

Alternative Dispute Resolution



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Editor's Note

Welcome to this Issue of the *Alternative Dispute Resolution Journal*, Vol. 5, No.2, a publication of the Chartered Institute of Arbitrators-Kenya Branch (CIArb-K).

The same has been rebranded to reflect the new colours and underline the CIArb values of high standards and continuous improvement.

The Journal has been a valuable source of information for Alternative Dispute Resolution (ADR) practitioners, academics, students and the general readers who wish to keep themselves abreast of developments in the ADR realm.

The Journal is available both in hardcopy and online at www.ciarbkenya.org.

ADR is continually evolving. We publish papers that capture aspects of the evolution and spur debate on the future of ADR and access to justice.

The Journal is peer reviewed and refereed so as to ensure the highest standards. It has a worldwide readership and is a global platform for scholarly discussion of ADR.

This edition contains articles on pertinent topics in ADR discourse and practice. They deal with ADR in conflict management, promotion of international arbitration in Africa, mediation and its relevance in today's context, doctrine of sovereign immunity and effect on the recognition and enforcement of investment arbitration awards, effects of the doctrines of estoppel and waiver in domestic and international arbitrations, and the general issues surrounding the effectiveness of arbitration as a dispute settlement mechanism.

ADR is relevant in the field of conflict management; certain mechanisms can empower individuals to expeditiously deal with conflicts and reduce the costs associated with unresolved differences in business, personal lives and within communities.

ADR is recognised in the Constitution of Kenya and is associated with the quest for access to justice for all. Its implementation has not been without challenges. The Journal publishes papers that discuss these problems and proffer solutions.

Readers' comments and feedback are important as they help us achieve the goal of continuous improvement.

CIArb-K takes this opportunity to thank the Publisher, contributing authors, Editorial Team, reviewers, scholars and those who have made it possible to publish this Journal and maintain its place as a top international publication.

Dr. Kariuki Muigua, Ph.D., FCIArb (Chartered Arbitrator)
Editor
Nairobi, July 2017.

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Promoting International Commercial Arbitration in Africa

*By: Dr. Kariuki Muigua**

Abstract

This paper examines the state of international commercial arbitration in Africa. It explores the legal and institutional framework governing international commercial arbitration in Africa and the extent to which such framework has provided the requisite infrastructure needed for the successful practice of international Arbitration in Africa. The paper also discusses the place of international commercial arbitration in the Kenyan context and the role it can play in enhancing economic development of the country. The challenges facing the legal and institutional framework are examined and the opportunities for improvement are analyzed. The discourse ends with an analysis of what Kenya and generally, the African continent, needs to do to enhance the practice of international commercial arbitration and to make it a centre for the same.

1.0 Introduction

In the face of globalization, the need for effective and reliable mechanisms for management of commercial disputes as well as other general disputes involving parties from different jurisdictions has not only become desirable but also invaluable.¹

* Ph.D in Law (Nrb), FCIArb (Chartered Arbitrator), LL.B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); MKIM; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Lecturer at the Centre for Advanced Studies in Environmental Law & Policy (CASELAP), University of Nairobi and the Chairperson CI Arb (Kenya Branch). [November, 2013]

* Paper first Presented at the East Africa International Arbitration Conference, held on 28-29 July 2014, at Fairmont the Norfolk, Nairobi.

Arbitration has thus gained popularity over time as the choice approach to conflict management especially by the business community due to its obvious advantages over litigation. Perhaps the most outstanding advantage of arbitration over litigation is its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable. Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes.²

However, Africa as a continent has not been quite at par with the rest of the world as far as international commercial arbitration is concerned. This is due to a number of factors as identified by various writers, which this write-up discusses in brief. However, it is imperative to note at the earliest that the importance of international commercial arbitration as the most viable approach to international disputes is being recognized and basic structures/institutions for arbitration are being established across the continent. This paper addresses the issue of international commercial arbitration in Africa, the challenges facing the same and the opportunities that exist for its promotion.

¹ *Alternative Dispute Resolution Methods*, Document Series No. 14, p. 2, Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000), Available at http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/DocSeries14.pdf

² Karl P. Sauvant and Federico Ortino, *Improving the international investment law and policy regime: Options for the future*, Background report prepared for the Seminar on Improving the International Investment Regime Helsinki, April 10-11, 2013 hosted by The Ministry for Foreign Affairs of Finland, 25 March 2013. Available at <http://www.formin.finland.fi/public/download.aspx?ID=113259&GUIDE> .

2.0 The Ideal of Arbitration in Africa

Commercial disputes are unavoidable. Because of this, efficient mechanisms for their management are essential. International trade disputes are also as unavoidable. The mechanisms now universally used for their management are negotiation, mediation, arbitration and conciliation. These mechanisms work best when a well-resourced, neutral and credible body administers the process.³

The recognized international arbitral institutions were initially based in Europe, but in recent years, there has been considerable growth of such institutions throughout the world. Some recent examples are China, Russia, India, Singapore and Dubai. International trade and commerce is enhanced by the growth of these institutions.⁴

International commercial arbitration in Africa exists through institutions such as Africa ADR which is the arbitral link between those who invest in Africa, and those who trade in Africa; between the business communities of Africa and abroad and between the international community.⁵ Africa ADR's mandate is to foster the culture of alternative dispute resolution in Africa.⁶

³ "Africa ADR – a new African Arbitration Institution", available at <http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution> [Accessed on 1/11/2013]

⁴ Ibid.

⁵ <http://www.africaadr.com/> [Accessed on 1/11/2013].

⁶ Ibid.

The referral of African disputes to European arbitral authorities for settlement is prohibitively expensive and unsatisfactory. Such referral also points to an explicit admission that the structure of arbitration in Africa has failed. International trade agreements should take the initiative of adopting a clause that sees any arising disputes referred to arbitration in Africa. The business and investment community stands to benefit from international commercial arbitration in Africa as the same provides a viable system offering a proper mechanism for the settlement of international and regional disputes. The system is cost efficient with venues in close proximity thus offering convenience. International commercial arbitration in Africa should thus be credible and efficient. The existence of such a system has the capacity to boost cross-border trade and investment.⁷

3.0 Challenges Facing the Practice of International Commercial Arbitration in Africa

3.1 The Choice/Appointment of International Arbitrators by Parties

Despite there being individuals with the relevant knowledge, skill and experience needed for international dispute resolution and the 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. This is further complicated by the fact that most disputants prefer to appoint non-nationals as arbitrators in international disputes, thus resulting in instances where even some Africans go for non-Africans to be arbitrators. This is so because parties are given the autonomy to appoint their arbitrators, conciliators or representatives and cannot be forced to accept the choice of arbitrator involuntarily unless

⁷ Africa ADR – a new African Arbitration Institution, Op. Cit..

under very limited and special circumstances. Arbitration is intended to be a voluntary process. However, it is not uncommon to see parties disagree on the appointment of an arbitral tribunal or attempt to obstruct the appointments to delay the arbitration⁸. This factor thus portrays Africa to the outside world as a place where there are no arbitrators with sufficient knowledge and expertise to be appointed as international arbitrators.

3.2 Lack of or Inadequate Legal and Institutional Framework/Capacity on Arbitration

There have been inadequate legal regimes and infrastructures for the efficient and effective organization and conduct of international commercial arbitration in Africa. Some African states have for a long time lacked an established legal framework on international commercial arbitration.⁹ The existing one annexed arbitration to court, a factor that cannot promote international commercial arbitration. The existing provisions barely mention international commercial arbitration with a specified framework on the same. Some states may also not be parties to all or some important multilateral treaties relevant to international dispute resolution. This has denied the local international arbitrators the fora to showcase their skills and expertise in international commercial arbitration. For instance, the arbitration law in South Africa is not drafted along the UNICITRAL¹⁰ model law lines and varies substantively with laws in other jurisdictions¹¹. Another example of a country with archaic

⁸ Lew, J., 'Comparative International Commercial Arbitration', 237, [London: Kluwer Law International, 2003].

⁹ Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa' Available at <http://www.mcgill.ca/files/isid/LDR.2.pdf>.

¹⁰ UNCITRAL *Model Law on International Commercial Arbitration* (1985).

¹¹ Arbitration in Africa, August 2011, South Africa, Available at

arbitration laws is Tanzania, whose Principal Arbitration Act was enacted on 22 May 1932. It is also not drafted in line with the UNCITRAL model law.¹² These two jurisdictions are an example of the situation in some African countries and this discourages foreigners from seeking arbitration services in Africa.

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. 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.

3.3 Varying Cultures between Disputants

Non-African disputants have always been wary of the African international commercial arbitrators especially where one of the disputants is African due to cultural differences. These differences may be in reference to economic, political and/or legal developments thus creating varying opinions of issues, prejudices and conflicts of interests especially in international economic relations. Some may seek to subject their dispute to another arbitrator who may not share a culture with either of the disputants but one aware of international best practices in arbitration.¹³

<http://www.nortonrosefulbright.com/files/south-africa-25761.pdf>.

¹² Arbitration in Africa, Tanzania, June 2007. Available at <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf>.

¹³ See Russell J. Leng and Patrick Regan, 'Social and Political Cultural Effects on the Outcome of Mediation in Militarized Interstate Disputes', Available at <http://cdp.binghamton.edu/papers/socialeffects-full.pdf>.

3.4 Lack of or Inadequate Marketing

There has not been zealous marketing of Africa as a centre for international commercial arbitration. Many people outside Africa still carry with them the perception that Africa does not have adequate/any 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.¹⁴

3.5 Uncertainty in Drafting

There is the need to draft the arbitration clause in an unambiguous manner to avoid misinterpretation of the same as this has always drawn the attention of courts leading to unnecessary interference. This interference intimidates the foreigners thus making them shy away from African centres.¹⁵

3.6 Interference by National Courts

Courts exercise authority over arbitration matters either as a matter of statutory or inherent powers. There are instances where the Arbitration Act gives the national courts the powers to intervene in arbitration proceedings. However, these powers sometimes are exercised far beyond what the Act provides. This often happens where the courts decide that there existed illegality, fraud, incapacity or that the award is against public policy. Court interference intimidates investors since they are never sure what reasoning the court might adopt should it be called upon

¹⁴ Hogan Lovells, 'Arbitrating in Africa'. Available at http://www.hoganlovellsafrica.com/_uploads/Publications/Arbitrating_in_Africa_-_Hogan_Lovells_March_2013.pdf.

¹⁵ 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.

to deliberate on such commercial disputes. Courts have, in the recent past, enforced the provisions of the Arbitration Act with exceptional diligence thus lending more credence to the arbitral process.

However, this alone cannot enhance arbitration.¹⁶ Section 10 of the Kenyan Arbitration Act provides that except as provided in the Act, no court shall intervene in matters governed by this Act. 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 expressly contemplated under the Model Law. However, courts have increasingly interfered in arbitration on grounds of public policy. The Act provides for international arbitration and this places Kenya in a favorable position as far as international arbitration is concerned. However, it is not very clear to foreigners as to when the Courts may interfere as the Act is too general in stating that the courts will not interfere except as it is provided for under the Act.¹⁷ The Act does not however define clearly the instances of such intervention and it leaves such interpretation to the courts. For instance, one of the instances of court intervention is where the arbitral award is against public policy. However, the definition of such public policy is not clear and it's subject to court interpretation.¹⁸ In Kenya,

¹⁶ Gakeri, J, *Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR*, International Journal of Humanities and Social Science, Vol. 1 No. 6; June 2011 Available at <http://ir.library.strathmore.edu/fileDownloadForInstitutionalItem.action;jsessionid=9E5FF2EC6DBB95D872EA5AD81AAB740A?itemId=375&itemFileId=329> [Accessed on 12/11/2013].

¹⁷ S.10, No. 4 of 1995.

¹⁸ This was discussed and upheld in the Kenyan case of *Anne Mumbi Hinga V Victoria Njoki Gathara* (Court of Appeal at Nairobi, Civil Appeal 8 of 2009 [2009] eKLR). Indeed, the Court of Appeal made an important observation that most of the applications going to court to have the award set aside will be on grounds of public policy. It however

public policy was defined by Ringera J (as he then was), in *Christ for All Nations vs. Apollo Insurance Co. Ltd*¹⁹ in the following words: -

“Although public policy is a most broad concept incapable of precise definition...an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:

- a) Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or*
- b) inimical to the national interest of Kenya; or*
- c) Contrary to justice and morality.”*

Though public policy has been defined in the Kenyan context²⁰, the lack of a clear cut definition of the same can sometimes be applied with disastrous results. This is not only a problem in Kenya but the world all over. For instance, in the Indian case of *Phulchand Exports Ltd v OOO Patriot*,²¹ the Supreme Court decided that a foreign award can be set aside under Section 48(2) of the Act if it is considered to be patently illegal. They gave public policy a wider meaning to include morality and

stated that one of the underlying principles in the *Arbitration Act* is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards. Secondly, public policy can never be defined exhaustively and should be approached with extreme caution. Failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State’s powers are exercised.

¹⁹ [2002] 2 EA 366.

²⁰ Ibid.

²¹ Civil Appeal 3343/2005 - 12 October 2011.

justice as a test. This is another controversial concept and thus it complicates the understanding of what is to be regarded as being against public policy.²² Nearer home, the Ugandan *Arbitration and Conciliation Act, 2000* (Ch 4)²³ provides under Section 34 for grounds upon which the High Court may set aside an arbitral award. It provides that the Court may set aside the award if it finds that it is against the public policy of Uganda.

The lack of a clear meaning of public policy gives courts more opportunities to interfere with arbitration proceedings. This uncertainty in court intervention discourages and intimidates local as well as foreign investors who carry on business in Kenya from settling their commercial disputes in Kenya, who instead opt for foreign jurisdictions. In some or most jurisdictions around the world, “Public policy” is said to include procedural questions as well as questions relating to substantive law.²⁴

Justice Murphy in the Australian case of *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (No 2) [2012] FCA 1214 (2 November 2012) laid out some guiding principles in relation to “public policy”. These included *inter alia*: Under the Model Law, the expression “public

²² Robert Cutler, et al., *India: a widening scope to avoid enforcement of foreign awards*, *Clayton Utz Insights*, 08 December 2011, Available at http://www.claytonutz.com/publications/edition/08_december_2011/20111208/india_a_widening_scope_to_avoid_enforcement_of_foreign_awards.page [Accessed on 18/10/2013].

²³ Available at http://arbitrationlaw.com/files/free_pdfs/Uganda%20Arbitration%20and%20Conciliation%20Act.pdf [Accessed on 23/10/2013].

²⁴ James Whittaker, et al., *Principles relating to public policy in the International Arbitration Act*, 29 November 2012, Available at www.corrs.com.au/publications/corrs-in-brief/principles-relating-to-public-policy-in-the-international-arbitration-act/ [Accessed on 23/10/2013].

policy” has a greater and different role in relation to setting aside an award in the court of supervisory jurisdiction (Art 34(2)(b)(ii)), than it does in relation to refusal to enforce an award in the court of enforcement (Art 36(1)(b)(ii)), in that an order refusing enforcement is effective only in the State where enforcement is sought, whereas an order setting aside an award prevents its enforcement in all countries which have signed up to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Convention); the plain words of Section 19(b) of the International Arbitration Act of 1974 of Australia unambiguously declare that if *any* breach of natural justice occurs in connection with the making of an award then, for the purposes of Arts 34(2)(b)(ii) and 36(1)(b)(ii), the award is in conflict with or contrary to the public policy of Australia. This is despite authority around the world indicating that a Convention award is only in conflict with or contrary to public policy if it offends fundamental notions of justice and fairness; nonetheless, it is important to keep in mind that Acts 34(2)(b)(ii) and 36(1)(b)(ii) provide that a court *may* set aside an award or refuse enforcement if it finds that the award is in conflict with or contrary to public policy. That is, the powers to set aside an award or refuse enforcement are discretionary and the proper exercise of the court’s discretion requires that it has regard to the objects of the IAA set out in Section 2D and the matters set out in Section 39 (2), namely the fact that arbitration is intended to be an efficient, enforceable and timely method of settling commercial disputes, and that arbitral awards are intended to provide certainty and finality. Although the decisions of the courts in Convention countries are not binding, there is an obvious importance to taking them into account, in order to achieve some international uniformity in the meaning and operation of “public policy”.²⁵

²⁵ Ibid.

Until and unless internationally accepted criterion for determining public policy is agreed upon, public policy as a ground for setting aside arbitral awards in international commercial arbitrations remains an obstacle to the blossoming of international arbitration in Africa.

3.7 Taking Care of Fundamentals

The concern has been that there are some countries in Africa that were/are not parties to the international laws on arbitration and particularly the New York Convention on the Recognition and Enforcement of Arbitral Awards (NYC) of 1958, which would guarantee the enforcement of arbitral awards and the International Convention on the Settlement of Investment Disputes (ICSID).²⁶ This impedes the practice of international commercial arbitration.

3.8 Control of Costs

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 more often than not left to the particular institutional guidelines, which institution may not be favorable to the parties. For instance, the Kenyan branch of Chartered Institute of Arbitrators has its own rules and guidelines on the remuneration of its arbitrators. However, these are only

²⁶ The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). It was opened for signature on March 18, 1965 and entered into force on October 14, 1966. The Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID was created by the Convention as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties, through conciliation or arbitration procedures. Recourse to the ICSID facilities is always subject to the parties' consent.

applicable to those who practice arbitration under the Institute and thus have limited applicability.²⁷

3.9 Keeping the Process Moving

International commercial disputants often resort to arbitration for its advantages over litigation which include speed. However, due to the other concerns as already discussed above, foreigners are not usually sure about the process and how fast the process would be. This may make them wary of engaging African arbitrators since they are out to save on time.

3.10 Perception of Corruption/ Government Interference

At times governments are also perceived to be interfering with private commercial arbitration matters. For instance, the government may try to influence the outcome of the process especially where its interests at stake and put forward the argument of grounds of public policy.

The Global Corruption Barometer 2013 is the world's largest public opinion survey on corruption. According to a Transparency International (TI) survey released in Berlin, Kenya ranked number 4 among countries with the highest cases of bribery in the world. The survey concluded that 7 out of 10 Kenyans interviewed by TI-Kenya had given a bribe in the preceding 12 months.²⁸ The report cited corruption to be especially rampant in dealings with key public institutions and services. According to the report, the police lead in the list of the most corrupt institution in Kenya. They are then followed by Parliament, Judiciary, the civil service

²⁷ See CIArb Kenya Website Available at www.ciarbkenya.org Accessed on 12th November, 2013.

