against the dismissal by the High Court of the applicant’s application to set aside the arbitral award. The Supreme Court held that:

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<sup>8</sup> Ibid

<sup>9</sup> Ibid, pg. J49

<sup>10</sup> 2018/HKC/0007

<sup>11</sup> Ibid, pg .J25

<sup>12</sup> Ibid, pg. J27

<sup>13</sup> Appeal No 63 of 2019

- “(1) ..the burden or duty of disclosure rests on the arbitrator. That duty is not discharged by the fact that a party becomes aware of the circumstances requiring disclosure through some other sources.
- (2) ..the fact that there was non-disclosure of the arbitrator's relationship was found by the court below. Although the appellant may have lost its right to challenge the appointment under Article 12 of the Model Law, this did not extinguish the perception of possible, or likelihood of bias which was created by the nondisclosure.
- (3) ..it was that non-disclosure which made the award liable to be set aside on the ground that it was against public policy.
- (4) ..contrary to the holding by the court below that the relationship of the arbitrator and the respondent was only to be dealt with under Article 12 of the Model Law, the non-disclosure of that relationship by the arbitrator brought it squarely into the ambit of circumstances upon which an arbitral award may be set aside under Section 17 of the Arbitration Act.”

The jurisprudence in Zambia has clearly linked the disclosure obligations under Article 12 of Schedule 1 of the Arbitration Act and the Arbitration Court Proceedings Rules with public policy, thereby bringing this into the realm of setting aside of any award rendered in a matter in which the requisite disclosure is found not to have occurred. So it now appears that Counsel can play a strategic long game; ignore the challenge procedure under Article 13 of Schedule 1 of the Arbitration Act, which will bring finality to the question of justifiable doubts as to impartiality and independence, and wait to see the Award, and attack it on public policy grounds if an infringement of the Arbitration Code of Conduct Regulations can be established. One could surmise that any of the other Regulations in the Statutory Instrument could also provide grounds for a public policy challenge.

It's highly unlikely that this was the intent of the Model Law, but the interplay of secondary legislation as it currently stands, with the Arbitration Act of 2000, creates a real and present danger for arbitration practice in Zambia.

## References

### International Instruments

1958, United Nations Convention on the Recognition and Enforcement of Arbitral Awards

2006, UNCITRAL Model Law on International Commercial Arbitration

### International Guidelines

2014, IBA Guidelines on Conflict of Interest in International Arbitration

### Institutional Rules

2021, International Chamber of Commerce Arbitration Rules

2020, LCIA Arbitration Rules

2016, Singapore International Arbitration Centre Arbitration Rules, 6th Edition

2013, Chartered Institute of Arbitrators Zambia branch Rules

### International Arbitration Acts

International Arbitration Act, No. 15 of 2007, South Africa

The Arbitration Act, Chapter 49 of the Laws of Kenya (2012 revision)

Arbitration Act 1996, England and Wales

### International Cases

*Halliburton v Chubb*, [2020] UK Supreme Court 48, On appeal from: [2018] EWCA Civ 817.

*Global Gas and Refinery Limited v. SPDC*, Lagos State High Court 2020, Case No. No: LD/1910GCM/2017

*Zimbabwe Electricity Supply Authority v. Genius Joel Maposa*, Supreme Court, Zimbabwe, 21 October and 21 December 1999.

*Re Corporación Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al.*, Ontario Superior Court of Justice, Canada, 22 September 1999

*Christ for all Nations v. Apollo Insurance Co. Ltd.*, High Court, Kenya, Civil Case 477 of 1999, [1999] L.L.R. 1635

*Desputeaux v. Éditions Chouette (1987) inc.*, Supreme Court, Canada, 31 March 2003, [2003] 1 S.C.R. 178

### **Zambian Legislation and Statutory Instruments**

The Arbitration Act No. 19 of 2000.

The Arbitration (Code of Conduct and Standards) Regulations, Statutory Instrument No. 12 of 2007

### **Zambian case law**

*Zambia Telecommunications Co. Limited and Celtel Zambia Limited*, Supreme Court Judgment No. 23 of 2008.

*Mpulungu Harbour Management Limited and Attorney General and Mpulungu Harbour Corporation Limited*, High Court Judgment, Case No. 2010/HPC/ARB/0589.

*National Pension Scheme Authority and Sherwood Greene Limited*, High Court, Case No. 2018/HKC/007.

*Hybrid Poultry Farm (Z) Limited and NFC Africa Mining PLC*, Supreme Court, Selected Judgment No. 49 of 2018.

## **Embracing Technology-Powered Alternative Dispute Resolution (ADR) in a Post Pandemic Africa; A Catalyst for Change in the E-Commerce, Trade and Justice Sectors**

*By: Alex Asenga Githara* \*

### **Abstract**

*The onset of the Covid 19 pandemic revolutionized technology on the African soil as various fields were forced to embrace technological set ups. The ADR field has coped well with this modern evolution. There has been a rise of Online Dispute Resolution taking the place of the traditional physical ADR systems. Undeniably, the impact of this technological- powered ADR has scaled up e-commerce, trade and justice systems. In spite of all the positives, we cannot turn a blind eye on the challenges that need to be vanquished.*

*This paper is split into four parts. First it addresses the onset and general scope of ODR in post pandemic Africa. The second part highlights how we can embrace ODR given that it is a new concept in the Africa. In an attempt to do so, this paper weighs the pros and cons of ODR. Thirdly, we venture into the new face of ADR, herein we have a look at the technological advancement and systems in place. Our analysis takes us into the future i.e., do we need a centralized system of ODR service providers? Lastly, we explore the implications of ODR in the fields of commerce, trade and justice. We cap it off by giving recommendations on best practices to be adopted and keys for growth.*

### **Keywords**

technology, online dispute resolution (ODR), dispute resolution, trade, e-commerce, justice, system automation, traditional Alternative Dispute Resolution (ADR), blockchain, smart contracts.