²⁸ Available at <http://www.the-star.co.ke/news/article-127501/kenya-ranks-fourth-bribery-index-ti> [Accessed on 02/11/2013].

and political parties. A grim 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 propagated that justice is impossible to achieve in Africa.

3.11 Bias against Africa

Without a shred of doubt, racism still exists in society. It rears its ugly head in day to day life. Recently, South Korea's top tobacco firm, KT&G was forced to pull down adverts for its new "This Africa" brand of cigarettes. This happened after complaints were presented that the use of images of apes dressed as humans was racist. The African Tobacco Control Alliance called for the posters to be withdrawn citing their offensive nature.²⁹

An American Court ruled recently that Kenya is insecure and unsafe while determining the issue of a Kenyan mother who intended to travel into the country with her 22-month old daughter. The application to bar her from travelling with her child was made by her former husband and granted by the court. The husband cited the terrorist attack at Westgate shopping mall. The husband even went further to state that Kenya is home to child traffickers, kidnappers and malaria outbreaks.³⁰

²⁹ "Korea firm to remove chimp ad", *Daily Nation*, Thursday October 24, 2013, Nairobi, Kenya.

³⁰ "Kenya unsafe for US child, rules court", *Daily Nation*, Tuesday October 22, 2013, Nairobi, Kenya Available at <http://mobile.nation.co.ke/News/Kenya-unsafe-for-US-child--rules-court/-/1950946/2043586/-/format/xhtml/-/qbkqh7z/-/index.html> [Accessed on 02/11/2013].

The existent bias as briefly outlined above renders Africa's image as a corrupt and uncivilized continent. The business association and interaction of Africa with the outside world is thus downplayed and kept at a minimum. The end result is a weaker business environment culminating in a weaker international arbitration environment.

3.12 Institutional Capacity

There exists a challenge on the capacity of existing institutions to meet the demands for ADR mechanisms introduced by legal frameworks as well as handling the commercial arbitration matters. 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.

3.13 Endless Court Proceedings

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 pending³¹. 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.

3.14 The Challenge of Arbitrability

Arbitrability is used to refer to the determination of the type of disputes that can be resolved through arbitration and those which are the domain

³¹ 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>

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).

of the national courts. It deals with the question of whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute.³² Courts often refer to “public policy” as the basis of the bar.³³ The challenge arises when a matter that is arbitrable in one jurisdiction fails the test of arbitrability in a different jurisdiction.

Arbitrability may either be subjective or objective. National laws often restrict or limit the matters, which can be resolved by arbitration. Subjective arbitrability refers to a situation where states or state entities may not be allowed to enter into arbitration agreements at all or may require a special authorization. Objective arbitrability refers to restrictions based on the subject matter of the dispute³⁴. Certain disputes may involve such sensitive public policy or national interest issues that it is accepted that they may be dealt only by the courts, for instance criminal law.³⁵

It has been argued that under Kenyan law, arbitrability might have acquired a broader definition after the passage of the current Constitution

³² Laurence Shore “Defining ‘Arbitrability’-The United States vs. the rest of the world”, *New York Law Journal*, 2009, available at <http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf>, [Accessed on 15/10/2013].

³³ *Ibid*, p. 1.

³⁴ Available at www.paneurouni.com/files/sk/fp/ulohy.studentor/2rocnikmgr/arbitrability-students-version.pdf, [Accessed on 8/11/2013].

³⁵ Katarína Chovancová, *Arbitrability*, Extract, p. 1, Institute of International and European Law, Available at <http://www.paneurouni.com/files/sk/fp/ulohystudentov/2rocnikmgr/arbitrability-students-version.pdf> [Accessed on 22/10/2013].

of Kenya, 2010³⁶, which elevates the status of Alternative Dispute Resolution (ADR). In this respect, the scope of arbitrability is broad under the Constitution of Kenya, 2010 as opposed to its scope under the Arbitration Act No. 4 of 1995 (As amended in 2009)³⁷. Article 159 of the Constitution provides that in the exercise of judicial authority, Courts and tribunals shall be guided by the principle that *inter alia* alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3). Clause (3) provides that the traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law. However, this remains to be seen especially due to the subjection of the same to repugnancy clause.

4.0 International Commercial Arbitration under Kenyan Law

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)³⁸ and to International Convention on the Settlement of Investment Disputes (ICSID). Kenya

³⁶ Government Printer, 2010, Nairobi, Kenya.

³⁷ Kariuki, F, "Redefining "Arbitrability": Assessment of Articles 159 & 189 (4) of the Constitution of Kenya", *Alternative Dispute Resolution*, The Chartered Institute of Arbitrators, Kenya Journal Volume 1, Number 1, 2013. ISBN 978-9966-046-02-4.

³⁸ 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.

became a signatory to ICSID on May 24, 1966, deposited its instruments of ratification on Jan. 3, 1967 and subsequently, the Convention came into force on Feb. 2, 1967.³⁹

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.⁴⁰

The *Arbitration Act*, No. 4 of 1995 (As amended in 2009) governs the arbitration process in Kenya. Under this law, parties to a dispute can by way of a written agreement refer their disputes to arbitration.⁴¹ This can be done in agreements via an arbitration clause which stipulates that any dispute arising therefrom shall be referred to arbitration. An arbitration is international if *inter alia* the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states⁴².

³⁹ International Centre for Settlement of Investment Disputes, 'List Of Contracting States And Other Signatories Of The Convention' (as of May 20, 2013), Available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> [Accessed on 23/10/2013].

⁴⁰ See international Council for Commercial Arbitration (ICCA), *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (with the assistance of the Permanent Court of Arbitration Peace Palace, The Hague (2011).

⁴¹ Section 4, No. 4 of 1995.

⁴² Section 3(a), No. 4 of 1995.

The importance of an 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.⁴³

Section 36(2) of the Kenyan *Arbitration Act*, 1995 provides that international arbitration awards shall be recognized as binding and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.

If applied correctly, Kenyan law therefore has the potential to further international commercial arbitration.

5.0 Way Forward

There is a need to employ mechanisms that will help promote and demonstrate Africa to the outside world as a place endowed with international commercial arbitrators with sufficient knowledge and expertise to be appointed to arbitrate international arbitrators. Promotion of arbitration alongside tourism would also be one effective strategy (Arbi-tourism).

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 around Africa. However, all is not lost as recently Kenya set up the Nairobi Centre for International Arbitration (NCIA). This was established under the *Nairobi*

⁴³ Section 36, No. 4 of 1995.

Centre for International Arbitration Act, No. 26 of 2013⁴⁴. Its functions are set out in Section 5 of the Act as *inter alia* to: first, promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act; second, administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; third, ensure that arbitration is reserved as the dispute resolution process of choice; and fourth, to develop rules encompassing conciliation and mediation processes. Further functions include: to organize international conferences, seminars and training programs for arbitrators and scholars; to coordinate and facilitate, in collaboration with other lead agencies and non-state actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation; to maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives; in collaboration with other public and private agencies, facilitate, to conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data; to establish a comprehensive library specializing in arbitration and alternative dispute resolution; to provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties; to provide advice and assistance for the enforcement and translation of arbitral awards; to provide procedural and technical advice to disputants; to provide training and accreditation for mediators and arbitrators; fourteenth, educate the public on arbitration as well as other alternative dispute resolution mechanisms; and, to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre achieve its objectives, *inter alia*.

⁴⁴ Government Printer, 2013, Nairobi, Kenya.

There is also the Kigali International Arbitration Centre (KIAC)⁴⁵. These together with the existing institutions are a step in the right direction towards promoting Africa as a choice international arbitration centre. In Kenya, there is the Centre for Alternative Dispute Resolution (CADR) that is a company limited by guarantee. CADR 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. Under CADR, referred disputes may be settled by arbitration, conciliation or mediation. Further to this, CADR provides a channel of communication between arbitrators and parties to the arbitration and also between the parties themselves. In relation to the notion of international commercial arbitration, CADR is mandated to organize, supervise, run and operate international arbitrations, conciliations and related dispute settlement in Kenya or elsewhere. The incorporation of CADR is undoubtedly a further initiative towards promoting international commercial arbitration in Kenya as well as Africa as a whole.⁴⁶

This will not only afford the local international commercial arbitrators the fora to showcase their skills and expertise in international commercial arbitration but may 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

⁴⁵ See Kigali International Arbitration Centre Website available at www.kiac.org.rw/ [Accessed on 11/11/2013].

⁴⁶ See CI Arb Kenya Website, Op. Cit.

and technological facilities; Security and safety of documents; Expertise within its staff; and some serious degree of permanence.⁴⁷

There is a need to set up more regional centres for training of international commercial arbitrators in Africa. This will not only ensure a bigger number of qualified international commercial arbitrators in Africa but will also deal with the challenges that might come with a situation where some African countries are not parties to international treaties on arbitration and the model law, a factor that might otherwise be a disadvantage to international commercial arbitrators from such countries. 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. If more African institutions take up such roles, then this would greatly enhance international commercial arbitration in Africa.⁴⁸

Joint annual conferences would also be a good marketing tool for African international commercial arbitrators as well as African arbitration centres. This should be backed by a joint website (or any other viable platform) where the existing regional arbitration centres in Africa are listed with their full description for the world to see. The profiles of all qualified international arbitrators (names forwarded by home country member institutions) should also be displayed in such platforms. There is also need for the existing institutions to seek collaboration with more

⁴⁷ Emilia Onyema, *Effective Utilization of Arbitrators and Arbitration, Institutions in Africa by Appointors*, 4th Arbitration and ADR in Africa Workshop, *Empowering Africa in the 21st 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>.

⁴⁸ See CIArb Kenya Website, Op. Cit.

international commercial arbitration institutions since this will work as an effective marketing tool for the exiting 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 law of arbitration recognizes that the role of the court in arbitration is inevitable and almost universally provides for it. The law also appreciates the need to limit court intervention in arbitration to a basic minimum.⁴⁹ This will subsequently boost the confidence of foreigners in the African Arbitration institutions. Effective and reliable application of international commercial arbitration in Africa has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously. This will not only enhance international commercial arbitration in Africa but also economic development for Africa as a continent.

5.0 Conclusion

International commercial arbitration in Africa has over time remained at a minimum compared to more advanced continental jurisdictions. This paper has examined the challenges facing the practice of international commercial arbitration in Africa. The fundamental concerns and issues about international commercial arbitration in Africa have been critically

⁴⁹ 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.

examined in the pursuit of promoting the practice. Issues relating directly to arbitration have been analyzed and in addition, peripheral matters that seem to hamper international commercial arbitration in Africa have been scrutinized. There is need for a clear framework within Africa within which international commercial arbitration can be further promoted. There are arbitral institutions already in place and this paper has discussed the same. The presence of such institutions in the continent points to an acceptance of alternative dispute resolution modes as well as the need to promote the practice of international commercial arbitration other than exporting commercial disputes to foreign countries for settlement. Indeed, these foreign countries and/or jurisdictions may be better endowed in alternative dispute resolution frameworks but the only way for Africa to achieve growth in terms of international arbitration begins when corporations and international businesses embrace the notion of conducting arbitration locally within the continent. There is a need to promote arbi-tourism and to put up adequate legal regimes and infrastructure for more arbitration centres in Africa as well as training centres for purposes of training international arbitrators in the continent. Africa definitely has the capacity to conduct rigorous and impeccable international commercial arbitration in its own right as a continent. Promoting international commercial arbitration in Africa is an imperative that is achievable. The time to showcase Africa as an ideal centre for the settlement of commercial disputes is now.

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The Effects of the Doctrines of Estoppel and Waiver in Domestic and International Arbitrations

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1.0 Introduction

Estoppel and waiver are conduct on the part of one party which does not alter the terms of the contract but merely affects the remedies in respect of a breach of those terms by the other party.¹ The two doctrines are similar if not identical but both require a clear and unequivocal promise or assurance by one party to a contract to another, that the promisor will not enforce its strict legal rights under the contract which promise or assurance is intended to effect the legal relations between them, and which is reasonably understood by the other party to have that effect and which is in fact acted upon by the other party.² Both are defence doctrines and it is necessary to consider how and to what extent (if at all) a party relied upon what was said or done and that will or may well depend upon whether it was realistic or reasonable in a design and construction context for it to have placed reliance on what was said or done.³

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¹ *Flacker Shipping Ltd v Glencore Grain Ltd* [2002] EWCA Civ 1068 per Potter LJ, para 61

² *MW Trustees Ltd v Telular Corporation* [2011] EWHC 104 (Ch), para 40

³ *Natl Amusements (UK) Ltd v White City (Shepherds Bush) Ltd Partnership* [2009] EWHC 2524 (TCC), para 35

The rules of estoppel and waiver can apply in circumstances so as to prevent a party from relying upon conduct by the other party which would otherwise justify his doing so. The occasions when these rules may be invoked are limited, for example, by the fact that it is rarely if ever possible to imply an unequivocal representation of fact from a party's silence on the relevant issue.⁴

It is a settled principle that an arbitration agreement is collateral or ancillary to the main contract within which it is contained, and this principle does not deprive it of its character and status of a contract.⁵ Consequent to its status as a stand-alone contract, legal doctrines that apply to the main contract could equally be applicable to an arbitration agreement; for example, estoppel and waiver apply to both the substantive contract and the arbitration agreement and the effects of both doctrines to the main contract could equally be applicable to the arbitration agreement.

The objective of this paper is to examine the effects of the doctrines of estoppel and waiver in both domestic and international arbitrations. International arbitrations include both international commercial

⁴ *Glencore Grain Rotterdam BV v Lebanese Organisation For International Commerce* ("Lorico") (Buyers) [1997] EWCA Civ 1958

⁵ In *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Law reports 48, at 50, Saville J explained the contractual character of arbitration as; "An arbitration clause in a commercial contract like the present one is an agreement inside an agreement. The parties make their commercial bargain, i.e. exchange promises in relation to the subject matter of the transaction, but in addition agree on a private tribunal to resolve any issues that may arise between them"

arbitrations and Bilateral Investment Treaty (BIT) arbitrations.⁶ Following this introduction, the second section discusses the doctrine of estoppel and its effects on arbitrations in different legal systems. The section also examines whether estoppel has always been given effect in BIT arbitrations. In the third section, the discussion is on the effects of the doctrine of waiver in the two types of arbitrations, and the conclusion follows at the fourth section.

2.0 Estoppel

Estoppel is an equitable remedy, designed to prevent unfairness.⁷ It is a flexible doctrine which can take account of an honest and responsible interaction of business parties to a contract. Where there is room for disagreement as to the meaning or effect of a contract but the parties have clearly chosen (or purported to choose) their own understanding of it and have dealt with one another on the basis of that understanding, whether that mutuality is found in a common assumption, or in acquiescence, or in one party's reliance on another's representation, the doctrine of estoppel allows the court in a proper case to give effect to the parties' objectively ascertainable and mutual dealings with one another.⁸ Estoppel is mutual and it is because of the principle of mutuality that estoppel can only be effective as between the same parties or their

⁶ The two types of arbitrations are governed by private international law unlike arbitrations between Sovereign States that are governed by public international law. This paper is only concerned with arbitrations governed by private international law.

⁷ *Tonkin v UK Insurance Ltd.* [2006] EWHC 1120 (TCC), para 206

⁸ *ING Bank NV v Ros Roca SA (Rev 1)* [2011] EWCA Civ 353 per Rix LJ, para 111

privies⁹, and someone who is not a party cannot take advantage of a decision in proceedings made when he was not there.¹⁰

Estoppel comes in two forms; estoppel *in pais* and estoppel *per rem judicatam*. The former is based upon a policy of giving limited effects to non-contractual representations and promises while the latter is based upon the altogether different policy of avoiding re-litigation of the same issues.¹¹

2.1 Estoppel in pais

There are various types of estoppel that fall under estoppel *in pais* and the one of interest is estoppel by convention.

⁹ Privies are traditionally grouped into three classes: (1) privies in blood, for example, ancestor and heir; (2) privies in law, for example testator and executor, intestate and administrator, bankrupt and trustee in bankruptcy; (3) privies in estate or interest, for example testator and devisee, vendor and purchaser, landlord and tenant, a husband and his wife claiming under his title and a wife and husband claiming under hers (see *Wiltshire v Powell & Ors* [2004] EWCA Civ 534, para 14).

¹⁰ Mutuality is a common law principle that works well in arbitration because arbitrators are appointed to decide the disputes in the arbitration between the particular parties and the privacy and confidentiality of arbitral process underline this. Third parties should therefore have difficulties having access to arbitration awards and materials relating to such decisions. An award of one tribunal can only be referred to in other proceedings only if the parties to that award consent to that course, even though it will not necessarily be conclusive evidence (see *Sun Life Assurance Company of Canada v The Lincoln National Life Insurance Co* [2004] EWCA Civ 1660). Although United States is principally a common law jurisdiction, the approach is different because the mutuality doctrine, under which neither party could use a prior judgment against the other unless both parties were bound by the same judgment, no longer applies (see *Parklane Hosiery Co., Inc. v. Shore*: 439 U.S. 322 (1979)).

¹¹ *Watt (formerly Carter) v Ahsan* [2007] UKHL 51; per Lord Hoffmann, para 30.

2.1.1 Estoppel by convention

The law of estoppel by convention was set out by Lord Steyn in *Republic of India v India Steamship Co Ltd*¹²;

"It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption.... It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

The principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings were outlined in *HM Revenue & Customs v Benschdollar Ltd*¹³ as;

- i. It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
- ii. The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

¹² [1997] UKHL 40.

¹³ [2009] EWHC 1310 (Ch), para 52

- iii. The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
- iv. That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
- v. Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

In arbitration, an issue as to whether an estoppel by convention had arisen was considered in *Jones Engineering Services Ltd v. Balfour Beatty Building Ltd*¹⁴ where the two issues for determination were whether there was a valid reference to arbitration and if so, whether an estoppel by convention had arisen which prevented the defendants from going back on the agreed assumption that an agreement existed. After an arbitrator had been appointed and held thirteen full or part days of hearing, the defendant asserted there was no concluded sub-contract incorporating the arbitration provisions in the standard form the parties had signed.

After finding there was an *ad-hoc* reference to arbitration, the Judge referred to the Court of Appeal decision in *Norwegian American Cruises A/S v. Paul Mundy, The "Vistafjord"* [1988] 2 Lloyd's Rep 343 and said the case was authority for the proposition that estoppel by convention is not confined to an agreed assumption as to fact, but maybe as to law, that the court will give effect to the agreed assumption only if it would be unconscionable not to do so and that once a common assumption is revealed to be erroneous, the estoppel will not apply to future dealings.