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## **Introduction**

Buying from the wisdom of the United Nations Commission on International Trade Law (UNCITRAL),<sup>1</sup> the General Assembly saw it wise to espouse on the ODR system more so underpinning tenets of an effective ODR system as fairness, transparency, due process and accountability. The ODR system is the new normal of resolution of disputes. It is on the forefront in modifying resolution of disputes. Across Africa, the modern trend has not substantiated and there is room for improvement. To evaluate the impact and role of ODR in Africa, it is prudent to sight its effects in the fields of trade, justice and e-commerce as shall be seen below.

### **I. The onset of ODR**

Up until the emergence of the internet in 1969, there was no concrete online ADR structure. ODR did not surface until the early 90's which saw dispute resolution techniques created to attend to some online issues like flaming and violations of "netiquette".<sup>2</sup> These techniques helped in managing disputes although there were no organized and particularly set up dispute resolution institutions. Even though there were forms of ODR prior to 2020, technology powered ADR crystallized with the advent of the Covid 19 pandemic. ODR involves the use of technology to enable the application of conventional ADR mechanisms in the online space.<sup>3</sup> These include online arbitration, online mediation, and online negotiation.<sup>4</sup>

ODR can simply be put as the application, use of computer networks and cyberspace facilities i.e., video conferencing, emails, chat and messaging features, and applications to resolve disputes utilizing the ADR methods.

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<sup>1</sup> UNCITRAL Technical Notes on Online Dispute Resolution, Official records of the General Assembly, Seventy-first Session, Supplement No.17 (A/71/17), para. 217.

<sup>2</sup> Rafal M., "Regulation of Online Dispute Resolution: Between Law and Technology," (2005). Available at [http://www.odr.info/cyberweek/Regulation%20%of20ODR\\_Rafal%20Morek.doc](http://www.odr.info/cyberweek/Regulation%20%of20ODR_Rafal%20Morek.doc). accessed on 6<sup>th</sup> May 2021.

<sup>3</sup> Petrauskas F. and Kybartiene E., "Online Dispute Resolution in Consumer Disputes." (2011) pg. 922. Available at [http://www.mruni.eu/en/mokslo\\_darbai/jurisprudencija/](http://www.mruni.eu/en/mokslo_darbai/jurisprudencija/) accessed on 6<sup>th</sup> May 2021; Arun R., "The Legal Challenges Facing Online Dispute Resolution: An Overview," (2007). Available at [http://www.galexia.com/public/research/articles/research\\_articles-art42.html](http://www.galexia.com/public/research/articles/research_articles-art42.html). accessed on 6<sup>th</sup> May 2021.

<sup>4</sup> Katsh E. "Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace," (2006) vol. 10: No.3 pg.3. Available at <http://www.lex-electronica.org/articles/v10-3/katsh.htm> accessed on 6<sup>th</sup> May 2021.

## II. ADR in post pandemic Africa

Africa, like the rest of the world witnessed phenomenal and unprecedented changes in its societal, economic, education and life of its people as brought about by the advent of the virus. Some of the changes in business, education, societal and individual consequences have modified behaviour and routines with variables and activities such as home schooling, intensification in e-commerce and online interaction.<sup>5</sup>

The new face of ADR is characterized by robust technology, fast communication and easier transfer of ideas and currency. Geographical, time and language barriers which have been major obstacles to ADR have been addressed by the cyberspace move. ODR mechanisms have effectively redressed the customary long and cumbersome resolution systems and language barriers associated with cross border dispute resolution.<sup>6</sup> The advantage of ODR is that it has proven to be convenient, practical, time-saving and non-prohibitive.

Not only do we have the ADR mechanisms being conducted online, profit and non-profit ADR organizations have been providing online dispute resolution services.<sup>7</sup> The Ghana ADR hub<sup>8</sup> and the Nairobi Centre for International Arbitration,<sup>9</sup> are examples of providers who revamped their online services and now conduct ADR proceedings, consultancies, trainings and webinars online.

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<sup>5</sup> Hannah R. Marston, "Technology & Social Media during COVID-19 Pandemic," (International Psychogeriatrics IPA Bulletin, 2020) 3 vol 37. <https://www.ipa-online.org/publications/ipa-bulletin/featured-articles/covid-19-bulletin-articles/technology-social-media-during-covid19> accessed on 6<sup>th</sup> May 2021.

<sup>6</sup> Aura Vista Vilalta, "ODR and E-Commerce," in M.S. Wahab, E. Kahath & D. Rainey, "Online Dispute Resolution Theory and Practice: A Treatise on Technology and Dispute Resolution," (2012, Eleven International Publishing) pg. 113.

<sup>7</sup> See Center for Information Technology and Dispute Resolution, Current ODR Projects and Websites, at <http://www.ombuds.org/center/onlineadr.html> accessed on 6<sup>th</sup> May 2021.

<sup>8</sup> See their website at Ghana ADR Hub, <http://ghanaadrhub.org> last visited on 6<sup>th</sup> May 2021.

<sup>9</sup> See their website at Nairobi Centre for International Arbitration, <https://www.ncia.or.ke> last visited on 6<sup>th</sup> May 2021; likewise, we have the Mediation Training Institute East Africa, accessed MTI East Africa: Mediation Training, Mediation Certification <https://www.mtieastafrica.org> accessed on 6<sup>th</sup> May 2021.

## **1. Embracing technology - powered ADR; the pros and cons of ODR.**

With e-commerce and online business transactions gaining track in the cyberspace, the shift towards technology – powered ADR is key to ensuring proper facilitation of commerce, justice and trade during these times where most activities have stalled.

The advantages attached to the ODR mechanisms include: convenience and speedy resolution of disputes as parties conduct the process online thereby eliminating travel and accommodation costs, the cost of arbitration facilities, making it economically viable. Disputants can conduct video conferencing, instant messaging and emailing, as well as chat room conferences from anywhere across the world.<sup>10</sup> There is also a speedy outcome of the arbitral award.