¹⁴ (1992) 42 Con LR 1

The Judge then applied those tests and said it was as clear as can be that there was from the inception of the arbitration, and all the way through, an agreed assumption that there was a valid arbitration agreement being on the terms of printed sub-contract form. That agreed assumption was acted on throughout the arbitration proceedings, right through to the end of the thirteenth day. In his judgment, he held it would be most unconscionable to allow the defendants to depart from that agreed assumption, seeing that the plaintiffs have incurred substantial costs, both in their preparation for the arbitration and in their pleadings and in interlocutory matters (such as discovery) and in 13 full or part days of hearing, including legal representation, calling of witnesses, etc, in reliance on that assumption. There was therefore an estoppel by convention that prevented the defendants from going back on the agreed assumption that a valid arbitration agreement existed.¹⁵

2.1.2 Abandonment

Abandonment can give rise to estoppel and preclude a party from pursuing arbitration proceedings. In *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)*¹⁶, with reference to a contract, Lord Brandon gave an example where such estoppel can arise when he said that, where A seeks to prove that he and B have abandoned a contract by showing that the conduct of B, as evinced towards A, has been such as to lead A reasonably to believe that B has abandoned the contract, even though it has not in fact been B's intention to do so, and that A has significantly altered his position in reliance on that belief, an implied abandonment of a contract as a result of the conduct of the parties

¹⁵ The decision is consistent with definition of "arbitration agreement" in Arbitration Act Revised Edition 2012 [2010] (adopted from Option II of Model Law Article 7) that state; the defined legal relationship does not have to be contractual.

¹⁶ [1983] 1 All ER 34.

can arise. This method involves the creation by B of a situation in which he is estopped from asserting, as against A, that he, B, has not abandoned the contract:

With reference to arbitration, the principle in *The Hannah Blumenthal* case was applied in *Hashwani v Jivraj*¹⁷ where the Judge found that the conduct of each of the claimant, the defendant, and the arbitrator, as evinced to the other and acted on by that other, amounted to an implied agreement to abandon the arbitration agreement¹⁸. The Judge concluded that the estoppel contentions did not rely on silence and inaction, and he identified the particular facts on which he based his finding of estoppel.¹⁹

Once a party to arbitration proceedings is estopped from asserting that he has not abandoned the agreement to arbitrate, the arbitration agreement becomes null and void, inoperative or incapable of being performed.²⁰

2.2 Estoppel per rem judicatam (Res Judicata)

Estoppel *per rem judicatam*²¹ is a manifestation of the principle that judicial decisions once made must be accepted as final and are not open

¹⁷ [2015] EWHC 998 (Comm).

¹⁸ *Ibid*, para 115.

¹⁹ *Ibid*, para 127.

²⁰ *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC), para 81.

²¹ In *Johnson v. Gore Wood* [2000] UKHL 65, the House of Lords held that *res judicata* is separate and distinct from the abuse of process rule in *Henderson v. Henderson* (1843) 3 Hare 100 at 114, but both share the underlying public policy that there should be finality in litigation and that a party should not be twice vexed in the same matter.

to challenge. Ultimately, it rests on a rule of policy that it is in the public interest for there to be finality in litigation, but it also sustains an important principle that decisions of competent tribunals must be accepted as providing a stable basis for future conduct.²² *Res judicata* is said to have both a positive effect and a negative effect, with the prescription of a decision as final referred to as “*the positive effect*” and the proscription of re-litigation of a judgment or award referred to as “*the negative effect*”.²³

Res judicata applies in all principal legal systems i.e. Common Law, Civil Law and International law and its objective is to prevent the same claimant bringing the same claim against the same respondent. The applicable rules and effects in the three legal systems differ, though in some instances not significantly, and for this reason, it is considered appropriate to deal with each system separately.

2.2.1 Common law

Res judicata is a term traditionally used to describe two discrete effects: (1) that a valid final adjudication of a claim precludes a second action on that claim or any part of it (usually referred to as “*cause of action estoppel*” or “*claim preclusion*”), and (2) that an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent

²² *Zurich Insurance Company Plc v Hayward* [2011] EWCA Civ 641 per Moore-Bick LJ, para 45.

²³ International Law Association (2004), Interim Report: “*Res judicata*” and Arbitration; Available at <http://www.ila-hq.org/en/committees/index.cfm/cid/19>; [Accessed on 26 March 2017].

action, whether on the same or a different claim (generally referred to as "issue estoppel" or "collateral estoppel").²⁴

i. Cause of action estoppel

Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case, unless fraud or collusion is alleged such as to justify setting aside the earlier judgment, the bar is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of the cause of action. Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.²⁵

Cause of action estoppel in arbitration came up in the case of *Ron Jones (Burton-on-Trent) Ltd v. John Stewart Hall*²⁶ that concerned a challenge of the arbitrator's jurisdiction. The parties had been involved in two arbitrations and one of the alternative grounds for challenge was: as a result of the Consent Order made between the parties and the effect given to it by the arbitrator in the first arbitration, some of the heads of claim in

²⁴ *Baker v General Motors Corp* 522 U.S. 222 (1998), at 233: Claim preclusion and collateral estoppel are US common law terms and cause of action estoppel and issue estoppel are English common law terms.

²⁵ *Price v Nunn* [2013] EWCA Civ 1002 per Sir Terence Etherton, para 67

²⁶ [1998] EWHC Technology 328

the second arbitration were *res judicata* and thus barred by cause of action estoppel.

In the first arbitration, the respondents had pleaded and pursued specific items as a defence, set-off and counterclaim to the appellant's claims, but by virtue of the Consent Order the respondents had agreed to pursue those specific items in the first arbitration, but had subsequently and voluntarily decided to withdraw the items. In the second arbitration, the respondent wanted to reinstate those specific items. It was held that where a party voluntarily withdraws a cause of action or defence from an arbitration whereby an award is made dismissing it and determining an amount that would or might have been different had the cause of action or defence been pursued, that award is tantamount to a decision on the merits²⁷ and it cannot be right that there should thereafter be a resurrection of that cause of action (or defence in the form of a cause of action) against the other party. To allow a party to do so would be contrary to the principles underlying the doctrine which were restated by Lord Keith in *Arnold v National Westminster Bank* [1991] 2 AC 93 at page 104F:

“The principles upon which cause of action estoppel is based are expressed in the maxims *nemo debet bis vexari pro una et eadem causa* and *interest rei publicae ut finis sit litium*”.

²⁷ A decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned. (See *The Sennar* (No 2) [1985] 1 WLR 490, per Lord Brandon at p.499 F).

The Judge then reviewed cause of action estoppel in terms of an arbitration agreement and said a party should forward with diligence the whole of its case that it wishes to have considered. A party has also to comply with procedural rules which it has accepted in or by virtue of the arbitration agreement and with directions of the tribunal and compliance will also mean that it must find out and decide what its case is within such a framework. Once it has done so it cannot without the consent of the other party then withdraw a cause of action or defence with a view to its prosecution in separate proceedings against that other party, for arbitration is a consensual process and is a submission to a particular tribunal agreed between the parties. *A fortiori* the strict rule must also apply where a party applies for but does not obtain leave to amend its case to bring in a new item of claim or defence for it cannot thereafter be allowed to circumvent its failure to comply with the procedural rules of the first arbitration and to commence a new arbitration.²⁸

ii. Issue estoppel

Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties or their privies to which the same issue is relevant one of the parties seeks to re-open that issue. In such a situation, and except in special circumstances where this would cause injustice, issue estoppel bars the re-opening of the same issue in the subsequent proceedings. The estoppel also applies to points which were not raised, if they could with reasonable diligence and should in all the circumstances have been raised, but again subject to special circumstances where injustice would otherwise be caused.²⁹

²⁸ *Ibid* fn. 26, para 66.

²⁹ *Price v Nunn* (*supra* fn. 25), para 68.

Arbitration, like litigation, is concerned only with the legal rights and duties of the parties thereto, and issue estoppel applies to arbitration as it does to litigation. The parties having chosen the tribunal to determine the disputes between them as to their legal rights and duties are bound by the determination by that tribunal of any issue which is relevant to the decision of any dispute referred to that tribunal. The determination of the issue between the parties gives rise to an issue estoppel and it operates in subsequent suits between the same parties in which the same issue arises. *A fortiori* it operates in any subsequent proceedings in the same suit in which the issue has been determined.³⁰

For interim awards that determine particular issues separately from other issues in the arbitration, the arbitrator's interim award creates an issue estoppel with respect to the issue determined. Where an award is an interim award stated in the form of a special case, it determines the particular issue or issues to which it relates in alternative ways dependent upon the answer of the Court to the question of law stated in the special case. That interim award too creates an issue estoppel or issue estoppels between the parties and the arbitrator is *functus officio* with respect to the issues to which it relates.³¹ Where a tribunal is not dismissing a claim, it may be inappropriate to give an award as that may give rise to an issue estoppel between the parties and the tribunal renders itself *functus officio*.

Where there is a foreign judgment concerning the enforcement of an arbitral award, in order to establish an issue estoppel, four conditions must be satisfied: (1) that the judgment must be given by a foreign court

³⁰ *Fidelitas Shipping Company Ltd v. V/O Exportchleb* [1966] 1 QB 630 per Diplock LJ at 641/4.

³¹ *Ibid.*

of competent jurisdiction; (2) that the judgment must be final, conclusive and on the merits³²; (3) that there must be identity of parties; and (4) that there must be identity of subject matter, which means that the issue decided by the foreign court must be the same as that arising in the country of enforcement's proceedings.³³

These principles were referred to and applied in *Diag Human Se v Czech Republic*³⁴, a case that concerned a claim by the claimant ("Diag Human") to enforce an Arbitration Award made in its favour in the Czech Republic against the defendant, the Czech Republic. The claim was made pursuant to Section 103 of the England and Wales Arbitration Act 1996. The reference in Section 103(1) is to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention). The arbitration agreement had a provision for a review process and the award was to be implemented only if neither party submitted for a review. After the award was served, the defendant applied for a review as stipulated in the agreement and what followed was a series of protracted court proceedings over a number of years in the Czech Republic concerning challenges to the constitution of the review tribunal which had not been resolved at the time of the judgment by the English court.

In previous enforcement proceedings initiated by Diag Human to enforce the Award under the NY Convention against the Czech Republic in Austria, in a judgment delivered just over a year before the judgement in

³² See fn. 27 for definition of "a decision on the merits".

³³ *Good Challenger Navegante S.A. v Metalexportimport S.A.* [2003] EWCA Civ 1668, para 50.

³⁴ [2014] EWHC 1639 (Comm).

the English court, the Supreme Court of Austria had found the arbitration proceeding had not been concluded and the arbitral award was thus not binding. The Czech Republic relied upon this judgment to claim the judgment gave rise to an issue estoppel to the effect that the Award was "not binding".

In the English Judge's view, the issue actually determined by the Supreme Court in Austria was that the Award was not binding. The decision was reached in the context of enforcement proceedings brought pursuant to the NY Convention which was in effect directly enforceable in Austria whereas the enforcement proceedings in England were brought pursuant to Section 103 of the 1996 Act. Given the background to that statutory provision and the fact that its purpose is to give statutory effect in England to the NY Convention, that was sufficient to give rise to an issue estoppel to such effect i.e. the Award was not binding.

The case of *Diag Human v Czech Republic* also demonstrates that although the NY Convention has no provisions on forum shopping and it is therefore not uncommon for a party to seek enforcement of an arbitral award in more than one jurisdiction³⁵, or having failed in enforcement proceedings in one country attempts to seek enforcement in another country, issue estoppel can create challenges to a forum shopping party. Martinez-Fraga & Samra say the curtailing of forum shopping and strategic gamesmanship - seeking "a second bite at the apple" by collateral estoppel furthers and achieves the fundamental tenets of

³⁵ For example, the English Judge noted at para 48 of the judgment that *Diag Human* had made various attempts to enforce the Award in other jurisdictions including France, Luxembourg, the USA and Austria, and that attempts to enforce in France and Austria had failed.

international arbitration (party autonomy, uniformity, transparency of standard, efficiency, and finality)³⁶

Although it is a settled principle that arbitration is a confidential process, the obligation of confidentiality does not apply as between the same parties in subsequent arbitrations, even if such arbitrations were to be presided by different arbitrators. This is because an award gives rise to an issue estoppel and removal of confidential obligations prevents a party from raising the matters already arbitrated and facilitates recognition and performance of the earlier award.³⁷

2.2.2 Civil Law

Many of the Civil Law countries in continental Europe, Middle East and South America have codified the doctrine of *re judicata*. In applying *res judicata*, civil law countries strictly apply the “triple identity test” that requires identity of: (1) the object (“*petitum*”) – the relief sought in a party’s claim in parallel or subsequent proceedings is identical, (2) the grounds on which the claim is based (“*causa petendi*”), and (3) the parties³⁸ - unrelated third parties are prohibited from benefitting or being restricted by a prior judgment or award. This paper will not discuss the

³⁶ Pedro J. Martinez-Fraga and Harout Jack Samra, *The Role of Precedent in Defining Res Judicata in Investor-State Arbitration*, 32 Nw. J. Int'l L. & Bus. 419 (2012); Available at <http://scholarlycommons.law.northwestern.edu/njilb/vol32/iss3/1/>; [Accessed on 27 March 2017].

³⁷ *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich (Bermuda)* [2003] UKPC 11.

³⁸ It is observed in the ILA interim report (*supra* fn. 23) there is no universally agreed definition of the identity of parties in civil law jurisdictions and it gives examples in France, Belgium and Italy as countries with differing definitions.

codification issue in detail but gives an example by outlining the main Codes from France.

Article 480 of the French *Nouveau Code de Procédure Civile* ("NCPC") states (in translation) "*The judgment which decides in its holdings all or part of the main issue, or one which rules upon the procedural plea, a plea seeking a peremptory declaration of inadmissibility or any other incidental application, shall from the time of its pronouncement, become res judicata with regard to the dispute which it determines.*"³⁹

And Article 1351 of the NCPC states (in translation); "*The force of res judicata takes place only with respect to what was the subject matter of a judgment. It is necessary that the thing claimed be the same; that the claim be based on the same grounds; that the claim be between the same parties and brought by them and against them in the same capacity.*"⁴⁰

With reference to arbitral awards, Article 1476 of the NCPC states (in translation); "*The arbitral award, from the moment that it has been given, shall carry the authority of res judicata in relation to the dispute which it has determined*"⁴¹. By Article 1500, it is provided the provision on arbitral awards applies to "*awards made abroad or made in international arbitration*"⁴².

³⁹ ILA interim report (*supra* fn. 23).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

Res judicata effect in Civil Law countries is more restricted than in Common Law jurisdictions because the doctrine only applies to claims and not to issues previously litigated (issue estoppel). As Söderlund puts it, in the context of *res judicata*, a feature of Europe's civil systems is different to the common law systems in that they do not attach *res judicata* effect to the adjudicatory bodies' conclusions in respect of specific issues or legal premises but only to the dispositive part of the judgment. In other words, if one and the same issue arises in another action, although between the same parties, the judge or arbitrator in the subsequent litigation will be at liberty to revisit the issue and conceivably arrive at a different conclusion.⁴³

2.2.3 *International law*

It is well established that *res judicata* is a principle of international law⁴⁴. In international arbitrations, there are four preconditions for the applicability of the doctrine of *res judicata*; (1) the prior award must be final and binding and capable of recognition in the country where the arbitral tribunal of the subsequent arbitration proceedings has its seat (including partial awards that contain final determination of an issue), (2) identity of the subject matter - the same claim or relief must be sought in the further arbitration proceedings, (3) identity of the cause of action - the claims or relief sought in further arbitration proceedings must be

⁴³ Söderlund, Christer (2005), *Lis Pendens, Res Judicata* and the Issue of Parallel Judicial Proceedings, *Journal of International Arbitration* 22(4): 301-322; Available at: http://web.law.columbia.edu/sites/default/files/microsites/columbia-arbitration-day/files/04_2005_-_soderlund_.pdf; [Accessed on 27 March 2017].

⁴⁴ Principally derived from the precedent established in the dissenting decision by a Permanent Court of International Justice (PCIJ), Judge Dionisio Anzilotti, who observed that *res judicata* was among the “*general principles of law recognised by civilised nations*” – the principle that was later incorporated in Article 38 of the Statute of the International Court of Justice.

based on the same cause of action and (4) Identity of the parties – the claim must have been rendered between the same parties as the parties in the further arbitration proceedings (the later three constituting the “triple identity test”).⁴⁵

The finality and binding effects (“positive *res judicata*”) of an award⁴⁶ have not generated major controversies in international arbitrations compared to the proscription of further re-litigation (“negative *res judicata*”) and this paper will therefore not deal with the former but the latter. The International Law Association (ILA) in its Final Report on *Res Judicata* and Arbitration recommended maintenance of the traditional triple identity test and notes the “triple identities” give an arbitral award “conclusive and preclusive effects”⁴⁷.

While there may not be many recorded controversies on the identities of the subject matter and the cause of action, the identity of parties has given rise to challenges in international arbitrations, and especially in BIT arbitrations mainly because different countries have different interpretations of legal entities⁴⁸, and where there are international legal

⁴⁵ International Law Association (2006), Final report on *Res Judicata* and Arbitration; Available at <http://www.ila-hq.org/en/committees/index.cfm/cid/19>; [Accessed on 02 April 2017].

⁴⁶ Due to the fact that all *lex arbitri* and International Arbitration Rules prescribe this as a condition for agreements to arbitrate – see for example Article 35(1) of the UNCITRAL Model Law on International Commercial Arbitration (from which most of the *lex arbitri* are based on), Article 53(1) of ICSID Convention, Regulations and Rules, Article 35(6) of ICC Rules of Arbitration (revised 01 March 2017).

⁴⁷ ILA Final Report (*supra* fn. 45) notes the terminology covers the full scope of application of the doctrine of *res judicata* and similar concepts (claim estoppel, former recovery, Issue estoppel and abuse of process).

⁴⁸ See for example statement with fn. 38.

considerations, there may not always be a precise equation between factors relevant to the lifting of the corporate veil under domestic and international law.⁴⁹ In its Final Report, the ILA Committee noted “*the application of the identity of parties test in recent BIT arbitrations also warrants extensive treatment*”. The two BIT arbitration cases of *Lauder v Czech Republic & CME Czech Republic BV v Czech Republic* are considered exceptional in the application of identity of parties test and recognition of *res judicata* effects and it is considered appropriate to make a brief review of what happened.