The system ensures that disputes are settled in a matter of days or weeks, compared to the months it may take to resolve litigation or even ADR mechanisms. Online ADR extinguishes communication challenges faced by parties located in different time zone and different jurisdictions. Compared to offline ADR service providers, most online ADR providers function around the clock making it best for international trade.<sup>11</sup>

Despite the benefits of ODR, critics question whether ODR is a suitable alternative to litigation or traditional ADR. They point to a number of challenges, limitations, and several hitches in the process which include:

Specific disputes are not amenable with the ODR. The system is best suited for commercial,<sup>12</sup> business to business, business to person, contractual, domain and intellectual property disputes.<sup>13</sup> Tortious claims of defamation may be inconvenient to be carried online as they require substantial discovery and evidentiary proceedings.

Likewise, the discovery process proves to be ineffective as disputed or limited facts and lack of a discovery procedure bars speedy and effective resolution of disputes. This

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<sup>10</sup> Richard M. Victorio, “Internet Dispute Resolution (IDR): Bringing ADR into the 21st Century,” (2001) pg. 289.

<sup>11</sup> *Ibid.*

<sup>12</sup> Michael Grebb, “Settle This: Which Technology Resolves Disputes Best? National Arbitration and Mediation,” (2001). Available at <http://www.clicknsettle.com/pr032001.cfm> accessed on 6<sup>th</sup> May 2021.

<sup>13</sup> WIPO Arbitration and Mediation Center, UDRP Case Filing and Decisions, at <http://arbitr.wipo.int/domains/statistics/cumulative/results.html> accessed on 6<sup>th</sup> May 2021.

equally prejudices the complainants who carry the burden of proof. Limiting the discovery process violates the principles of natural justice and raises concerns on due process.<sup>14</sup>

Locating a party's assets to enforce an arbitral award effectively in a certain jurisdiction is arduous. When awards cannot be enforced or remedies rendered moot, disputants lose their confidence in the ODR proceedings.<sup>15</sup> The traditional nature of the ADR where the concerns and sentiments of a disputant are felt before a decision is rendered is lost. Similarly, when online disputes are settled over e-mail, the parties may engage in caucusing without the mediator's<sup>16</sup> knowledge. Evaluating the credibility of parties and witnesses is a challenge for the mediators and arbitrators unlike during face-to-face interactions.<sup>17</sup>

## **2. The new face of ADR. (Online Dispute Resolution)**

In the aftermath of the Covid 19 pandemic, trade is seemingly disrupted, investors lay in uncertainty and economies are struggling to recuperate, this presents an opportune time for ODR to manifest itself. It is certain that ODR will be retained due to its efficacy. Traditional ADR and ODR can equally complement each other. Katsh and Rifkin,<sup>18</sup> refer to the aid given by technology to ADR as the fourth party in addition to the disputants and the impartial third party.<sup>19</sup> They state that the "fourth party" is used to assist the third party in resolving the dispute and not to replace the impartial neutral third party.

Implementing technology in these resolution methods involves adding more structure. Such structure is required by and partially dependent on what can be achieved with available soft and hardware. With augmented and fully automated technology,

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<sup>14</sup> Elizabeth G. Thornburg, "Going Private: Technology, Due Process, and Internet Dispute Resolution," (2000) 34 Rev. pg. 151, 201.

<sup>15</sup> See Henry H. Perritt, Jr., "Will the Judgment-Proof Own Cyberspace?" (1998) 32 Int'l Law pg. 1121, 1123.

<sup>16</sup> Arbitrator, conciliator or any impartial and independent third party resolving the dispute.

<sup>17</sup> Henry H. Perritt, Jr., "Dispute Resolution in Cyberspace: Demand for New Forms of ADR," (2000) 15 pg. 675, 680-81.

<sup>18</sup> Katsh E. and Rifkin J., "Online Dispute Resolution: Resolving Conflicts in Cyberspace," (2001) pg.9.

<sup>19</sup> The arbitrator, mediator, negotiator etc.

resolution processes are evolving to form an altogether new dispute resolution branch with its own regularities.<sup>20</sup>

The technical aspects of ODR pave way for specific procedures that divergent from those applicable in ADR. It has been suggested that the self-regulatory nature of ADR would promote the evolution of a cogent body of customary cyberspace law for resolving online disputes.<sup>21</sup> Given the likelihood of governments to intervene and legislate along geopolitical lines there is need for a system suited to adjust to the uniqueness of internet disputes.<sup>22</sup> Critically, such a system is viewed to be vulnerable to market forces, instability or any legitimacy.<sup>23</sup>

Disputants need to have faith in such a framework to settle their disputes online, and courts may be reticent to enforce the decisions delivered by such online ADR service providers. As e-commerce grows, a disorganized online ADR system may not adequately serve online communities. There is need to brace ourselves for the technological architecture.

### **3.1 Borrowing from the West: A look into the PayPal and CyberSettle models.**

These ODR service providers use an innovative negotiation process and a computer software program that enables multiple parties to participate in internet-based resolution such as negotiation.<sup>24</sup> The online process features phases and uses optimization to transform conflicting objectives into fair and efficient solutions.

A third party facilitator works with the parties online to help them express their interests and identify issues. The trained facilitator also assists the parties model a negotiation problem and complete an underlying agreement which outlines the issues to be

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<sup>20</sup> H. Pakaslahti, "The Costs of Resolving Conflicts Online," (2017) pg. 3; Poblet, Marta-Ross, "Graham: ODR in Europe," in Mohamed Abdel Wahab, Ethan Katsh, Daniel Rainey (eds.), "Online Dispute Resolution, Theory and Practise," (Eleven International Publishing, 2012)

<sup>21</sup> E. Casey Lide, "ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation," (1996) pg. 193, 222.

<sup>22</sup> Lan Q. Hang, "Online Dispute Resolution Systems: The Future of Cyberspace Law," (2001) 41 pg. 863.

<sup>23</sup> See Hang, *supra* note 23, at 863.