The two cases arose following expropriation of a Radio and Television Broadcasts licence issued in 1993 by the Czech Republic (the Republic) to a company controlled by a United States citizen, Ronald S. Lauder (Lauder). After the licence was granted, another company, CME Czech Republic B.V. (CME), Dutch company that was controlled by Lauder as a minority shareholder, acquired shareholdings in Lauder’s Czech company. In August 1999, Lauder initiated arbitration against the Republic in London pursuant to the BIT applicable between the US and the Republic. The Tribunal issued an award on 03 September 2001 and unanimously agreed that some events constituted a violation of the American and the Republic’s BIT, but that such violation did not, however, give rise to any liability of the Republic for damages and dismissed Lauder’s claim for damages.

In February 2000, while the London proceedings were on, CME demanded arbitration in Stockholm, Sweden, against the Republic in accordance with the BIT between the Netherlands and the Republic. The

⁴⁹ *La Generale des Carrieres et des Mines v Hemisphere Associates LLC (Jersey)* [2012] UKPC 27, para 27.

Stockholm Tribunal issued an interim award on 13 September 2001 (ten days after London award) and found the Republic was liable to redress the injury incurred by CME as a consequence of the Republic's violation of BIT terms, with quantum to be established later. In the second (quantum) phase, the Republic unsuccessfully argued in Stockholm proceedings that the London proceedings Final Award had a *res judicata* effect on questions of liability. The final award was issued on 14 March 2003 and the Tribunal awarded damages of circa US\$270 million. While the Stockholm quantum proceedings were ongoing, the Republic commenced court proceedings in the Swedish (Svea) Court of Appeal⁵⁰ seeking invalidation or alternatively setting aside of the interim award, and that was not resolved until 15 May 2003 when the court upheld the Tribunal's findings.

The Republic's motion in the Svea Court of Appeal comprised of among others, the claim by the Republic that the Stockholm Tribunal lacked jurisdiction to examine the case *per se* due to *lis pendens*⁵¹ and *res judicata* since the defendants in the Stockholm proceedings and London proceedings were identical and, in practice, the petitioners were the same. In response, CME, in part stated Lauder and CME are not the same party.

⁵⁰ *The Czech Republic v CME Czech Republic B.V.* Case no T 8735-01.

⁵¹ *lis pendens* has been described as a "situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different states at the same time"; (see ILA Final Report (*supra* fn.45)). Common law has no *lis pendens* rule and instead has a discretionary doctrine of *forum non conveniens* in which the existence of a *lis pendens* is merely one factor to be taken into account (see *Canada Trust Company v. Stolzenberg and Gamba* [2000] UKHL 51).

In its decision, on whether identity may be deemed to exist between the claimant parties in the different arbitration proceedings, namely *Lauder and CME*, the court said that according to Swedish law, one of the fundamental conditions for *lis pendens* and *res judicata* was that the same parties are involved in both cases and as far as was known, the same condition applies in other legal systems which recognize the principles. Identity between a minority shareholder, *albeit* a controlling one, and the actual company could not, in the Court of Appeal's opinion, be deemed to exist in a case such as the instant one, and this assessment would apply even if one were to allow a broad determination of the concept of identity.⁵²

With respect to piercing (or lifting) the corporate veil, the Republic had in support of its position referred, *inter alia*, to principles regarding piercing the corporate veil, which for example may entail, in certain circumstances, that a shareholder may be equated with the company. The court observed that no international cases had been presented in the case in which, in an actual situation of *lis pendens* and *res judicata*, a controlling minority shareholder had been equated with a company.⁵³

It is indisputable that the dispute referred to both London and Stockholm Tribunals was by the same parties but based on different BITs. In a legal opinion authored by two distinguished legal commentators in June 2002, after the Stockholm Tribunal had issued the interim award but before issuing the final version, the distinguished commentators said the Stockholm Tribunal should defer to the doctrine of *res judicata* and end the proceedings since the London Tribunal had already rendered a

⁵² *Czech Republic v CME* (*supra* fn. 50) at p.98.

⁵³ *Ibid.*

decision in the same matter.⁵⁴ A few years after the arbitrations and the Svea Court's Judgment, one of the commentators was to write, "*the ultimate fiasco in investment arbitration occurred in the Lauder/CME arbitrations against the Czech Republic.*"⁵⁵

The failure by both the Stockholm Tribunal and the Court of Appeal to give *res judicata* effect to *Lauder/CME* arbitrations may not be the last to be seen in BIT arbitrations and according to Martinez-Fraga & Samra, the rapid proliferation of investment treaties and the increasingly complex nature of international corporate structures, the consequences of this failure, and the implications of these decisions will not remain an isolated incident.⁵⁶

Another issue regarding *res judicata* effect in international arbitrations concerns whether *res judicata* attaches to the entire decision including its reasoning or only to the ruling or the *dispositif*.

In the *Channel Arbitration*⁵⁷ that concerned the delimitation of continental shelf between the United Kingdom and the French Republic, the Tribunal

⁵⁴ Schreuer C. & Reinisch A. (2002), UNCITRAL Arbitration Proceedings, Quantum proceedings, *CME Czech Republic B.V. (The Netherlands) v The Czech Republic*: Available at http://www.univie.ac.at/intlaw/wordpress/pdf/other_2_cmequant_2.pdf; [Accessed on 29 March 2017].

⁵⁵ August Reinisch, The Proliferation of International Dispute Settlement Mechanisms: Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), *International Law between Universalism and Fragmentation*. Festschrift in Honour of Gerhard Hafner, 107-126, Available at https://tec.fsi.stanford.edu/sites/default/files/Proliferation_of_DS_Mechanisms.pdf, [Accessed on 31 March 2017].

⁵⁶ Pedro J. Martinez-Fraga and Harout Jack Samra (*supra* fn.36).

⁵⁷ United Nations (2006), Reports of International Arbitral Awards 30 June 1977 - 14 March 1978, Vol. XVIII pp. 3-413, Available at

stated that it considers it to be well settled that in international Arbitration proceedings, the authority of *res judicata*, that is the binding force of the decision, attaches in principle only to the provisions of its *dispositif* and not to its reasoning. However, in the opinion of the Tribunal, it was equally clear that, having regard to the close links that exist between the reasoning of a decision and the provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the *dispositif*. According to ILA final report⁵⁸, the consequence of claims estopped on the basis of the same cause of action by virtue of the *res judicata* effects of both the dispositive part of the award as well as its underlying reasoning prevent some evidence or legal argument regarding that cause of action being reargued.

3.0 Waiver

The expression "waiver" is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise.⁵⁹

In arbitration, a waiver of a right to object or to a claim can arise due to statutory provisions or non-statutory legal principles.

3.1 Statutory waiver

The common types of statutory waivers are waiver of right to object and waiver of right to appeal against arbitration awards.

http://legal.un.org/riaa/cases/vol_XVIII/3-413.pdf [Accessed on 03 April 2017].

⁵⁸ *Ibid* fn.45.

⁵⁹ *Millar v. Procurator Fiscal (Scotland)* [2001] UKPC D4; per Lord Bingham, para 31.

3.1.1 *Waiver of right to object*

Section 5 of the Kenyan Arbitration Act provides for a waiver of right to object. The effect of this section is that a party to an arbitration must act promptly and within a prescribed time, if he considers there is a provision in the Act that no longer needs to be complied with because it is no longer valid or there is non-compliance with certain requirement under the arbitration agreement. If he fails to do so and proceeds with the arbitration, he would be deemed to have waived the right to object at a later date.⁶⁰

The expression “proceeds with the arbitration” in Section 5 is not considered to be different to the expression "continues to take part in the proceedings" in section 73 of England and Wales Arbitration Act 1996⁶¹. In *Rustal Trading Ltd v Gill & Duffus SA*⁶², Moore-Bick J said the expression "continues to take part in the proceedings" is broadly worded and unless a party make it clear that he is withdrawing from the proceedings, he continues to take part in them until they reach their conclusion, normally in the publication of a final award.

⁶⁰ Provision based on Article 4 of UNCITRAL Model Law and adopted by many States with arbitral legislation based on that law. See another example in *The Czech Republic v CME* (*supra* fn. 50) where the court said that according to Swedish law, in arbitration proceedings, *lis pendens* and *res judicata* constitute bars to substantive adjudication which are taken into account only after a party has raised an objection with respect thereto. Since the Czech Republic had expressly stated that it did not rely on the doctrines of *lis pendens* and *res judicata*, by section 34 of the Swedish Arbitration Act and following its participation in the arbitration proceedings, it was not entitled to invoke those principles because it was deemed to have waived its rights to object (at p.95/96).

⁶¹ Section 73 is on “Loss of right to object”, thus making it a statutory estoppel although not expressly stated in the Act.

⁶² [2000] 1 Lloyd's Law Reports 14.

3.1.2 *Waiver of right to appeal against arbitration awards*

This type of waiver is available in a few countries and is applicable in both domestic arbitrations, for example in Russia and in international arbitrations, for example in Switzerland.⁶³ This paper will not discuss the various countries' codifications but will only review the type of waiver with reference to the provisions in the Swiss law.

Article 192 of Swiss Federal Statute on Private International Law ("SPILA")⁶⁴ is on waiver of annulment and it states;

*"If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2)."*⁶⁵

"²If the parties have waived fully the action for annulment against the awards and if the awards are to be enforced in Switzerland, the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy"

⁶³ Guglya, Leonila, Waiver of Annulment Action in Arbitration: Progressive Development Globally, Realities in and Perspectives for the Russian Federation (Different Beds – Similar Dreams?) (January 3, 2012). Czech (& Central European) Yearbook of Arbitration, Vol. 2, pp. 81-105, April 2012. Available at SSRN: <https://ssrn.com/abstract=2260561>. [Accessed on 15 May 2017].

⁶⁴ Available at:

https://www.swissarbitration.org/files/34/Swiss%20International%20Arbitration%20Law/IPRG_english.pdf. [Accessed on 15 May 2017].

⁶⁵ *Ibid.*

The effects of waiver of annulment, though to an extent viewed as an “*extreme*” form of party autonomy in international arbitration that ousts the review of awards by national courts, could lead to procedural and cost efficiency, and also safeguard the ready award from redundant attacks or irregular annulment especially from jurisdictions known for their not-that-friendly arbitration-related stance.⁶⁶ A negative effect of this type of waiver is that it can potentially lead to forum shopping until a court that can grant enforcement is found, thus reversing the fundamental tenets of international arbitration.⁶⁷

Where the parties with no ties to Switzerland opt for such a waiver, the law provides for the application, by analogy, of the NY Convention if the award is to be enforced in Switzerland. The arbitration tribunal’s decisions are then subject to review by the ordinary courts, since Article V of the New York Convention lists a number of grounds on which the recognition and enforcement of an award could, exceptionally, be refused.⁶⁸

3.2 Non-statutory Waiver

For a non-statutory waiver to be effective in arbitration, several requirements have to be fulfilled: An arbitration agreement must be voluntary and not compulsory. Compulsory in this context means

⁶⁶ Guglya, Leonila, Waiver of Annulment Action in Arbitration (*supra* fn. 63).

⁶⁷ See statement with fn. 36.

⁶⁸ *Tabbane v. Switzerland* - 41069/12 (Decision 1.3.2016): European Court of Human Rights / Information Note 194 - March 2016 at p.22. Available at http://www.echr.coe.int/Documents/CLIN_2016_03_194_ENG.pdf. [Accessed on 15 May 2017].

required by law.⁶⁹ The arbitration agreement must also be agreed to without constraint and not run counter to any important public interest.⁷⁰ The principle underlying the doctrine of constraint is essentially the same as the principle that the waiver must be voluntary in the sense that the arbitration agreement must not be compulsory as being required by law. In both cases the principle is that the waiver must be voluntary in the sense that the parties have voluntarily (or freely) entered into the arbitration agreement. Thus, if there is duress or undue influence or mistake, which invalidates the arbitration agreement, there would be no waiver of relevant rights.⁷¹ If there are onerous and unusual terms, these must be brought to the attention of the *proferee*, otherwise same case applies.⁷²

Where parties have voluntarily or (as some of the cases put it) freely entered into an arbitration agreement, they are to be treated as waiving their rights to a hearing before the courts (except in accordance with the arbitral legislation), to a public hearing and public judgment.⁷³ Non-statutory waiver in arbitration can arise in various circumstances: when a party fails to raise or preserve an objection, by abandonment of rights, by an election or by waiver of sovereign immunity by States.

⁶⁹ *Stretford v The Football Association Ltd. & Anor* [2007] EWCA Civ 238, para 48.

⁷⁰ *Ibid*, para 50.

⁷¹ *Ibid*, para 52.

⁷² *Ibid*, para 53.

⁷³ *Ibid*, paras 45 & 66.

3.2.1 *Waiver of Objection*

This type of waiver is available in common law States where a waiver of right to object is not codified, for example in the United States of America. The effect of this type of waiver in the USA is that a party is precluded from attacking arbitrators on grounds previously known but not raised until after an award has been rendered. Thus, in *Aaot Foreign Economic Association (vo) Technostroyexport, v. International Development and Trade Services*⁷⁴, the issue before the US Court of Appeals for the Second Circuit was whether the lower court erred in confirming two international arbitration awards rendered by an allegedly corrupt tribunal where the losing party, knowing the relevant facts, chose to participate fully in the proceedings without disclosing those facts until after the adverse awards had been rendered. The losing party had opposed enforcement of the awards under Article V(2) (b) of the NY Convention as "contrary to the public policy" of the United States.

The court agreed with the lower court's decision that the losing party waived its right to assert the public policy exception where it had knowledge of the facts but remained silent until an adverse award was rendered. The court's approval was based on what the Judge described as the settled law of that circuit that precludes attacks on the qualifications of arbitrators on grounds previously known but not raised until after an award has been rendered.

3.2.2 *Waiver by Abandonment*

The primary meaning of the word "waiver" in legal parlance was described as the abandonment of a right in such a way that the other

⁷⁴ F.3d 980 (2d Cir. 1998).

party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted.⁷⁵

In *The Hannah Blumenthal*⁷⁶ case, Lord Brandon said the concept of the implied abandonment of a contract can arise by showing that the conduct of each party, as evinced to the other party and acted on by him, leads necessarily to the inference of an implied agreement between them to abandon the contract.⁷⁷ In the same case, Lord Diplock dealt with the obligations assumed by the parties under an arbitration clause in a commercial contract. He said that the inference a reasonable man would draw from the prolonged failure by the claimant in an arbitration procedure is that the claimant is willing to consent to the abandonment of the agreement to submit the dispute to arbitration. If the respondent draws such inference and by his own inaction thereafter indicates his own consent to its abandonment in similar fashion to the claimant and is so understood by the claimant, the court would be right in treating the arbitration agreement as having been terminated by abandonment. Lord Diplock then confirmed that in *The Splendid Sun* [1981] 2 All ER 993, [1981] 1 QB 694, all three members of the English Court of Appeal drew such an inference from the conduct of both parties in the arbitration and in his view, that case was rightly decided.

⁷⁵ *Banning v Wright* [1972] 1 WLR 972 at p.979.

⁷⁶ *Ibid* fn. 16.

⁷⁷ In the same case, Lord Diplock discussed the contract of abandonment and said it is created by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other. What is necessary is that the intention of each as it has been communicated to and understood by the other (even though that which has been communicated does not represent the actual state of mind of the communicator) should coincide.

The *Splendid Sun* case concerned a dispute out of a charterparty of a vessel. Following a dispute, the parties submitted it for arbitration, with each party appointing an arbitrator. During the eight years that followed, no progress was made in the arbitration and the only notable events that occurred were after three years, the charterers closed their file, and two years later, their arbitrator died and was not replaced. A few months into the ninth year, the owners served points of claim in the arbitration, and the charterers applied and were granted an injunction to restrain the owners from proceeding with the arbitration, it being held that the proper inference to be drawn from the conduct of the parties, in particular the long period of total inactivity, was that the parties had abandoned the agreement to submit the dispute to arbitration.

When parties abandon an arbitration agreement, they waive their rights to arbitrate their disputes and the arbitration agreement becomes null and void, inoperative or incapable of being performed.

3.2.3 *Waiver by Election*

The doctrine of election prevents a party from "approbating and reprobating" or "blowing hot and cold". It applies when a person has to choose between two inconsistent courses of action. If that person has full knowledge of the facts which give rise to these alternate rights and unequivocally communicates his decision to pursue one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did.⁷⁸

⁷⁸ *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd* [1971] AC 850 at 883.

In *Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corporation of India (The Kanchenjunga)*⁷⁹, Lord Goff said that the doctrine of waiver by election arises where the other party has repudiated the contract or has otherwise committed a breach of the contract which entitles the innocent party to bring it to an end, or has made a tender of performance which does not conform to the terms of the contract. He said the doctrine operated in the following way: (i) it requires knowledge of the relevant facts by the party making an election that he is making a choice between two alternative and inconsistent courses of action then open to him, (ii) it has to be communicated to the other party in clear and unequivocal terms either by words or conduct, and (iii) a party can only waive a right if it is has full knowledge of the right and elects to waive it.

When a party to an arbitration agreement commences court proceedings, that party would be in breach of the arbitration agreement that could potentially lead to it being construed that it had waived its right to arbitrate. Putting it in other words, that party would be in repudiatory breach of the arbitration agreement. When a repudiatory breach of the arbitration agreement occurs, the opposing party has a choice as to whether to terminate it (the arbitration agreement) by making a substantive response to the claim in court by the other party or to affirm it by filing a stay of court proceedings under the Arbitration Act. It must choose one, it cannot do both: it is put to its election.⁸⁰ Once the opposing party has made an election and decided to let the dispute be determined by the court, the parties waive their right to arbitrate⁸¹ and the court is

⁷⁹ [1990] 1 Lloyd's Rep 391 (HL), at 398/399.

⁸⁰ *Herschel Engineering Ltd v Breen Property Ltd* [2000] EWHC Technology 178.

⁸¹ The parties cannot be said to have waived their rights to arbitrate despite the repudiatory breach by one party, unless and until the opposing party has substantively

seized of the dispute, that it is by its decision alone that the rights of the parties are to be settled, the arbitrator is *functus officio*⁸² and the parties arbitration agreement become null and void, inoperative or incapable of being performed.

Where the terms of contract containing an arbitration agreement are agreed and one party breaches one of the terms, for example he never signs the contract although it is agreed it is a requirement for him to do so, but performs his contractual obligations but later defaults on other terms, for example payment for services, that party can be deemed to have chosen to waive his rights to rely on the signing requirement and to be deemed to be bound by the contract and the arbitration clause.⁸³

The kind of waiver in this type of case is that which is concerned with the abandonment of a right by the defaulting party. It is a non - contractual right in the sense that there is no pre-existing contract between the parties that gives rise to rights of the defaulting party that it might abandon. But the defaulting party had a "right" to refuse to sign the contract terms and if he abandons that right in such a way as to indicate to the other party that he no longer insisted on signing the terms before a valid contract was created, then he is exercising a kind of election.⁸⁴ That election is between two inconsistent or mutually exclusive courses; either requiring signature of the terms and in that case no binding contract or abandoning that

responded to the claim in court (see *Downing v Al Tameer Establishment* [2002] EWCA Civ 721, para 21).

⁸² *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257.

⁸³ *Oceanografia SA DE CV v DSND Subsea AS* [2006] EWHC 1360 (Comm).

⁸⁴ *Ibid*, para 90.

requirement and indicate that, notwithstanding the lack of signing, there was a valid and binding contract and the parties are bound by the terms of the arbitration clause.⁸⁵

3.2.4 *Waiver of Sovereign Immunity by States*

Sovereign immunity is a procedural bar going to the jurisdiction of a national court and does not go to substantive law.⁸⁶ It is capable of being waived and a state entitled to invoke it may do so.⁸⁷ The procedural bar equally applies to arbitration and states agreeing to arbitrate disputes are required to consent to a waiver of their sovereign immunity for the arbitral tribunal to have jurisdiction.

Many states distinguish waiver of immunity from arbitral jurisdiction, waiver of immunity from recognition and enforcement of awards and waiver of immunity from execution of awards. At common law, it is well-established that a party seeking to enforce an arbitration award (or a judgment) against a foreign State on the basis of a waiver of state immunity must establish a waiver at two distinct stages. The impleaded State must have waived both its jurisdictional immunity from suit in the forum State and the immunity of its property from execution by the forum State's process.⁸⁸

⁸⁵ *Ibid*, para 92: The statement fulfils the first condition identified by Lord Goff in *The Kanchenjunga* (*supra* fn.79).

⁸⁶ *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia* [2006] UKHL 26.

⁸⁷ *High Commissioner for Pakistan in the United Kingdom v Prince Mukkaram Jah, His Exalted Highness the 8th Nizam of Hyderabad* [2016] EWHC 1465 (Ch).

⁸⁸ *Democratic Republic of The Congo v FG Hemisphere Associates LLC* [2011] HKCFA 43, para 379.

Treaties, Conventions and International Arbitral Institutions have standardised obligations with respect to waivers, but a Contracting State is free to expressly reserve its rights at the time of ratification of the respective Treaty or Convention⁸⁹.

i. *Waiver of immunity from arbitral jurisdiction*

There are questions as to whether the waiver of immunity from arbitral jurisdiction should be expressly or implicitly waived. In the Swiss Supreme Court case of *Westland Helicopters (UK) v The Arab Republic of Egypt*⁹⁰, the court said; "...a sovereign state cannot be deemed to have waived its immunity from jurisdiction if it did not agree to an express waiver clause."

But this provision has not been universally accepted and implicit waiver has been found to apply in other jurisdictions. In the Svea Court of appeal case of *Libyan American Oil Co. v. Socialist People's Arab Republic of Libya*⁹¹, the court held by a majority that Libya had waived immunity by agreeing to an arbitration clause that was part of an oil licence agreement and

⁸⁹ For example, Saudi Arabia reserved the rights of not submitting all questions pertaining to oil and pertaining to acts of sovereignty to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) whether by way of conciliation or arbitration: See ICSID (2016) Contracting States and measure taken by them for the purpose of the Convention [online]. Available at: <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%208-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf>. [Accessed on 24 February 2017].

⁹⁰ (1991) Yearbook of Commercial Arbitration XVI, para 16.

⁹¹ (1981) 20 ILM 893.

following an arbitration, the successful party sought enforcement of the award before the Swedish court.⁹²

ii. *Waiver of immunity from recognition and enforcement of awards*

Waiver of immunity from enforcement is not expressly stated in the common law principle but provisions in International Conventions and authorities from various jurisdictions show the obligations may arise either by express or implied terms.

One of the purposes of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) is to facilitate for arbitration of investment disputes between Contracting States and nationals of other Contracting States.⁹³ By Article 54 of the Convention, it is provided that Contracting States shall recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. By expressly agreeing to this provision, Contracting States agree to a waiver of immunity from enforcement.⁹⁴

Authorities from various jurisdictions show that under the NY Convention, a waiver of recognition and enforcement of arbitral awards

⁹² In separate enforcement proceedings involving the same parties, the U.S. District Court for the District of Columbia - 482 F. Supp. 1175 (D.D.C. 1980) had also accepted the petitioner's claim that Libya implicitly waived its sovereign immunity by expressly agreeing to the arbitration and choice of law clauses.

⁹³ Article 1 (3) of the Convention.

⁹⁴ See *Liberian Eastern Timber v The Government of the Republic of Liberia* 650 F. Supp. 73 (S.D.N.Y. 1986).

is implied for States that have ratified it. Thus in *TMR Energy Ltd. v. State Property Fund of Ukraine*⁹⁵, the Federal Court of Canada stated that the mere fact that a state entity should have entered into an arbitration agreement providing for arbitration in a country signatory to the NY Convention, without reserving its right to jurisdictional immunity, it must be taken to have known and accepted that any resulting award could be subject to recognition and enforcement by judicial process, and thus, have waived jurisdictional immunity in relation to the recognition of the award.⁹⁶

For States that have codified the common law principle, a waiver of immunity from enforcement is implied. For example, section 9 of the United Kingdom State Immunity Act 1978 provides; "*Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.*" In *Svenska Petroleum Exploration AB v Lithuania*⁹⁷, the English court of appeal approved the lower court's decision that there was no basis for construing section 9 of the State Immunity Act as excluding proceedings relating to the enforcement of a foreign arbitral award, holding that arbitration is a

⁹⁵ 2003 FC 1517, para 65.

⁹⁶ Same principle applied in *IPITRADE INTERNATIONAL v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978). In that case, the U.S. District Court for the District of Columbia Judge said that the arbitral award against Nigeria was subject to the NY Convention to which the United States (country of enforcement), France, Nigeria, and Switzerland were all signatories, and Nigeria's agreement to arbitrate all disputes arising under the contract in accordance with Swiss law and by arbitration under ICC (headquartered in France) Rules constituted a waiver of sovereign immunity and the waiver cannot be revoked by a unilateral withdrawal.

⁹⁷ [2006] EWCA Civ 1529, para 117.

consensual procedure and the principle underlying section 9 is that, if a state has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective.

iii. *Waiver of immunity from execution of an award*

It is well established that a waiver of immunity from enforcement does not imply a waiver of immunity from execution of the judgment and a separate waiver is required. Unless a waiver of immunity from execution is expressly provided for in an arbitration agreement, it becomes difficult to execute an award because under international law, foreign States enjoy immunity on properties and assets serving sovereign purposes⁹⁸, and the fact that by virtue of sovereign immunity, one State shall not be subject to the jurisdiction of another State.⁹⁹ Lack of guidance on how to deal with executions of awards in NY Convention further adds to the difficulties and challenges a successful party in an arbitration encounters in executing an award. These factors can lead to delays in executing an award against a recalcitrant State especially if all its properties and assets in the country of execution are used for sovereign purposes.¹⁰⁰

Immunity from execution does not apply to assets and properties of a State not used for sovereign purposes. According to Gaukrodger, a number of civil law jurisdictions have adopted the principle that a State does not enjoy immunity from execution for property in use for

⁹⁸ *Franz J. SEDELMAYER v Germany* [2009] ECHR 2000.

⁹⁹ See statement with fn. 86.

¹⁰⁰ *Ibid* fn. 98: Although the subject matter of the case was not about execution of an award, it gives good insight of a State defences based on “assets serving a sovereign purpose” and challenges a party attempting to execute an award in his home country against a foreign State can encounter.

commercial purposes, and common law jurisdictions' statutes generally allow for execution against foreign state property in use or intended for use in commercial purposes.¹⁰¹ From the civil law principles and common law statutes, a waiver of immunity from execution of arbitral awards implicitly arise for properties belonging to foreign states that are used for commercial purposes.¹⁰²

4.0 Conclusion

Estoppel can give rise to an *ad-hoc* arbitration agreement to contracting parties and they would be bound by it, and in the absence of any express terms to the contrary, be relieved of the obligation to litigate disputes in court. The parties can then benefit from advantages of arbitration that include convenience of choosing proceedings date and may be the venue, confidentiality, privacy and depending on how the parties conduct themselves, there could be early resolution of dispute and costs savings. On the other hand, an implied abandonment of arbitration agreement can arise and the abandoning party is estopped from asserting that he has not abandoned it. Estoppel *per rem judicatam* provides a basis for ensuring that both domestic and international arbitral decision-making process operates in an orderly and effective way by upholding two principles of public policy; that of requiring there be finality in decision-making and that no one should be made to arbitrate the same matter twice.

¹⁰¹ Gaukrodger, D. (2010), "Foreign State Immunity and Foreign Government Controlled Investors", OECD Working Papers on International Investment, 2010/02, OECD Publishing. <http://dx.doi.org/10.1787/5km91p0ksqs7-en>. [Accessed on 23 March 2017]. For examples of common law jurisdictions' statutes, see Section 13 of UK State Immunity Act 1978 and Section 1610 of US Foreign Sovereign Immunities Act.

¹⁰² See *Liberian Eastern Timber v The Republic of Liberia* (*supra* fn. 94).

For there to be a waiver in arbitration, there has to be reliance on the part of the party to whom the representation had been made. Once a waiver is established, a party who waives his rights is not allowed to revert to the original legal rights and enforcements of rights thereafter are subject to the waiver already made. Waiver of rights includes rights conferred to a party by both statutes and common law and in arbitration, a waiver can lead to an arbitration agreement becoming null and void, inoperative or incapable of being performed with parties losing rights to arbitrate their disputes and leaving them with option of litigating court. By signing an arbitration agreement, a government waives its immunity from arbitral jurisdiction and undertakes contractual obligations by becoming party of it, and by doing so, it implicitly includes waiver of immunity from enforcement but not its waiver of immunity from execution, for which a separate waiver, expressly stated would be required for assets and properties serving sovereign purposes but not commercial interests.

Illegality of Agreements and Its Effects on Arbitration Clause

*By: Ombo Duncan Malumbe**

1.0 Introduction

Arbitration is a popular form of solving disputes, which is a part of the Alternative Dispute Resolution (ADR) spectrum. However, the current practice of Arbitration raises two schools of thought, whereby some contend that any Arbitration that is binding does not form part of ADR whilst the other sect is content that a binding Arbitration forms part of ADR.¹ Nevertheless, that is a topic to be addressed on a different rostrum. For purposes of this research, which is not affected by the two schools of thought, the paper delves into whether a contract (also called the “agreement”) that has an Arbitration Clause shall be immortal based on the principle of separability should it be procured through any illegal measures.

In order to be part of a certain engagement, there is always the urgent need to capture the concerns of each party in a document, which in most circumstances, the parties agree to have an Arbitration Clause as an effective tool to settle any dispute that may emanate during their engagement. However, there are peculiar circumstances that can put to question the manner in which the agreement was reached; hence, the need to address the question presented herein.

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¹ Jean R. Sternlight, 'Is Binding Arbitration A Form of ADR: An Argument That The Term ADR Has Begun To Outlive Its Usefulness' (2000) 2000 Journal of Dispute Resolution.

In light of the above, to address the question effectively, the paper zooms into Contract Law, Public Policy, the Principle of Separability (in reference to Arbitration Clause) and whether the Principle of Separability applies to an agreement when it initially violated the Principles of Contract Law and or Public Policy. In addition, what is the suitable rostrum to address the question of the legality of the agreement, the Court (inclusive of a tribunal and Commissions) or an Arbitrator, having in mind the doctrine of *Kompetenz-Kompetenz*?

Arbitration, Principle of Separability, Illegality of Contract, Principles of Contract Law Illegality of Agreements and its effects on Arbitration Clause Contract Law and Arbitration Clauses.

Disputes can be of any nature including but not limited to Commercial Transaction, Employment, Medical/ Chemical Tests, Mobile Services, Advertisement and Academic oriented. All forms of engagements above, among others, are guided by the basic and most fundamental principles of Contract Law and it is imperative that should an agreement lack one of the ingredients of a contract, the same should render the contract void *ab initio*.

The principles of Contract Law (the “Principles of Contract”) are *offer, acceptance, consideration, certainty, intention, capacity and formalities (legality and documentation formalities)*. Certain agreements might entail all the aforementioned Principles of Contract but other unique events that might take place prior to signing the agreement might be deemed as *bad practice* and/or *corruption*, which can be questioned under the illegality principle – an act that is in breach of a given policy (inclusive of public policy), be it by the Government or Private entity. Therefore, should such an act or omission occur, which is influenced by the parties to the agreement or any other interested party acting directly or remotely, the same should be

addressed promptly – and through the appropriate platform, thus, be it a Court (inclusive of a Tribunal or Commission) or Arbitration.

In *Regazzoni v KC Sethia*², the House of Lords (*now the Supreme Court of United Kingdom*) pronounced itself as follows:

*[T]hat the contract was unenforceable since an English court will not enforce a contract, or award damages for its breach if its performance would involve doing an act in a foreign and friendly State which violates the law of that State. This principle is based on public policy and international comity.*³

The above conclusion equally applies to any application or interpretation of local laws by local Courts on matters within the jurisdiction of that country. Therefore, should the agreement meet all the principles of contract, the same shall not suffice when the end-result shall lead to violation of laws of that given country or a foreign country.

It is not an absolute or general principle that any agreement shall entail an Arbitration Clause whether agreed or not agreed to by the parties in a given agreement. Therefore, the conception of an Arbitration Clause is pegged on a given Agreement, which makes the Arbitration Agreement or Clause relevant to a given scenario. Further, an Arbitration Clause is shaped *vis-à-vis* a given agreement, therefore, should an agreement be deemed void *ab initio* that does not necessarily affect the validity of the

² [1958] AC 301.

³ *Regazzoni v KC Sethia (supra)*.

Arbitration Agreement or Clause⁴; however, it raises questions on the full applicability of the same Arbitration Clause.

There have been ample cases addressing the question of whether an Arbitration Clause is effective when the initial agreement results in abuse of a given policy (inclusive of public policy). In a recent case, *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Limited & Ors*⁵, decided by the High Court, the United Kingdom, it pronounced as follows:

The position is not affected by what are to be assumed to be the bad motives and intentions in adopting arbitration to conceal wrongdoing. As Mr Berry QC pointed out in his award, there is no public policy requiring the exposure of criminals for punishment in China.⁶

On the onset, for the Arbitrator to address an objection raised concerning the Jurisdiction of the Arbitration proceedings, the Arbitrator relies on the doctrine of *Kompetenz-Kompetenz* to address the same – thus, whether the Arbiter finds anything that denies him or her from proceeding with the matter and, if any, the Arbitrator shall down his or her tools.

In reference to the pronouncement in *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Limited & Ors (supra)* the Arbiter proceeded

⁴ *Kenya Airports Parking services Ltd & Another v Municipal Council of Mombasa* Civil case 434 of 2009; See also, *Midland Finance & Securities Globetel Inc v Attorney General & another* [2008] eKLR.

⁵ [2013] EWHC 1063 (Comm).

⁶ *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Limited & Ors (Supra)*.

with addressing the matter on the grounds that there is no Public Policy in China requiring exposure of one (a criminal) to be prosecuted. Therefore, that is the only loophole that enabled the Arbitration Clause to remain fully effective despite the invalidity of the initial agreement that resulted in having the Arbitration Clause. In addition, should the Arbitrator have found that the Public Policy in China provides otherwise, the same would have led to a different outcome. In light of the above, it is clear that the question of internal Policy of a Juridical Person and/ or Public Policy of a given Country shall have influence on the applicability of Arbitration Clauses.

In the Republic of Kenya, there are ample legislations that structure the kind of Public Policy expected by the Society, not to mention that the same is conceptualised through the Constitution of Kenya, 2010 (the “Constitution”). In addition, in the advent of the Constitution, the application of laws, more so on questions of Constitutionality, and the Constitution applies both vertically and horizontally. Thus, it not only applies towards any breach occasioned by the Government but also citizens in their private entities or practice.

As a recap, Chapter 5 of the repealed Constitution of Kenya was generally interpreted by the Court in *Richard Nduati Kariuki v Leonald Nduati Kariuki & Another*⁷ as follows:

The challenge to this court by the applicants is whether the fundamental rights and freedoms are vertical – guaranteed, secured and enforced by the State or by State agents who carry out public duties and functions. The structure of Chapter 5 is such that only a vertical application was contemplated and not horizontal

⁷ [2006] eKLR.

application. Thus, the whole thrust of Chapter 5 rights and freedoms is against public authorities.⁸

Therefore, pre-2010, it was clear that the application of Chapter 5 of the repealed Constitution was only applicable vertically. However, this changed post-2010 and Kenyan Courts have pronounced it in the following terms:

The rigid position that the human rights applies (sic) vertically is being overtaken by the emerging trends in the development of human rights law and litigation. We can no longer afford to bury our heads in the sand, for we must appreciate the reality, which is that private individuals and bodies such as clubs and companies wield great power over the individual citizenry, who should as of necessity be protected from such non-State bodies who may for instance discriminate unfairly, or cause other Constitutional breaches... I need not point out that this is the beginning of a new dawn for Kenya; one that should be embraced enthusiastically by all and it will not matter who the duty holder is, rather, what matters is who should enjoy the rights as enshrined in the Constitution. It must be clear by now that I find that the fundamental rights are applicable both vertically and horizontally, save that horizontal application would not apply as a rule but it would be an exception, which would obviously demand that the court do treat on a case by case basis by examining the circumstances of each case before it is legitimized.⁹

⁸ *Richard Nduati Kariuki v Leonald Nduati Kariuki & Another (supra)*.

⁹ *Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others* [2014] eKLR; *See also, Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi*, Nairobi Petition No. 625 of 2009 [2011] eKLR.