<sup>24</sup> Ernest M. Thiessen & Joseph McMahan, Jr., "Beyond Win-Win in Cyberspace," (2000) 15 pg. 643.

resolved.<sup>25</sup> The facilitator enters the confidential preferences of the parties into the website whose software develop settlement packages for the parties to consider.<sup>26</sup>The parties evaluate settlement packages based on their preferences. Should parties choose a similar settlement package, the software attempts to generate improvements in order to maximize the benefits to both of them. Where a party wishes to terminate the negotiation, a final written agreement is drafted with the current solution and signed by all of the parties.<sup>27</sup>

This model system is being faced out by fully automated Artificial Intelligence (AI) algorithms which take the place of the trained facilitator. The ODR practice in Africa is not as developed as that in the West although there has been a significant number of ODR service providers since the pandemic.

PayPal and CyberSettle highlight the kind of models that need to be integrated in Africa in resolving disputes all the more in commercial, trade and justice sectors. PayPal is an American based company managing an online payment system. It has employed an ODR process where parties voluntarily settle their disputes by first using assisted negotiation software and when parties cannot reach a settlement, adjudication. PayPal then enforces the award given by freezing the money involved in the transaction of the dispute. Through this web based system, it has resolved over 60 million disputes a year.<sup>28</sup>

Another focus study is on CyberSettle which uses blind-bidding negotiation to settle insurance and commercial disputes. The technology allows parties to negotiate online and make confidential offers that are only disclosed when both offers match certain standards or a given amount of money. This double-blind feature breeds a sense of privacy<sup>29</sup>. Cybersettle compares the parties' submissions to determine if they are in range of a mutually-acceptable settlement. The web based system has been in the market

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<sup>25</sup> Robert C. Bordone, "Electronic Online Dispute Resolution: A Systems Approach – Potential Problems and a Proposal," (1998) 3 pg. 175, 176.

<sup>26</sup> See SmartSettle, SmartSettle Process, at <http://www.oneaccordinc.com/html/process.html> accessed on 20<sup>th</sup> June 2021.

<sup>27</sup> *Ibid.*

<sup>28</sup>How to respond to a dispute, claim or chargeback – PayPal, at <https://www.paypal.com/re/webapps/mpp/resolve-disputes-chargebacks> accessed on 20<sup>th</sup> June 2021.

<sup>29</sup> Cybersettle, at <http://www.cybersettle.com> accessed on 20<sup>th</sup> June 2021.

since 1998 settling over 200,000 disputes with an accumulated value of over USD 1.6 billion.<sup>30</sup>

### **3.2 Do we need a centralized Online Dispute Resolution system in Africa?**

With the pop up of ADR online service providers, it goes without saying that there is need of a centralized body to examine complaints, refer disputes to the relevant online ADR service providers and facilitate swift, cost-effective and efficacious decisions. Such a body can be relied on as a system operator to enforce the awards given<sup>31</sup> and may in the long term develop a body of law, essential in regulating disputes online.<sup>32</sup>

The main challenge is that such a body must be unanimously agreed upon as the sole regulatory framework, as it is predictable that competitors might arise or the body might get overburdened by copious increase in the number of disputes leading to collapsing the entire system. To address this, the body can refer the matter to independent service providers where it could monitor the efficiency of these independent providers on a regular basis.

### **4.0 Implications in e-commerce, trade and justice.**

ICT is revolutionizing trade in Africa and online transnational trade is forecasted to increase post the pandemic. As trust and confidence are the major requisites for business and ODR system, there needs to be a consolidated legal framework, a framework of regulations that deals with structural asymmetries in business transactions. More often than not, online dispute management systems are aimed at achieving enterprise and society's commercial goals as well as minimizing distortion to trade.<sup>33</sup>

The OECD guidelines for Consumer Protection in the Context of Electronic Commerce<sup>34</sup> encourage cross-border transactions in businesses, and ensures consumer

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<sup>30</sup>Cybersettle makes the case for resolving disputes online, at <https://www.mediate.com/articles/LevinDbl20080227B.cfm> accessed on 20<sup>th</sup> June 2021.

<sup>31</sup> Thomas Schultz, "Online Arbitration: Binding or Non-Binding?" *ADR Online Monthly*, at <http://www.ombuds.org/center/adr2002-11-schultz.html> accessed on 7<sup>th</sup> May 2021; the author proposes a Dispute Resolution Referral Center (DRRC), similar to the one we are putting across.

<sup>32</sup> Robert C. Bordone, "Electronic Online Dispute Resolution: A Systems Approach – Potential, Problems, and a Proposal," (1998) pg. 201.

<sup>33</sup> EU legislation on ADR and ODR is aimed at increasing consumer trust in e-commerce and usage of internal market possibilities. See digital single market policy [https://ec.europa.eu/commission/priorities/digital-single-market\\_en](https://ec.europa.eu/commission/priorities/digital-single-market_en) accessed on 6<sup>th</sup> May 2021.

<sup>34</sup> The Guidelines for Consumer Protection in the Context of Electronic Commerce, principle VI under B (sub iv). <http://www.oecd.org/dsti/sti/it/ec/index.htm> accessed on 7<sup>th</sup> May 2021.

representatives and governments work together to provide consumers with equitable, prompt resolution and affordable redress. These guidelines are very much applicable to the African context and are key in regulating e-commerce.

In this fast paced world, it is in complete to talk about technology and trade without blockchain technology and smart contracts. Blockchain technology, because of its transparent nature, acts as a global spreadsheet that can be downloaded on any system, anywhere, and by anybody.

There has been an increase in digitisation of transactions introduced the concept of e-contracts, which is rapidly replacing traditional written contracts. The use of digital currencies for transaction purposes is taking toll across the world as well as in African countries. Blockchain arbitration, with the help of smart contracts, can facilitate the functions of; storing and verification of rules, and automated execution, upon the setting-off of the smart arbitration clause incorporated in the smart contract. The block arbitration can be dissected into on-chain and off-chain, where on-chain involves the use of a smart contract in a classic dispute resolution mechanism while off-chain involves arbitration without excessive automation, except for the purposes of appointing an arbitrator.<sup>35</sup>

Under a smart contact, a party can digitise the terms of a contract and lock the funds and if the task at hand is fulfilled, the funds will be allowed to pass through. The advantage of this self-executable nature of the smart contract is that it automatically enforces the award and transfer the prescribed fee to the party which the award is given in favour of.<sup>36</sup>

Blockchain arbitration unlike other forms of ODR and the traditional ADR mechanisms requires submission of coded evidence in place of the conventional oral hearings. Ultimately, this method of dispute resolution ignores the principles of natural justice and disrupts an integral part of the adjudicatory mechanisms. Furthermore, the possibility of procurement and admission of evidence from third parties is completely done away with as the nature of the strict functionality of blockchain that eliminates the presence

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<sup>35</sup> Blockchain Arbitration – The Future of Dispute Resolution at <http://cilj.co.uk> accessed on 20<sup>th</sup> June 2021.

<sup>36</sup> See an example at <https://kleros.io/> accessed on 21<sup>st</sup> June 2021.



of third parties, who are not privy to the contract. Also, the traceable feature of blockchain presents a challenge on the requirements of privacy especially on the right to be forgotten.<sup>37</sup>

The integration of these concepts with arbitration, a frequently used fora for dispute resolution, has the potential to restructure the functionalities of a classic dispute resolution mechanism was considered to be the fastest mode of justice delivery, but now something even faster has been theorised and put to use by some of the most prominent open-source websites. The most beguiling feature of arbitration is its ability to adapt to innovations and changes as opposed to rigid traditional court litigation.

Sale and service contracts are likely to be subjects of online disputes. The influx of online trade activities necessitates the need to have ODR mechanisms to solve online disputes. The ODR system facilitates the justice system by offering prompt, convenient, efficient and cost friendly administration of retributive and restorative justice. This new outlook of justice is attractive and does not lose the allure of justice in conventional litigation.

## **5.0 Recommended best practices for Online Dispute Resolution: Opportunities to explore**

To promote efficiency and efficacy of the ODR mechanisms, there is need to incorporate the following practices. These practices are picked from established ODR service providers and systems across the world.

To enable the growth of online ADR is the exigency for public awareness and understanding of the ADR mechanisms. ODR service providers and stakeholders<sup>38</sup> must take concrete steps to not only market their services online but also establish initiatives that will broaden public understanding and confidence in online ADR.<sup>39</sup> This would make the public appreciate and trust ODR. There needs to be set minimums for ODR

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<sup>37</sup> EU Court decides on two major “right to be forgotten” cases: there are no winners here <https://www.accessnow.org/eu-court-decides-on-two-major-right-to-be-forgotten-cases-there-are-no-winners-here/> accessed on 20<sup>th</sup> June 2021.

<sup>38</sup> Judicial authorities, educational institutions, e-businesses, governmental institutions, and non-profit organizations.

<sup>39</sup> See Bordone, supra note 26, at pg. 196-97.

providers. The ABA<sup>40</sup> encourages ODR providers to confide in the general public their terms and conditions, services provided, procedures adopted for the resolution of disputes, the costs and prerequisites associated with their services and the type of technology and software that they use to ensure that the ODR process is easily accessible, efficacious, and secure.<sup>41</sup> This is helpful to facilitate a consumer's decision in choosing an ODR provider.

Also, to create confidence in the online ADR services, providers should adopt security mechanisms such as restricting access to their websites by using usernames and passwords, to ensure the safety of their customer's information.<sup>42</sup> The website operators should adopt the latest security technology available and update this technology to prevent hacking into their computer systems and employ use digital signatures in their online communications that encrypts the online transmission.

In addressing enforcement of online awards, insertion of a clause in a user agreement where the parties agree to be bound by the decision of the online ADR provider can be adopted.<sup>43</sup> A disputant can also give an undertaking and dispose some money with the service provider and should the award not be in his favour, he forsakes the money deposited. Should a party not cooperate in enforcing the online award, the aggrieved disputant may be able to sue in court for breach of contract.

### **5.1 Keys for Growth**

It is imperative to have accreditation of ODR providers to ensure compliance and monitoring with ethical standards. The algorithm software architectures are still defunct in functionality with debilitated awareness in selective automated decision making. The human behind programming of the system needs to be responsible in cases of system misconduct.

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<sup>40</sup> American Bar Association Task Force on E-Commerce and ADR, Recommended Best Practices for Online Dispute Resolution Providers Available at: <http://www.law.washington.edu/abaeadr/documentation/docs/BestPracticesFinal102802.doc> last visited 7th May 2021.

<sup>41</sup> *Id*, at pg. 3,4,8 and 10.

<sup>42</sup> ABA Final Report, supra note 31 at 35.

<sup>43</sup> *Id*, at pg. 37.

There is also need of making it mandatory to use ODR in certain sectors or generally in all cross-border disputes. This would ensure uniformity and certainty in the award systems as well enable expansion of commerce across the continent.

To deal with the challenges surrounding block chain arbitration and smart contracts, various domestic laws need to be equipped to deal with the issues arising out of such arbitrations. The formation of contracts needs to include codes as an acceptable form along with written and oral agreements. In the same line we need to have a regional Convention that allows for electronic-based arbitration agreements in line with the 2006 UNCITRAL recommendations.<sup>44</sup>

Data privacy can be handled by using a private block chain server, in which the transactions are within a closed circle and cannot be accessed by an outsider. It is imperative to note that technology is not an all-pervasive entity but an assisting mechanism.

## **6.0 Conclusion**

Bracing technology-based ADR (ODR) is key in this transitional period and beyond. As highlighted, there have been several limitations of the ODR process, nevertheless, quick solutions have ensured that the process continues to thrive. The impact of ODR is often felt through the satisfaction of basic conditions like accessibility, appropriate training of neutrals and parties and creations of trust and awareness. The end point is to introduce ODR as a potent tool that brings ADR to the doorstep of online users and people involved in e-commerce. The potential of the more traditional resolution methods supplemented by online technologies appears to remain untapped. It is evident that this topic needs to be studied more as the technological field is evolving by day.

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<sup>44</sup> 2006: A/6/17 (Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session.)

## References

Biukovic, L., “International Commercial Arbitration in cyberspace: Recent Developments, North eastern Journal of International Law and Business,” (2002) vol.