In *Isaac Ngugi v Nairobi Hospital & 3 others*¹⁰ the Court pronounced as follows:

Nyamu J., in the *Richard Nduati Kariuki v Leonard Nduati Kariuki and Another* [2006] Misc App. No. 7 of 2006 [2006] eKLR cites a quote by J. Balkan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York, Free Press, 2004) where it is stated, “*The diffusion of political authority in the context of the global economy has led to concerns about the ability of constitutionalism to operate as a check on political power if it speaks only to the state. Moreover, there is growing awareness-perhaps fuelled by recent examples of corporate corruption and wrong doing-that private power as much as public power has the capacity to oppress.*”

In light of the above, it is evident that the Kenyan scenario is different from the Chinese scenario as pronounced in Beijing Jianlong Heavy Industry Group v Golden Ocean Group Limited & Ors (supra) whereby there is no Public Policy to have a criminal or criminal activity exposed so as to have the person prosecuted. In Kenya, the Public Policy engulfs both vertical and horizontal engagements and should there be any activity that is contrary to the provisions of the Constitution and any other legislation in tandem with the Constitution, the same should be alarmed forthwith.

It is evident that a Contract that entails a clause on Arbitration but violates the Public Policy of Kenya, shall have a grave effect on the Arbitration Clause. Thus, its full applicability shall be ineffective forthwith. For instance, in *Nedermar Technology Bv Ltd v Kenya Anti-Corruption Commission & Another*¹¹ the Court pronounced *that fraud is*

¹⁰ [2013] eKLR.

¹¹ [2006] eKLR.

arbitrable before the arbitral tribunals; the reason for this is that fraud does touch on the validity of a contract and validity is arbitrable before arbitral Tribunals. Therefore, it is evident that any activity that puts into question the validity of the Contracts deprives the Arbiter the authority to address the issue at hand, as it offends Public Policy.¹²

2.0 The Principle of Separability: Arbitration Clauses

As noted and/or slightly addressed above, an Arbitration Clause is an autonomous Clause or Agreement to the main Agreement that leads to having the need to have an Arbitration Clause. Separability *vis-à-vis* Agreements means that each clause in a given contract exists autonomously from the other and that in the event one clause is determined as void, the rest are not affected save where the whole agreement is determined as void. However, despite such circumstances, the Arbitration Clause remains immortal to whatsoever absurdity that may possibly occur. Thus, in the event of any allegation or determination that a certain agreement is illegal, the same shall not affect the validity of the Arbitration Clause.

Regardless of the above mentioned, it is clear that the applicability of Arbitration Clauses is always limited due to the allegation of illegality of the Agreement. In such cases, the Arbitration Clause only allows the Arbiter to hear the matter, not on the substance of the initial dispute but on the legality of the Agreement. In such circumstances, the Arbiter only appreciates the evidence in place to reach an objective conclusion. In the event that the Arbiter confirms that the Agreement is illegal, not to mention it offends Public Policy, the Arbiter will not listen to the substantive questions that had arisen.

¹² *Nedermar Technology Bv Ltd v Kenya Anti-Corruption Commission & Another (supra).*

However, establishing that an Agreement is invalid and contrary to Public Policy leads to a straightforward presentation; thus, any possibility of being argumentative shall make it impossible to grant such prayers by the Arbiter - and or the Courts upon Appeal.¹³

In *Renusagar Power Co. Ltd vs General Electric Co*¹⁴ the Supreme Court of India pronounced itself as follows:

We do not consider it necessary to go into the question whether the principle of unjust enrichment is a part of the public policy of India since we are of the opinion that even if it be assumed that unjust enrichment is contrary to public policy of India, *Renusagar* cannot succeed because *the unjust enrichment must relate to the enforcement of the award* and not to its merits in view of the limited scope of enquiry in proceedings for the enforcement of a foreign award under the Foreign Awards Act.¹⁵

In light of the excerpt above, it is evident that there is a grey line as to when the concept of Public Policy shall come into play effectively.

In *Buckeye Check Cashing Inc. v Cardegena et al.*¹⁶ the Court pronounced as follows:

¹³ *National Iranian Oil Company (NIOC) v Crescent Petroleum Company International Ltd (CP) & Crescent Gas Corporation Ltd (CG)*.

¹⁴ On 7 October, 1993.

¹⁵ *Renusagar Power Co. Ltd vs General Electric Co (supra)*.

¹⁶ 546 U.S. 440 (2006); See also, *Infocard Holdings Limited v Attorney General & 2 others* [2014] eKLR.

[T]he principle of separability of an arbitration clause in an agreement has thus been given judicial stamp of approval and is applicable even where one of the parties is challenging the validity or illegality of the agreement itself. As stated in the above U.S case, the issue as to the validity of the agreement is an issue that the arbitrator has jurisdiction to deal with.¹⁷

In the event that there exists any dispute *vis-à-vis* an Agreement entailing an Arbitration Clause and a Party therein raises the question of invalidity of the contract, the Arbitration Clause is only applicable in terms of enabling the Arbiter to determine their own jurisdiction based on the doctrine of *Kompetenz-Kompetenz*. The Arbiter will receive evidence to determine the allegation. It should be noted that the question of validity is pegged on an allegation and the same is noted yet proved, hence, cannot deprive the Arbiter the opportunity to address oneself over the same issue.

In *Midland Finance & Securities Globetel Inc v Attorney General & another*¹⁸ read together with *Nedermar Technology Bv Ltd v Kenya Anti-Corruption Commission & Another (supra)* it is clear that irrespective of the Arbitration Clause not being affected by the invalidity of a Contract, the same only suffices for purposes of the Arbiter to address whether actually there is any act or omission that can be deemed as that which deprives the Arbiter the authority to hear the matter substantively. In addition, in *Midland Finance & Securities Globetel Inc v Attorney General & another (supra)* the Judge goes further to assert that when the invalidity and or illegality has

¹⁷ *Buckeye Check Cashing Inc. v Cardegena et al. (supra)*.

¹⁸ [2008] eKLR.

bearing on Public Policy, the same shall be addressed by the Court and not the Arbitral Tribunal.

3.0 Public Policy

It is evident that giving the term Public Policy definitive terms is quite hard as the phrase Public Policy is broad¹⁹ and quite malleable to the changes that are taking place in the Society. The Court of Appeal of Kenya in *Tanzania National Roads Agency v Kundan Singh Construction Limited*²⁰ it pronounced itself as follows:

“although public policy is a most broad concept incapable of precise definition ... an award could be set aside under section 35(2)(b)(2) of the Arbitration Act as belief inconsistent with the public policy of Kenya if it was shown that either it was:

(i) Inconsistent with the Constitution or other Laws of Kenya whether written or unwritten, or

(ii) Inimical to the national interest of Kenya, or

*(iii) Contrary to justice and morality.*²¹

In addition, under Section 37 of the Arbitration Act read together with Section 35 (2) (b) (ii) of the same Act, it provides *“that the recognition or*

¹⁹ *Rwama Farmers Co-operative Society Limited versus Thika Coffee Mills Limited* [2012] eKLR.

²⁰ [2014] eKLR.

²¹ *Tanzania National Roads Agency v Kundan Singh Construction Limited (supra)*; See also, *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR.

enforcement of the arbitral award would be [refused if it is] contrary to the public policy of Kenya.”²²

In light of the above precedent and legislation, it is vivid that Public Policy cannot be given a generally applicable definition but is pegged on the laws, State interests and Justice, and morality that fall within a specific State, in this case, Kenya.

In *Evangelical Mission for Africa & another v Kimani Gachuhi & another*,²³ the Court extensively addressed the question of Public Policy *vis-à-vis* Arbitral Awards in the following terms:

I hold that position despite the fact that I am conscious of the fact that it is also in Kenya’s public policy to enforce international arbitral treaties and agreements such as the one under consideration with a view of sustaining such treaties and agreements as Kenya may be signatory to...in this case the court is persuaded to protect a public policy in favor of Kenyan citizen who would be exposed to a health risk as discussed hereinabove. Indeed in my opinion, a contract or an award whose effect would be to release to the public maize unfit for human consumption would itself be tortuous as well as illegal within the legal meaning used hereinabove and accordingly the transaction contract would be against Kenya’s public policy....

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices, which were considered perfectly normal at one time,

²² The Arbitration Act No. 4 of 2012 of the Laws of Kenya.

²³ [2015] eKLR.

have today become obnoxious and oppressive to public conscience. If there is no new head of public policy, which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case, which may not be covered by authority, our courts have before them the beacon light of the preamble to the constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the fundamental rights and the directive principles enshrined in our constitution.²⁴

The excerpts above proffer a clear image of what Public Policy is and how it can affect an Arbitral Award. Therefore, the same can be construed to mean that an Arbitral award is based on an Agreement that is contrary to the Public Policy, the manner in which the Arbitral Award was reached is contrary to the Public Policy and/ or in order to realise the Arbitral award, it shall lead to abuse of Public Policy. In addition, as noted above, Public Policy is not a constant factor but it is based on the ever-changing legislations of the Society, the interests of the State, not to mention the Constitution of Kenya.

In *J M M, J N G & P M W v Registered Trustees of the Anglican Church of Kenya*²⁵ the Employment and Labour Relations Court – having equal status as the High Court – through its Judgment pronounced itself as follows:

²⁴ *Evangelical Mission for Africa & another v Kimani Gachuhi & another (supra)*.

²⁵ [2016] eKLR.

The court finds that a criminal allegation is a continuing injury which is resolved one way or the other upon the criminal court deciding the case. Only the criminal court has the necessary jurisdiction to determine and render a finding on criminal liability. Under Article 50(2) (d) of the Constitution of Kenya, 2010, every accused person has the right to a fair trial which includes the right to a public trial before a court established under the Constitution. Under sections 4 of the Criminal Procedure Code Cap75, an offence under the Penal Code Cap 63 is tried by the High Court or a subordinate court by which the offence is shown in the fifth column of the first schedule to the Criminal Procedure Code to be triable. Under section 4 of the Criminal Procedure Code Cap75, an offence under other statute is tried by the court as prescribed by the statute or by the High Court or a subordinate court as prescribed to try the offence under the Criminal Procedure Code. Thus, the court holds that an employer exercising the administrative disciplinary control over the employee is not a prescribed court for the purpose of making findings on criminal liability of the employee and employers lack power or authority to make a finding of criminal liability against the employee.²⁶

The above case does not address Arbitration but there is an element of Public Policy. Hence, in reference to the excerpt above as read together with *Tanzania National Roads Agency v Kundan Singh Construction Limited (supra)*, it is clear that a question of Public Policy arises when a matter offends the Constitution of Kenya, other local legislations, is harmful to National Interests, or repugnant to justice and immorality. Therefore, it is prudent that the suitable outfits should be given the leeway to address

²⁶ *J M M, J N G & P M W v Registered Trustees of the Anglican Church of Kenya (Supra)*; See also, *David Nyamai and 7 Others -Versus- Del Monte Kenya Limited [2015] eKLR*.

the question as to whether there is abuse of Public Policy by the Parties (inclusive of interested parties) directly or remotely.

4.0 Conclusion

In reliance on the information herein above, it is vivid that different Countries have shown diverse approaches to the applicability of the Arbitration Clause and that there is going to be more of the same. However, what comes out clearly is the fact that Arbitration Clauses are never affected by the alleged invalidity of the Agreement, but it only limits its scope to grant the Arbiter the authority to exercise the doctrine of *Kompetenz-Kompetenz* whereby the Arbiter listens to the raised allegations in order to render a decision on the same.

As noted throughout this paper, it has been highlighted that an alleged illegality of an Agreement shall not invalidate the Arbitration Clause, but it is further mentioned that the alleged illegality limits the Arbiter to only realise the doctrine of *Kompetenz-Kompetenz*. However, that position vests the Arbiter with unlimited authority to assess laws that are only bestowed to special courts, tribunals and or commissions, of which the Arbitral Tribunal is not one. It should be noted that upon confirming that a matter is tainted by abuse of Public Policy, the same shall mean the Party alleging the illegality principle based on Public Policy has a high chance of success in the matter. Therefore, the assessment of evidence by an Arbiter not only entails appreciating evidential procedures but encroaching laws that are only bestowed to special Constitutional and Statutory bodies for purposes of interpretation of the law.

Therefore, should there be any question of illegality principle that offends Public Policy, the matter ought to be forwarded to a Court, Tribunal and or Commission (other than Arbitral Tribunal) having the Constitutional

and or Statutory authority to address such a question. Since Kenyan Laws apply vertically and horizontally, any allegation of the illegality principle should be addressed by the respective rostrum, thereafter, the next action shall be addressed based on the Ruling delivered by that Court, Tribunal and or Commission, which does not include the Arbitral Tribunal.

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4. *Evangelical Mission for Africa & another v Kimani Gachuhi & another* [2015] eKLR
5. *Infocard Holdings Limited v Attorney General & 2 others* [2014] eKLR
6. *Isaac Ngugi v Nairobi Hospital & 3 others* [2013] eKLR
7. *J M M, J N G & P M W v Registered Trustees of the Anglican Church of Kenya* [2016] eKLR
8. *Kenya Shell Limited v Kobil Petroleum Limited* [2006] eKLR
9. *Midland Finance & Securities Globetel Inc v Attorney General & another* [2008] eKLR
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Doctrine of Sovereign Immunity: Its Applicability in the Recognition and Enforcement of Investment Arbitration Awards in Kenya

*By: Eric Thige Muchiri**

1.0 Introduction

Kenya has recently recorded increasing foreign direct investment into her various economic sectors such as mining, renewable and non-renewable energy, and infrastructure projects. With such investments which involve heavy capital outlays by the foreign investors, conflicts are bound to, and they have arisen between the State and the investors.

Various investors have commenced investment arbitration against Kenya based on the applicable laws. Kenya is now defending at least two investment arbitrations at the International Centre for Settlement of Investment Disputes (ICSID) which have been widely reported on.

Yet, Kenya remains a sovereign State with one of the most progressive Constitutions in Africa. This paper seeks to explain the doctrine of sovereign immunity as practised in investment arbitration. It also seeks to explain the place the doctrine in the Kenyan legal system while also considering the contemporary challenges surrounding it.

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2.0 Background

The doctrine of sovereign immunity is based on the idea that all sovereign States are equal on the international arena, and thus a State is entitled to 'determine its own internal affairs without interference from a foreign state, authority or jurisdiction, including, in the framework of international investment disputes, that of the 'forum state' in which a resolution is sought'.¹ This superiority gives the Host State a higher hand in the 'negotiations and any subsequent dispute' with a foreign investor. A Host State may rely on sovereign immunity to either challenge the actual jurisdiction of an arbitral tribunal or the enforcement of an arbitration award.²

Investment arbitration is the settlement of investment disputes between foreign investors and Host States through arbitration.³ The arbitration may be based either on (a) an investment treaty, multilateral investment treaty (MIT) or a bilateral investment treaty (BIT), (b) the Host State's national investment law, or (c) on an investment agreement.⁴

¹ Nasser Mehsin Al-Adba, 'The Limitation of State Sovereignty in Hosting Foreign Investments and The Role of Investor-State Arbitration to Rebalance The Investment Relationship' (DPhil Thesis, The University of Manchester) at 183.

² Martin Dixon, Robert McCorquodale and Sarah Williams, 'Cases and Materials on International Law' (Oxford University Press 2003) 331.

³ Leng Lim, Chin and Ho, Jean. *International Investment Arbitration*. (New York: Oxford University Press, 2016) at 1.

⁴ <<http://internationalarbitrationlaw.com/about-arbitration/international-disputes/investment-arbitration/>> accessed 28th April 2017.

Parties to commercial transactions have the freedom to trade and are presumed to have equal bargaining power; thus, they are taken to be well-equipped to protect their interests.⁵ In contrast, the Host State in international investments, usually has control over the executive, legislative and judicial powers within its territory, and is thus usually more powerful than the foreign investors.⁶ Investment arbitration operates on this presumption of inequality between the parties and seeks to interpret and apply the foreign investor protection provisions in the MITs or BITs.⁷ Such provisions, which are risks that the foreign investors run, include protections against unlawful expropriation, nationalisation, or other forms of unwarranted interference by the Host State.

3.0 Theories of Sovereign Immunity

3.1 Absolute immunity of the sovereign

This theory is based on the idea that all sovereign states are equal at the international forum, and that a sovereign state is free to govern within its territory however it pleases.⁸ In the 1812 American case of *The Schooner Exchange v. McFaddon & Others*, the US Supreme Court described absolute immunity as follows:

⁵ Nasser (note 1) at 146.

⁶ Ibid.

⁷ Ibid.

⁸ Nasser (note 1).

‘The jurisdiction of a nation within its own territory is exclusive and absolute. It is susceptible of no limitation not imposed by itself.’⁹

Absolute immunity shields a sovereign state from liability in other jurisdictions, protects its property from seizure or attachment, the taxation of its assets in any other country, or the indignity of being sued as a defendant in a foreign state without the latter’s consent.¹⁰ With time, these absolute immunity principles have been eroded leading some courts to describe them as ‘anachronistic’ in the modern world.¹¹

3.2 Restrictive immunity of the sovereign

Globalization has limited the ability of a sovereign State to operate autonomously. A sovereign State is now enjoined to “consider the broader transnational implications of its policies and actions, as a failure to meet these obligations has transnational or cross border implications.”¹² These considerations inform the theory of restrictive immunity of sovereign States. According to the restrictive theory,

⁹ *The Schooner Exchange v. McFaddon & Others* 11 U.S. 116.

¹⁰ Christopher C. Joyner, *International Law in the 21st Century: Rules for Global Governance* (Rowman & Littlefield Publishing Group 2005) at 52.

¹¹ See the Kenyan Court of Appeal decision in *Karen Njeri Kandie v Alssane Ba & another* [2015] eKLR at 12 in which the court stated as follows: “We, too, agree that the doctrine of absolute immunity would be anachronistic, and has been for some time now. What immunity there is must be restricted or qualified so that private or commercial activities cannot be immunized.”

<<http://kenyalaw.org/caselaw/cases/view/107722/>> accessed 28th April 2017.