22: Issue 3 pg. 340. Available at <http://scholarlycommons.law.northwestern.edu/njilb/vol22/iss3/20> accessed on 6th May 2021.

Elizabeth G. Thornburg, “Going Private: Technology, Due Process, and Internet Dispute Resolution, (2000) 34 pg. 151, 201.

Henry H. Perritt, Jr., “Dispute Resolution in Cyberspace: Demand for New Forms of ADR,” (2000) pg. 675, 680-81.

Henry H. Perritt, Jr., “Will the Judgment-Proof Own Cyberspace?” (1998) 32 pg. 1121, 1123  
<http://law.richmond.edu/jolt/v10i3/article25.pdf>. accessed on 6<sup>th</sup> May 2021.

Katsh E. 2006, “Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace,” *Lex Electronica* vol. 10: No.3 pg. 3. Available at <http://www.lex-electronica.org/articles/v10-3/katsh.htm> accessed on 6th May 2021.

Lucille M. Ponte, “Boosting Consumer Confidence in E-business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions,” (2012) pg. 441, 442-44.

M.S. Wahab, E. Kahath & D. Rainey, “Online Dispute Resolution Theory and Practice: A Treatise on Technology and Dispute Resolution” (2012, Eleven International Publishing) pg. 113.

Nwandem Osinachi, “Online Dispute Resolution: Scope and Matters Arising,” (2014). Available at SSRN: <http://dx.doi.org/10.2139/ssrn.2592926> accessed on 6<sup>th</sup> May 2021.

*Embracing Technology - Powered Alternative Dispute Resolution (ADR) in a Post Pandemic Africa; A Catalyst for Change in the E-Commerce, Trade and Justice Sectors: Alex Asenga Githara* (2021) 9(4) *Alternative Dispute Resolution*

Poblet, Marta–Ross, Graham, “ODR in Europe,” in Mohamed Abdel Wahab, Ethan Katsh, Daniel Rainey (eds.), “Online Dispute Resolution, Theory and Practise.” (Eleven International Publishing, 2012).

Rafal, M., “Regulation of Online Dispute Resolution: Between Law and Technology,” (2005). Available at [http://www.odr.info/cyberweek/Regulation%20of%20ODR\\_Rafal%20Morek.doc](http://www.odr.info/cyberweek/Regulation%20of%20ODR_Rafal%20Morek.doc) accessed on 7<sup>th</sup> May 2021.

Robert C. Bordone, “Electronic Online Dispute Resolution: A Systems Approach – Potential, Problems, and a Proposal,” (1998) pg. 201.

Schultz, T., “Online Arbitration: Binding or Non-Binding?” (2002).

Schultz, T., “Does Online Dispute Resolution Need Governmental Intervention? The case of Architectures of Control and Trust.” (North Carolina Journal of Law & Technology, 2004) vol.6. Available at <http://ssrn.com/abstract=896532> accessed on 6<sup>th</sup> May 2021.

Schultz, T., Kaufmann-Kohler, G., Langer D., Bonnet, V., “Online Dispute Resolution: The state of the art and the issues,” (2001). Available at <http://ssrn.com/abstract899079> accessed on 6<sup>th</sup> May 2021.

Thompson, D., “The Growth of Online Dispute Resolution and its use in British Columbia,” (2014). Available at <https://www.cle.bc.ca/practicePoints/LIT/14-GrowthODR.pdf> accessed on 7<sup>th</sup> May 2021.

UNCITRAL Model Law on Electronic Commerce.

Van Den Heuvel, “E. Online Dispute Resolution as a solution to cross-border E-disputes: An introduction to ODR.” Paper presented at Building Trust in the online environment: Business to customer dispute Resolution. Available on <http://www.oecd.org/dataoecd/63/57/1878940.pdf> accessed on 6<sup>th</sup> May 2021.

**Case Note:**  
**Finality of The Arbitral Award Reaffirmed -**  
**Express Connections Limited vs Easy Properties Limited (2021) eKLR**

*By: Wilfred Mutubwa \**

**Introduction**

This was a ruling by Mativo J. on two applications, namely, the application dated 4<sup>th</sup> November 2020 filed by Express Connections Limited, and the application dated 28<sup>th</sup> December 2020 filed by Easy Properties Limited. The common thread between the two applications was that they arose from the same arbitral proceedings which culminated in the final arbitral award dated 22<sup>nd</sup> October, 2019 and the award on costs dated 5<sup>th</sup> October 2020 rendered by Hon. Arbitrator, Advocate, Allen Waiyaki Gichuhi.

The point of divergence was that the two applications sought diametrically opposed orders. Whereas **the first sought** an order that the said award be recognized, adopted and enforced as a judgment of this court, **the second sought** a raft of prayers among them, an order that the said awards be set aside in their entirety.

**The 1<sup>st</sup> application**

The 1<sup>st</sup> applicant, M/s Easy Properties Limited sought orders that the Final Award and the Award on Costs be set aside in their entirety. It also prayed for an order that the court certifies under Article **165 (4)** of the Constitution that the application raises substantial questions of law and refer the matter to his Lordship the Chief Justice to empanel a bench of an uneven number of not less than three judges to hear the matter. Additionally, it prays for an order that the matter or the relevant parts thereof be heard *de-novo* before the Environment and Land Court. Lastly, it prays for orders that the court grants any other or further relief as this court may deem fit to preserve the integrity of law and due process in the Final Award. Prayers **(1) & (2)** of the application are spend.

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This was founded on the grounds that the arbitration proceedings were complex and incapable of being handled by a sole arbitrator sufficiently. Further, owing to the complexity of the matter, the arbitrator dealt with matters beyond his jurisdiction and not contemplated by the arbitration clause. Additionally, the 1<sup>st</sup> applicant states that the process was unduly influenced because there existed a conflict of interest between the representative of the respondent Mr. Ngotho and Engineer Scott an expert relied upon by the tribunal. It also states that the Arbitral proceedings were conducted in a manner that did not conform to fundamental concepts of fair hearing, justice and equality.

Further, the 1<sup>st</sup> applicant stated that the Arbitrator went against public policy as the decision did not take into account various legal and financial obligations on the subject property by the respondent. It also states that the award affects rights, obligations and duties of persons and or entities who were not party to the arbitration proceedings. Lastly, the 1<sup>st</sup> applicant stated that the Arbitral award does not reflect fairness and justice.

### **The 2<sup>nd</sup> applicant's Notice of Preliminary Objection**

The 2<sup>nd</sup> applicant, M/s Express Connections Limited filed a Notice of Preliminary objection objecting to the 1<sup>st</sup> application on the following grounds, namely; that the application was filed outside the three months limit contrary to section 35(3) of the Arbitration Act; that this court's jurisdiction to set aside an award is limited to matters provided under section 35 of the Arbitration Act and any other intervention by the court is expressly prohibited by Section 10 of the Act; that the application offends section 5 of the Act to the extent that the applicant proceeded with the arbitration without stating his objection and is therefore deemed to have waived the right to object; and, that the application offends rule 36(1) of the Arbitration Rules, 2015.

The 2<sup>nd</sup> applicant also stated that the application offends section 17 (2) of the Arbitration Act; that the applicant cites issues which were raised by the applicant in *Easy Properties Limited v Express Connections Limited* which was dismissed therefore the issues are *res judicata* since no appeal was preferred against the ruling dated 21<sup>st</sup>February 2019. Additionally, the applicant has not sought extension of time, hence, the application offends sections 35 and 32A of the Arbitration Act and Rules 29(16) and (17) of the Arbitration Rules, 2015. Lastly, that the application is bad in law, fatally and incurably defective and amounts to an abuse of the court process

### **Analysis & Determination**

A useful starting point is to recall the often-repeated uncontroverted statement of the law that the general approach on the role and intrusion of the court in arbitration proceedings in Kenya is provided for in section **10** of the Act which provides that except as provided in the Act, no court shall intervene in matters governed by the Act. The said section limits the jurisdiction of the court in absolute terms to only such matters as are provided for by the Act. The section embodies the recognition of the policy of party's "autonomy" which underlie the arbitration generally and in particular the Act.

Section **10** enunciates the need to control the court's role in arbitration so as to give effect to that policy.<sup>1</sup> The principle of party autonomy is recognized as a critical precept for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense. Simply put, the Act was enacted with the key purpose of increasing party autonomy and minimizing court intervention.

Section **10** permits two possibilities where the court can intervene in arbitration. *One* is where the Act expressly provides for or permits the intervention of the court. *Two*, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. Perhaps I should hasten to state that the Act cannot reasonably be construed as ousting the inherent power of the court to do justice. As was explicated by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*,<sup>2</sup> this judicial intervention can only be countenanced in exceptional instances. Even then, the Apex Court underscored the need for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts.

The Apex Court stated that section **10** of the Act was enacted to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a court may intervene. There is a need for courts when considering applications for confirmation or setting aside of arbitral awards to adhere to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimizes the scope for intervention by the courts. It follows that parties who resort to arbitration must know

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<sup>1</sup> See Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293.

<sup>2</sup> {2019} e KLR.



with certainty instances when the jurisdiction of the courts may be invoked. Such instances under the Act include, applications for setting aside an award, determination of the question of the appointment of an arbitrator, recognition and enforcement of arbitral awards, and other specified grounds such as where the arbitral tribunal rules as a preliminary question that it has jurisdiction.

Since the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent on, them to ensure that arbitration awards meet certain standards to prevent injustice.<sup>3</sup> By agreeing to arbitration, the parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else; and by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out in the Act, and, by necessary implication, they waive the right to rely on any further grounds of review, “common law” or otherwise.

This court in *Northwood Development Company Limited v Shuaib Wali Mohammed*<sup>4</sup> stated that “the objective of arbitration is to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense. The second objective should be the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator’s jurisdiction is the arbitration agreement between the parties). The third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process. True to the principle of party autonomy the tribunal’s statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal’s statutory duty to conduct the proceedings in a fair and impartial manner.”

*Res judicata* is provided for in Section 7 of the Civil Procedure Act.<sup>5</sup> Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 contemplates five conditions which, when co-existent, will bar a subsequent suit. The

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<sup>3</sup> Redfern and Hunter Law and Practice of International Commercial Arbitration 4ed (Sweet & Maxwell, London 2004) at 65-6; Kerr “Arbitration and the Courts – The UNCITRAL Model Law” (1984) 50 Arbitration 3 at 4-5; London Export Corporation Ltd v Jubilee Coffee Roasting Co. Ltd [1958] 1 WLR 271 at 278

<sup>4</sup> Misc. Civil Application No. E 1200 of 2021.

<sup>5</sup> Cap 21, Laws of Kenya.

conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.<sup>6</sup>

The 1<sup>st</sup> applicant argued that the 2<sup>nd</sup> applicant did not serve certified copies of the award and the agreement. However, the said documents are annexed to the 2<sup>nd</sup> applicant's affidavit and they were uploaded into the e-filing system. The said argument fails.

### **Conclusion**

Arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. The arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are to be determined. The Arbitration Act confers the Arbitrator exclusive jurisdiction over questions of fact and law which excludes appeals and limits reviews. The court may only be approached as provided by the Act. The circumstances under which the court can intervene are enumerated in section 35 and as the Supreme Court stated in the *Nyutu Case* stated in exceptional circumstances otherwise the arbitral award is final. Unless the arbitration agreement provides otherwise, an award is only subject to the provisions of the Act, final and not subject to appeal or review and that each party to the reference must abide by and comply with the award in accordance with its terms. Clearly, the Legislature intended the arbitral tribunal to have exclusive authority to decide whatever questions submitted to it, including any question of law. That is what the parties agreed.

In view of my analysis of the facts, the law and authorities herein above detailed, the court found that the 1<sup>st</sup> applicant failed to establish any grounds for this court to set aside the arbitral award. Put simply, the 1<sup>st</sup> applicant had not demonstrated any of the grounds provided in section 35 for setting the award aside.