¹² Jennifer Westaway, “Globalization, Sovereignty and Social Unrest” (2012) 5 (2) *Journal of Politics and Law* 132 at 137 <<http://dx.doi.org/10.5539/jpl.v5n2p132>> accessed 28th April 2017.

immunity from the exercise of judicial jurisdiction by another state is only attached to State actions and claims arising out of exercise of sovereign authority – *jure imperii*.¹³ This is as opposed to actions and claims of the sovereign state arising in the course of business or commerce – *jure gestionis*: immunity does not apply to such actions.¹⁴

Courts in Kenya appear to follow and apply the theory of restrictive immunity. The Court of Appeal in *Ministry of Defence of The Government of the United Kingdom vs Joel Ndegwa*¹⁵ held as follows:

It is apparent that there is no absolute sovereign immunity. It is restrictive. The test is whether the foreign sovereign or government was acting in a governmental or private capacity then the doctrine will apply otherwise it will not afford protection to a private transaction. The nature of the act is, therefore, important.¹⁶

This position has been followed by subsequent and differently-constituted benches of the Court of Appeal in *Karen Njeri Kandie v Alssane Ba & another* [2015] eKLR, and more recently in *Unicom Limited v Ghana High Commission* [2016] eKLR.¹⁷

¹³ Nasser (note 1) at 185.

¹⁴ Ibid.

¹⁵ [1983] eKLR < <http://kenyalaw.org/caselaw/cases/view/4589/> > accessed 28th April 2017.

¹⁶ Ibid at 4.

¹⁷ For similar holdings by the Kenyan Employment and Labour Relations Court see *Ishak Mohamed v Libyan Embassy* [2016] eKLR, and *Elkana Khamisi Samarere & another v Nigerian High Commission* [2013] eKLR; by the Kenyan High Court see *Twictor Investments Ltd vs*

This restrictive immunity theory also holds sway in the international realm. The European Court of Justice has seen the “consolidation of a restrictive approach which permits enforcement measures against property clearly serving non-governmental purposes”.¹⁸ Similarly, in the English case of *Trendex Trading Corporation vs. Central Bank of Nigeria*, the UK Court of Appeal held that “international law now recognize[s] no immunity from suit for a Government department in respect of ordinary commercial transactions as distinct from acts of a governmental nature”.¹⁹

This restrictive approach to immunity has been seen as promoting avoidance of liability by States.²⁰ Indeed, an analysis of the Kenyan cases quoted above show that in all of them, State immunity was upheld, and consequently the suits were either dismissed or struck out.

On the other hand, the restrictive approach can be seen as promoting foreign investment in that it clarifies that State immunity is restricted to actions or claims arising out of exercise of sovereign authority but not those which are of commercial nature.²¹

The Government of The United States Of America [2003] eKLR, and *Tanad Transporters Ltd v United Nations Childrens Fund* [2009] eKLR.

¹⁸ August Reinisch, ‘European Court Practice Concerning State Immunity from Enforcement Measures’ (2006). 17 (4) EJIL, 803 – 836 at 835 <<http://www.ejil.org/pdfs/17/4/100.pdf>> accessed 29th April 2017.

¹⁹ [1977] 1 QB 529 <<http://www.uniset.ca/other/css/19772WLR356.html>> accessed on 29th April 2017.

²⁰ Nasser (note 1) at 187.

²¹ Ibid.

This article proceeds on this currently-recognized theory of restrictive immunity. This enables a discussion on the qualifications and exceptions to the doctrine of sovereign immunity as applicable to investment arbitration.

4.0 A general overview of the legal framework of investment Arbitrations under ICSID

The principal treaty that regulates investment arbitration is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).²² The ICSID Convention is a multilateral treaty which was formulated under the auspices of the World Bank to further the Bank's objective of promoting international investment.²³ The ICSID Convention was opened for signature on 18 March 1965, and came into force on 14 October 1966.²⁴

The ICSID Convention established ICSID which provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.²⁵ ICSID is premised on

²² Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)

<https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf> accessed on 28th April 2017.

²³ <<https://icsid.worldbank.org/en/Pages/about/default.aspx>> accessed 29th April 2017.

²⁴ Dr. Yaroslau Kryvoi, 'International Centre for Settlement of Investment Disputes (ICSID)' *International Encyclopaedia of Laws*, (2010) 21 <<http://cisarbitration.com/wp-content/uploads/2013/07/International-Centre-for-Settlement-of-Investment-Disputes-ICSID.-Ya.-Kryvoi.-Kluwer-Law-Int-2010.pdf>> accessed 29th April 2017.

²⁵ ICSID Convention, Articles 1 and 2.

the belief that an institution specially designed to facilitate the settlement of investment disputes between governments and foreign investors could help to promote increased flows of international investment.²⁶

Article 25 (1) of the ICSID Convention provides for the jurisdiction of ICSID arbitration tribunal as extending to (1) any legal dispute (2) arising directly out of an investment, (3) between a Contracting State (or any constituent subdivision or agency of a Contracting State that has been designated to ICSID by that State) and (4) a national of another Contracting State, (5) which the parties to the dispute consent in writing to submit to the Centre.

ICSID conciliation and arbitration proceedings are governed by the ICSID Convention, the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules), the Administrative and Financial Regulations, the Rules of Procedure for Conciliation Proceedings (the Conciliation Rules) and the Rules of Procedure for Arbitration Proceedings (the Arbitration Rules), as amended and adopted by the Administrative Council of ICSID.²⁷ The ICSID Convention does not confer rights on the foreign investors and states; it simply provides an arbitration mechanism where there is an ICSID arbitration clause, and the Host State has given its consent to such arbitration.²⁸

²⁶ International Centre for Settlement of Investment Disputes (ICSID) 2005 annual report (English)
<<http://documents.worldbank.org/curated/en/969521468140977865/International-Centre-for-Settlement-of-Investment-Disputes-ICSID-2005-annual-report>> accessed 25th April 2017.

²⁷ Kryvoi (note 24) from 33 - 42.

²⁸ Phillip Capper, *International Arbitration A Handbook* (3rd edn, Lovells 2004) at 142.

In case of arbitrations in which one of the parties is not a Contracting State or a national of such a State, ICSID provides an Additional Facility Rules authorizing the ICSID Secretariat to administer conciliation and arbitration proceedings in such circumstances.²⁹ The rules of the ICSID Convention and the rules of the Additional Facility differ in that the ICSID Convention's self-contained provisions on recognition and enforcement of awards are not applicable to Additional Facility awards.³⁰ Additional Facility awards are enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention). This is the reason why proceedings under the Additional Facility Rules may be conducted only in the countries that are parties to the New York Convention.³¹

4.1 Recognition and enforcement of ICSID awards

The ICSID Convention provides a smooth, self-contained and efficient system of recognition and enforcement.³² The mechanism is contained in Articles 53, 54 and 55 of the ICSID Convention.

²⁹ Mary Anyango Oganga, 'The International Centre for the Settlement of Investment Dispute[s]: Jurisdiction and Relevance to Africa', (LLM Research Project, The University of Nairobi 2007) at 1

< <http://erepository.uonbi.ac.ke/bitstream/handle/11295/11742/Oganga-The%20International%20Centre%20For%20The%20Settlement%20Of%20Investment%20Dispute%20Jurisdiction%20And%20Relevance%20To%20Africa.pdf?sequence=1&isAllowed=y> > accessed 29th April 2017.

³⁰ Kryvoi (note 24) at 52.

³¹ Ibid.

³² Ibid at 20.

There is a major difference between the terms “recognition”, “enforcement”, and “enforcement” as used in the ICSID Convention, as they describe different stages in the payment of the award. Professor Schreuer interprets “recognition” as the stage of verification of the award.³³ He interprets the terms “execution” and “enforcement” as synonymously denoting the stage of attachment of assets in satisfaction of the claim.³⁴ He adds that only the English text of the ICSID Convention uses the terms “execution” and “enforcement”; the Spanish and French texts, which are equally binding, use one word for both concepts.³⁵ On the other hand Aaron Broches, who was general counsel of the World Bank and was one of the drafters of the ICSID Convention, held the view that the term “enforcement” meant both recognition and enforcement.³⁶ This article proceeds on the usage of the terms “recognition”, “execution” and “enforcement” as espoused by Professor Schreuer as he has laid the basis for viewing the latter two terms as synonymous.

An award rendered pursuant to the ICSID Convention (ICSID award) imposes a binding obligation on litigants, and which award cannot be reviewed by any procedure other than those provided for in the ICSID

³³ Anastasiia Filipiuk, ‘Enforcement of ICSID Arbitration Awards and Sovereign Immunity’ (LLM Short Thesis, Central European Thesis 2016) at 6.

³⁴ Ibid.

³⁵ Anastasiia (note 33).

³⁶ Aron Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’ (1987) 2 ICSID Rev.-Foreign Invest. L. J <https://oup.silverchaircdn.com/oup/backfile/Content_public/Journal/icsidreview/2/2/10.1093/icsidreview/2.2.287/2/2-2-287.pdf> accessed 29th April 2017.

Convention itself.³⁷ The review procedures are interpretation³⁸, revision³⁹, supplementation and rectification⁴⁰, or annulment.⁴¹

Article 54(1) of the ICSID Convention provides for the execution mechanisms. According to the Article, a Contracting State is bound to recognize an ICSID award as binding and enforce the pecuniary obligations imposed by that award within its territories as it were a final judgment of a court in that State. This gives an ICSID award the *res judicata* effect on the national courts as a matter determined by arbitration.⁴²

An ICSID award is binding on the parties immediately upon rendering; only when a party fails to abide by or to comply with the terms of the ICSID award is the other party allowed to resort to the enforcement and execution mechanisms under Article 54.⁴³ The presentation of a duly certified copy of the final award to the appropriate, competent court or authority of the Contracting state in dispute under Article 54(2) provides for the implementation of the state law governing the execution of local judgments.⁴⁴

³⁷ ICSID Convention, Article 53(1).

³⁸ ICSID Convention, Article 50.

³⁹ ICSID Convention, Article 51.

⁴⁰ ICSID Convention, Article 49 (2).

⁴¹ ICSID Convention, Article 52.

⁴² Kryvoi (note 24) at 77.

⁴³ Ibid.

⁴⁴ Nasser (note 1) at 217.

4.2 Sovereign Immunity in Recognition and Execution of Arbitral Awards

Article 55 of the ICSID Convention allows for the invocation of the defence of sovereign immunity by Contracting States. It reads,

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

This Article allows for the national laws relating to sovereign immunity to be resorted to during the recognition and enforcement of an ICSID award.

4.2.1 Sovereign immunity at the recognition stage of an ICSID award

The defence of sovereign immunity during the recognition of an ICSID award cannot stand. Firstly, by ratifying the ICSID Convention and consenting to arbitrate at ICSID, States are deemed to have waived their sovereign immunity at the stage of recognition of the award.⁴⁵ Secondly, recognition of an ICSID award is automatic upon presentation of a copy of the award certified by the Secretary-General of ICSID to a competent court or other designated authority.⁴⁶

In the US case of *Blue Ridge Investments v. Republic of Argentina*⁴⁷, Argentina sought to dismiss a petition to confirm an ICSID award filed

⁴⁵ Anastasiia (note 33) at 17.

⁴⁶ Ibid note 22, Article 53 (2).

⁴⁷ *Blue Ridge Investments v. Republic of Argentina*, F. Supp.2d 367 (S.D.N.Y. 2012), *aff'd* 735 F.3d 72 (2nd Cir. 2013).

by Blue Ridge Investments. Argentina argued that its consent to an ICSID arbitration did not amount to a waiver of immunity to suits in the United States. The Court dismissed this argument on two bases: firstly, it held that as a signatory to the ICSID Convention, Argentina had waived its sovereign immunity in the United States with respect to enforcement of an ICSID award.⁴⁸ Secondly, the Court held that under the Foreign Sovereign Immunities Act, Argentina had waived its sovereign immunity under the arbitral award exception.⁴⁹ This exception barred Argentina from invoking its sovereign immunity before American courts as there was a valid ICSID award, and both Argentina and the US were parties to the ICSID Convention.

American courts have also held that investigation and regulation of commercial transactions are exercises of sovereign power, and not commercial activities which can allow a sovereign state to be sued in the American Courts.⁵⁰

4.2.2 Sovereign immunity during the execution of an ICSID award

Article 55 as read together with Article 54 (3) of the ICSID Convention allows a Contracting State to rely on national laws on sovereign immunity to avoid attachment of its assets in execution of an ICSID

⁴⁸ Ibid at 374.

⁴⁹ Ibid.

⁵⁰ See *Community Finance Group, Inc. et al v. Republic of Kenya et al*, No. 0:2010cv00838 - Document 30 (D. Minn. 2011) < <http://law.justia.com/cases/federal/district-courts/minnesota/mndce/0:2010cv00838/111916/30/> > accessed 2nd May 2017. See also *Peter George Odhiambo, v. Republic of Kenya, a Foreign State, et al.*, No. 13-7100 in which it was held that a contract that was offered, accepted, and performed in Kenya lacked the connection to the United States required by the commercial activity exception to the FSIA <<http://caselaw.findlaw.com/us-dc-circuit/1676885.html>> accessed 2nd May 2017.

award. Nevertheless, even where a Contracting State is successful in raising the defence of sovereign immunity, Article 53 of the ICSID Convention still enjoins the Contracting State to honour and comply with the ICSID award. ICSID in *MINE v. Guinea* stated on the issue as follows,

It should be clearly understood,..., that State immunity may well afford a legal defence to forcible execution, but it provides neither argument nor excuse for failing to comply with an award...Non-compliance by a State constitutes a violation by that State of its international obligations and will attract its own sanctions.⁵¹

Many Contracting States apply the restrictive immunity approach to sovereign immunity such that only those assets that are used for commercial activities are liable for attachment by a successful party. In *Liberian Eastern Timber Corporation (LETCO) v Liberia*,⁵² Liberia successfully raised the defence of sovereign immunity from execution against its assets (tonnage and registration fees collected by the agent of Liberia) in the US on the basis that the assets were sovereign and not commercial. LETCO brought another suit for execution against Liberia in the US District of Columbia with respect to the same ICSID award.⁵³ This time, LETCO sought to attach the bank accounts used for the functioning of the Liberian Embassy and the Central Bank. The Court in allowing

⁵¹ *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Interim Order No. 1 concerning Guinea's Application for Stay of Enforcement of the Award dated August 12, 1988, ICSID Reports: Volume 4: Reports of Cases Decided Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965, 115-116, para 25 (1997).

⁵² ICSID Case No. ARB/83/2, 1983.

⁵³ *LETCO case*, US District Court, DC, 2 ICSID Reports 390.

Liberia's application for a restraining order and injunction held that the bank accounts of the Embassy used or intended to be used for the purposes of the diplomatic mission were immune from attachment. The Court added that the concept of 'commercial activity' should be defined narrowly because 'sovereign immunity remains the rule rather than the exception...and because courts should be cautious when addressing areas that affect the affairs of foreign governments.'⁵⁴ Even if a portion of the funds in the Embassy's accounts were used for commercial activities such as purchase of goods and services for the running of the Embassy, it would not make the entire bank account to lose its sovereign immunity in accordance with the narrow definition of 'commercial activity'.⁵⁵

A Contracting State is distinct from its designated and authorized agency unless the latter is under the extensive control of the State.⁵⁶ In the French case of *Benvenuti and Bonfant Srl v. Banque Commerciale Congolaise and Others*⁵⁷, Benvenuti sought to execute an ICSID award against a State bank (Banque Commerciale Congolaise) which was neither a party to the dispute nor to the award. Benvenuti argued that despite the separate legal personalities of the state-owned bank, they should be regarded as a part of the state whenever the State exercises control over them. The Court held that the control exercised by the State over the State bank was insufficient to enable the latter to be an 'emanation of the State of Congo,

⁵⁴ Ibid at 393 - 395.

⁵⁵ Ibid at 395.

⁵⁶ Asouzu, Amazu A., *International Commercial Arbitration and African States, Practice, Participation and Institutional Development*, (1st edn, Cambridge University Press 2001) at 385.

⁵⁷ *Benvenuti and Bonfant Srl v. Banque Commerciale Congolaise and Others*, France, Cour de Cassation, Paris, 21 July 1987, 1 ICSID Rep 373 (1993).

from which it is distinct'.⁵⁸ Therefore, the Court held that the State bank could not be held responsible for the obligations of the Contracting State, and that its assets could not be attached.

In the United Kingdom, the property of a central bank of a foreign state is covered by sovereign immunity. In the case of *AIG Capital Partners Inc. v. Kazakhstan*⁵⁹ AIG Capital Partners Inc attempted to attach assets held in the UK by third parties for the benefit of the National Bank of Kazakhstan. The High Court interpreted the UK State Immunity Act 1978 as extending sovereign immunity to such assets, and it did not matter 'whether the central bank is a department of the State or a separate entity'.⁶⁰

5.0 Recognition and enforcement of Non-ICSID awards

The recognition and enforcement of non-ICSID awards is regulated by the national law governing arbitration and international conventions governing the recognition and enforcement of international investment awards.⁶¹ Non-ICSID awards may be handed down by arbitral tribunals under the ICSID Additional Facility Rules, or institutions that conduct investment arbitration such as the International Chamber of Commerce,

⁵⁸ Ibid at 374.

⁵⁹ *AIG Capital Partners Inc. v. Kazakhstan* [2005] EWHC 2239 (Comm) <<https://www.italaw.com/sites/default/files/case-documents/ita0022.pdf>> accessed 29th April 2017.

⁶⁰ Ibid at para 57.

⁶¹ Nasser (note 1) at 219.

the Stockholm Chamber of Commerce, and the London Court of International Arbitration.⁶²

The principal convention governing the recognition and enforcement of non-ICSID awards is the New York Convention. The New York Convention regulates the recognition and enforcement of foreign arbitral and other 'non-domestic awards' between states and investors, whether arising due to the independent international investment agreement or under international treaties between nations.

The party seeking recognition and enforcement is only required to produce to the relevant court: a duly authenticated original award or a duly certified copy thereof and, the original Arbitration Agreement or a copy thereof.⁶³

Recognition and enforcement under the New York Convention is also subject to the rules on sovereign immunity. Firstly, this is because the New York Convention 'refers to the national procedural laws which include the rules of public international law, encompassing the right to sovereign and diplomatic immunity.'⁶⁴ Secondly, a reference to the New York Convention reflects an intention that an arbitral award can be

⁶² Ibid.

⁶³ New York Convention, Article 4.