Now turn to the 2<sup>nd</sup> application. The Court weighed the material presented before me and the law. The court found no impediment to the said application. The effect is that the application dated 4<sup>th</sup> November 2020 was merited. The Court allowed the said application. The final orders of the court were: -

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<sup>6</sup> See *Lotta v Tanaki* {2003} 2 EA 556.

- a. **That** the application dated 28<sup>th</sup> December 2020, filed by Easy Properties Limited, i.e ARB No. E007 of 2020 is hereby dismissed.
- b. **That** the application dated 4<sup>th</sup> November 2020, filed by Express Connections Limited, i.e ARB No. E003 of 2020 is hereby allowed.
- c. **That** Final Award delivered by Hon. Arbitrator, Advocate, Allen Waiyaki Cichui on 22<sup>nd</sup> day of October, 2019 be and is hereby recognized and adopted as a judgment of this court.
- d. **That** the award on costs award made by Hon. Arbitrator, Advocate, Allen Waiyaki Gichui on 5<sup>th</sup> day of October, 2020 be and is hereby recognized and adopted as an order of this court.
- e. **That** Express Connections Limited, be and is hereby granted leave to enforce the Final Award as a decree of this court.
- f. **That** Easy Properties Limited shall pay Express Connections Limited the costs of these consolidated applications.

## **Call for Submissions**

Alternative Dispute Resolution is a peer-reviewed/refereed publication of the Chartered Institute of Arbitrators, Kenya, engineered and devoted to provide a platform and window for relevant and timely issues related to Alternative Dispute Resolution mechanisms to our ever growing readership.

Alternative Dispute Resolution welcomes and encourages submission of articles focusing on general, economic and political issues affecting alternative dispute resolution as the preferred dispute resolution settlement mechanisms.

Articles should be sent as a word document, to the editor ([editor@ciarbkenya.org](mailto:editor@ciarbkenya.org)/ c.c.: [admin@kmco.co.ke](mailto:admin@kmco.co.ke)) and a copy to the editorial group ([adrjournal@ciarbkenya.org](mailto:adrjournal@ciarbkenya.org)). Articles should ideally be around 3,500 – 5,000 words although special articles of up to a maximum of 7,500 words could be considered.

Articles should be sent to the editor to reach him not later than Wednesday 9th February 2022. Articles received after this date may not be considered for the next issue.

Other guidelines for contributors are listed at the end of each publication. The Editor Board receives and considers each article but does not guarantee publication.

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The Editorial Board welcomes and encourages submission of articles within the following acceptable framework.

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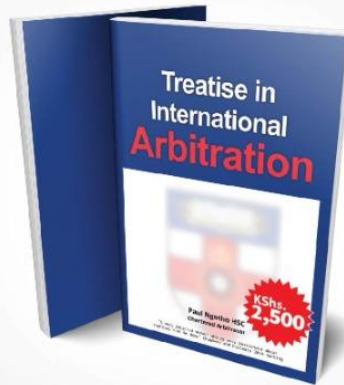
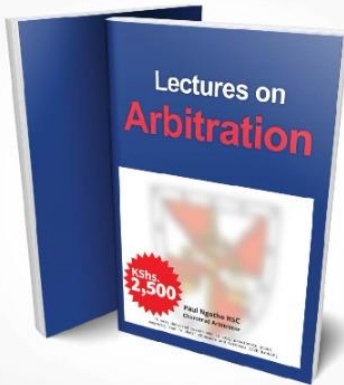
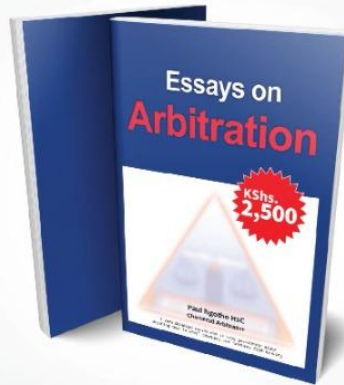
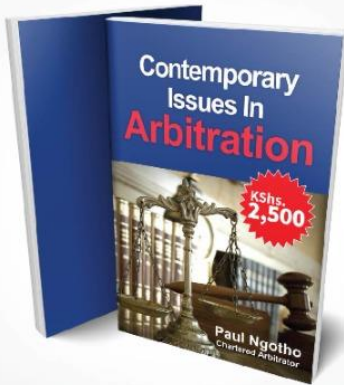
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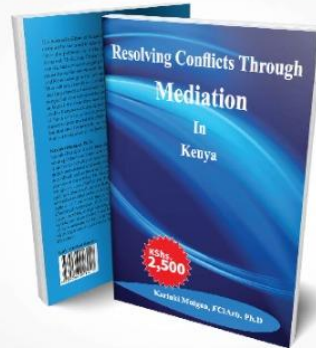
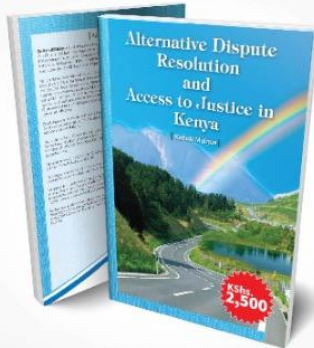
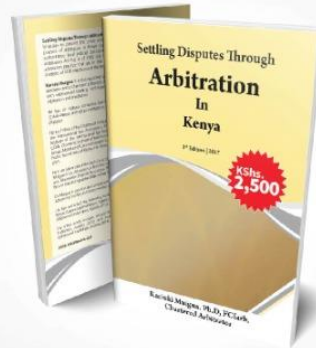
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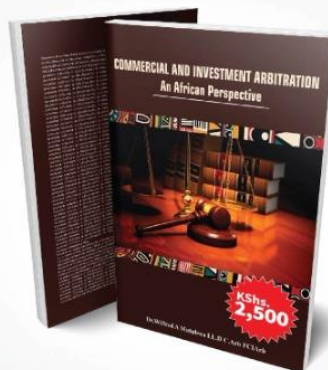
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