⁶⁴ Seema Bono, et al., 'Sovereign Immunity and Enforcement of Arbitral Awards: Navigating International Boundaries' (Mayer Brown) at 16
<<https://m.mayerbrown.com/Files/Publication/2e0f7077-9b25-430e-8b70-6a8f8c1a9d76/Presentation/PublicationAttachment/1be4c54c-bfc2-4d78-9403-85e37c560f43/12270.PDF>> accessed 1 May 2017.

enforced in general among the Signatory States, but does not infer an intention to entirely waive immunity.⁶⁵

Article 3 (h) of the New York Convention provides that enforcement of an arbitral award is to be refused where such enforcement of the award would violate international public policy as prevailing in the country where enforcement is sought. Based on this provision, and also on their national laws, Signatory States which apply restrictive immunity are entitled to refuse to enforce an award that calls for attachment of sovereign assets as compared to assets used for commercial purposes.

6.0 The Kenyan position

The Constitution of Kenya, 2010 (the Constitution) is the 'supreme law of the Republic and binds all persons and all State organs at both levels of government'.⁶⁶ Article 2 (4) provides that any law, including customary law, that is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. The Constitution also provides that the general principles of international law⁶⁷, as well as any treaty or convention ratified by Kenya⁶⁸, shall form part of the law of Kenya. Article 159(2) (c)

⁶⁵ Ibid.

⁶⁶ Article 2 (1) of the Constitution of Kenya, 2010, *Government Printer*, 2010, Nairobi. Also see Kariuki Muigua, 'Constitutional Supremacy over Arbitration in Kenya', (2015) 3(2) *Alternative Dispute Resolution* at 10.

<http://www.kmco.co.ke/attachments/article/120/Constitutional%20Supremacy%20over%20Arbitration%20in%20Kenya_03_dec.pdf> accessed 18 January 2017.

⁶⁷ Constitution of Kenya, Article 2(5).

⁶⁸ Constitution of Kenya, Article 2(6).

of the Constitution enjoins courts and tribunals in the exercise of judicial authority, to be guided by the principle of promotion of alternative forms of dispute resolution (ADR) including reconciliation, mediation and arbitration.

Sovereign immunity in Kenya is mainly provided for under the Privileges and Immunities Act.⁶⁹ The Act 'gives the force of law in Kenya to certain Articles of the Vienna Convention on Diplomatic Relations signed in 1961 and the Vienna Convention on Consular Relations signed in 1963.'⁷⁰ Kenya is yet to ratify the United Nations Convention on Jurisdictional Immunities of States and their Property; as such, it is inapplicable as the law of Kenya.⁷¹ The doctrine of sovereign immunity in Kenya is also applicable by dint of Article 2 (5) of the Constitution as it is a general principle of international law.⁷²

Kenya signed the ICSID Convention on 24th May 1966, ratified it on 3rd January 1967, and it came into force on 2nd February 1967.⁷³ The ICSID Convention was domesticated by the enactment of the Investment Disputes Convention Act⁷⁴. The preamble to the Act provides that it is an

⁶⁹ Privileges and Immunities Act, Chapter 179 of the Laws of Kenya, *Government Printer, Nairobi*.

⁷⁰ As stated by the Court of Appeal in the *Unicom Limited v Ghana High Commission* case at 4.

⁷¹ See the *Unicom Limited v Ghana High Commission* and *Karen Njeri Kandie v Alssane Ba & another* cases.

⁷² Seema Bono (note 64) at 4.

⁷³ Kryvoi (note 24) at 109.

⁷⁴ Investment Disputes Convention Act, Chapter 522 of the Laws of Kenya, *Government Printer, (1966) Nairobi*.

Act of Parliament to give legal sanction to the provisions of the ICSID Convention. Section 4 of the Act provides for the recognition and enforcement of an ICSID award as follows,

An award rendered pursuant to the Convention, and not stayed pursuant to the relative provisions of the Convention, shall be binding in Kenya, and the pecuniary obligations imposed by the award may be enforced in Kenya as if it were a final decree of the High Court.

No proceedings for recognition and enforcement of an ICSID award have ever been brought in Kenya.⁷⁵ This is because most of the applications are usually against African states, and they are mostly filed in the developed countries such as USA and France.⁷⁶ This has denied Kenya, as well as other Africa States, a chance to develop jurisprudence in the area even though such States are active participants in the ICSID mechanism.⁷⁷

The Arbitration Act, 1995 is the principal Act that regulates domestic and international arbitration in Kenya.⁷⁸ Part VII of the Act provides for recognition and enforcement of international arbitral awards as binding and enforceable in accordance with the New York Convention to which Kenya is a signatory.⁷⁹ Section 37 (b) (ii) of the Arbitration Act, 1995

⁷⁵ Asouzu (note 56) at 386.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ The Arbitration Act No. 4 of 1995 (as amended in 2009), Laws of Kenya, *Government Printer*, Nairobi.

⁷⁹ Ibid, section 36 (2).

empowers the High Court to refuse recognition or enforcement of an arbitral award if such actions would be contrary to the public policy of Kenya. Justice Ringera, as he then was, in *Christ for All Nations v Apollo Insurance Co. Ltd*⁸⁰, described public policy as follows:

Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality.”

The doctrine of sovereign immunity is part of the law of Kenya not only by dint of Privileges and Immunities Act but also as a general principle of international law. The doctrine of sovereign immunity has been consistently applied, in the restrictive sense, by the Kenyan courts. Therefore, any non-ICSID award that calls for Kenya to disregard the restrictive approach to sovereign immunity, for example by requiring attachment of a bank account of the Embassy of a Signatory State, would be inconsistent not only with the Constitution but also with written law. It would be against the public policy of Kenya and no High Court would recognize or enforce such an award. For instance, the Court of Appeal in *Tononoka Steels Limited vs Eastern and Southern Africa Trade and Development Bank* held as follows regarding the interplay between restrictive immunity and public policy,

In extending to PTA Bank what amounts to an absolute immunity from suits and legal process, the question which arises is whether,

⁸⁰ [2002] 2 E.A 366.

having regard to the nature of the business and operations of the PTA Bank, Parliament could have intended that it should be granted absolute immunity from suits and legal process across the board to cover even purely commercial transactions pertaining to its activities as a bank. I would think that such an extension would not only be against public policy but also in breach of international law. I know of no country which would allow a bank to provide banking and financial services with absolute immunity from suits and legal process and with absolutely no protection for its hapless customers.⁸¹ [Emphasis added]

7.0 Contemporary Challenges to the Doctrine of Sovereign Immunity in Investment Arbitration

Investment arbitration, especially under ICSID, has been viewed as a threat to the sovereignty of developing countries, 'and a tool of foreign investors rather than an impartial forum'.⁸² This threat led some countries to oppose the ICSID mechanism in 1964 – before the ICSID Convention came into effect; the opposition was by a group of 21 countries (almost every Latin American country), plus Iraq and the

⁸¹ [1999] eKLR as per Kwach J.A.

⁸² Ibid note 22 at 84.

Philippines.⁸³ Recently, the Republic of Venezuela, Bolivia, and Ecuador denounced the ICSID Convention.⁸⁴

The recognition and enforcement mechanism of ICSID awards – such an award automatically becomes a final judgment of a competent court in any of the Contracting States – appears to be another major cause of such discontent.⁸⁵ Such automatic mechanism appears to wipe out any sovereignty that a State may have over its assets in other Contracting States where the ICSID award may be recognized and enforced. This may have prompted the decision by the High Court of Tanzania to issue an injunction against a party to ICSID arbitration from ‘enforcing, complying with or operationalizing’ an ICSID interim and non-pecuniary award pending the outcome of a case filed before the High Court.⁸⁶ This ICSID recognition and enforcement mechanism is in contrast to the mechanism under the New York Convention which requires additional domestic enforcement procedures, and which includes some grounds for refusal, albeit limited, in any of the Signatory Parties.⁸⁷

⁸³Claire Provost and Matt Kennard, ‘The Obscure Legal System That Lets Corporations Sue Countries’ *The Guardian* (London 10 June 2015)
<<https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid>> accessed 2 May 2017.

⁸⁴ Sergey Ripinsky, ‘Venezuela’s Withdrawal From ICSID: What it Does and Does Not Achieve’ (2012) IISD <<https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>> accessed 2 May 2017.

⁸⁵ Ibid.

⁸⁶ Deborah Ruff and Trevor Tan, ‘Tanzania ‘anti-ICSID’ Injunction Cause for Concern or Contravention?’ (2014) 3 International Arbitration Report
<<http://www.nortonrosefulbright.com/files/20141002-tanzania-anti-icsid-injunction-121543.pdf>> accessed 2nd May 2017.

⁸⁷ Sergey Ripinsky (note 84).

Investment arbitral tribunals and their awards have also been accused of lacking judicial transparency and accountability, which may be required of the domestic judicial systems, especially when there are huge awards against developing countries.⁸⁸ Transparency and accountability are central to democratic governance.⁸⁹ Also, rulings by tribunals on public policy issues, which would be better handled by the national courts, are seen as compromising the independence and integrity of domestic legal systems because it is viewed as the contracting out of the judicial function in public law.⁹⁰

On the other hand, it must be remembered that sovereignty still empowers a State to govern within its territory according to its wishes. With such sovereignty, the State has the powers to negotiate on suitable provisions in the MITs and BITs that it becomes party to. Further, the State should follow the laid down foreign investor protection provisions in the MITs or BITs to avoid unnecessary arbitrations.

In case of foreign investors, and in order to overcome the perceived negative effects of the doctrine of sovereign immunity, it has been suggested that they should negotiate for the State Party to waive its

⁸⁸ Kryvoi (note 24) at 85. For a discussion of the Kenyan issues on transparency and accountability, see L. Obura Aloo, and Edmond Kadima Wesonga, 'What is there to hide? Privacy and Confidentiality versus Transparency: Government Arbitrations in light of the Constitution of Kenya 2010', (2015) 3(2) *Alternative Dispute Resolution* at 18 <<http://www.ciarbkenya.org/assets/journal-volume-3-issue-2.pdf>> accessed 18th January 2017.

⁸⁹ Transparency and accountability are some of the values and principles of governance stated under Article 10 (1) of the Constitution of Kenya.

⁹⁰ Kryvoi (note 24) at 85

immunity for execution in the contracts.⁹¹ Clause 15 of the ICSID Model Clauses provides a sample of such a waiver clause as follows,

The Host State hereby waives any right of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this Agreement.

Such a waiver clause may still be subject to national laws on sovereign immunities as these may not be overrode by an investment contract between a State and a private party.⁹² In Kenya, the supremacy of the Constitution means that such waiver clauses would be subject to it otherwise they would be null to the extent of their inconsistency.⁹³

8.0 Conclusion

The doctrine of sovereign immunity allows for States to govern within their territory in accordance with their will. Moreover, it allows States to shield their sovereign assets from execution by successful foreign investors in arbitral tribunals. Furthermore, foreign investors are at liberty to execute their awards against assets used for commercial purposes by the States.

This restrictive approach to the doctrine of sovereign immunity by various national courts allows for the efficient operation of recognition and enforcement of investment arbitration awards. This is particularly

⁹¹ Asouzu (note 56) at 388

⁹² Ibid

⁹³ See Dr. Kariuki Muigua (note 66)

important because a State may use sovereign immunity to frustrate compensation, leaving foreign investors without a remedy.

In addition, the international investment arbitration regime needs to enhance its transparency and accountability procedures so as to maintain confidence among the various parties. Lastly, care is to be had to national laws when drafting MITs, BITs, and investment agreements so as to include suitable provisions on the doctrine of sovereign immunity.

The Current Trend of Costs in Arbitration: Implications on Access to Justice and the Attractiveness of Arbitration

*By: Raphael Ng'etich**

Abstract

Costs are at the core of arbitral proceedings. Each party to the arbitral proceedings keeps a keen eye on the costs incurred and whether they will be able to recover them. The crucial role played by costs is that they can, and often do, determine whether the parties access justice or not. A claimant may abandon a legitimate claim due to the fear that they may not recover their costs. A defendant too may decide to settle a claim due to the prediction of the costs to be incurred, even though the claim may be exaggerated. The current trend in arbitration indicates that arbitral proceedings are increasingly more expensive than litigation yet arbitration had been priding itself of cost-effectiveness. The question in this regard, therefore, is: are the increasing costs an impediment to access to justice? Furthermore, does this reduce the attractiveness of arbitration as a dispute resolution method?

1.0 Introduction

It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book and left it a living letter; found it the patrimony of the rich and left it the inheritance of the poor; found it the two-edged sword of craft and oppression and left it the staff of honesty and the shield of innocence.¹

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Costs play a crucial role in arbitration. They are at the core of access to justice by the disputants. Disputants have to consider cost implications from the beginning to the end of the arbitral process. A claimant, on the one hand, is interested in knowing whether they will be able to recover their costs should they obtain an award against the respondent. A respondent, on the other hand, is keen to see what costs they may be ordered to pay to the claimant should they be the losing party. It is in this regard that costs may deter the claimant from pursuing their claim even if it is well founded, and may, alternatively, force the respondent to settle even though the claim is exaggerated. Costs, therefore, can determine whether parties access justice or not. This implication is much pronounced nowadays due to the increasingly higher costs incurred in arbitration. Parties opt for arbitration primarily due to its attractive features including the presumption of lower costs in comparison to litigation.² However, the trend today indicates that arbitration is in some instances more expensive than litigation. Cost awards in international commercial arbitrations offer good examples. Arbitration was initially considered more efficient and cost-effective, but today it is noted that arbitral costs 'have been getting out of hand.'³

In light of this development, critical issues need consideration. One of them is access to justice, which requires removal of legal, financial and

¹ Henry Peter Brougham, quoted by Justice Iyer in *Fertilizer Corp. Kamgar Union (Regd.) v Union of India*, (1981) 2 SCR 52, para 50.

² Mururu N, 'Towards efficiency and economy in arbitration' *Alternative Dispute Resolution* (2013), 7.

³ Goekjian SV, 'The conduct of international arbitration' 11 *International Trade Symposium Issue*, 2/3 (1979), 424.

social barriers in seeking solutions from justice systems.⁴ The increasing costs of arbitration, therefore, impose a financial barrier in access to justice since it deters poor claimants from prosecuting their claims, and, alternatively, forces poor defendants to settle claims due to the fear of having to pay high costs should they lose. Another issue requiring consideration is whether the increasing costs are reducing the attractiveness of arbitration as a method of dispute resolution.

This paper explores these questions and seeks to identify the ways in which the inherent characteristic of arbitration with respect to costs can be maintained so that arbitration retains its position as a preferred method of dispute resolution.

2.0 Costs in Arbitration

Costs must be incurred for the arbitral process to proceed well. These costs include: arbitrator's fees; costs of securing the arbitration venue; costs of providing transcripts; legal fees of advocates; expert fees; disbursements; and other allowances.⁵ Among these costs, some are attributable to the arbitrator or arbitral institution while others are attributable to the parties.⁶ Those attributable to the arbitrator or arbitral institution include: arbitrator fees; arbitrator's expenses which include travelling and accommodation, mail and telecommunication services and

⁴ Muigua K and Kariuki F, 'Alternative dispute resolution, access to justice and development in Kenya' *Strathmore Law Journal* (2015), 7.

⁵ Muigua K, *Settling disputes through arbitration in Kenya*, Glenwood Publishers, Nairobi, 2012, 161.

⁶ Sessler A, 'Costs in arbitration' 5th PreMoot Conference: The Discovery of Arbitration, CISG and Wine, Hanover, February 2016, 5.

photocopies; fees and expenses of the arbitral institution; ancillary common expenses, for example, hearing room charges, cost of reporters and interpreters, fees and expenses of the secretary to the arbitral tribunal, and fees and expenses of the expert appointed by the arbitrator or arbitral tribunal.⁷ On their side, each individual party incurs costs including lawyer's fees and expenses, fees and expenses of experts appointed by the party, travel and accommodation expenses of witnesses of fact, and translation costs.⁸

The topic of costs has recently captured academic attention and has gone on to 'become something of a hot topic in international arbitration, with a number of recent articles expressing concern over what is seen as the escalating cost and uncertainty over the application of existing rules.'⁹ There are various methods of assessing costs and these methods vary according to jurisdiction. The methods also depend on arbitral institutions, for example, the International Chamber of Commerce has guidance techniques on controlling of costs.¹⁰

The various methods currently used derive from two basic models: the American Rule and the English Rule. The pure American Rule, on the one hand, requires that parties bear their own costs without regard to the

⁷ Ibid.

⁸ Ibid.

⁹ O'Reilly M, 'Provisions on costs and appeals: An assessment from an international perspective' The British Institute of International and Comparative Law Conference, London, February 2010, 1.

¹⁰ See, International Chamber of Commerce Commission on Arbitration, *Techniques for Controlling Time and Costs in Arbitration*, 2007.

outcome, and share those of the tribunal due to 'the philosophy that access to justice is paramount and barriers to seeking justice should be eliminated.'¹¹ According to the pure English Rule, on the other hand, the 'loser' pays the reasonable costs of the 'winner' and those of the tribunal, 'based on the philosophy of indemnity - if I was right to take this action, then I should not be out of pocket for doing so.'¹² However, there are variations of these rules, for example, in the American Rule, a party may have to bear the costs of the other if it acted in bad faith, while in the English Rule, and awards of fractional costs are done in cases of partial success.¹³

The interaction between these two models is reflected in arbitral rules, for example, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, which provides that the costs of arbitration are in principle borne by the unsuccessful party but gives discretion to the tribunal to apportion costs reasonably taking into account the circumstances of the case. The discretion to apportion costs was incorporated due to the concern that 'a poorer party might hesitate to seek justice if it feared that it might have to bear the costs of a richer party.'¹⁴

¹¹ O'Reilly (n 9) 2.

¹² Ibid.

¹³ Ibid.

¹⁴ UNCITRAL A/CN.9/9C.2/8R. 13.

3.0 Current Trend of Costs and Impact on the Attractiveness of Arbitration

Affordable costs used to be one of the 'key selling points for arbitration'.¹⁵ Disputants opted for arbitration, among other reasons, on the presumption that it was less expensive than court proceedings. It is in this respect that litigation was comparatively described, for example, as 'a gamble or luxury that only the affluent can afford',¹⁶ and as 'an extremely rare commodity for the majority of the people'.¹⁷ However, this position has long changed due to the prevailing trend of costs in arbitration:

In the past it was assumed that one of the advantages of arbitration, including international arbitration, over litigation is that arbitral proceedings are more efficient and hence cheaper. Nowadays, however, it is rather a common consensus that arbitration is generally no longer faster or cheaper than typical court proceedings.¹⁸

¹⁵ Mururu (n 2) 7.

¹⁶ Singh TN, 'Constitutional values and judicial process' as quoted in Laibuta K, 'Proportionality of costs in pursuit of effective remedies: A conceptual imperative' *Alternative Dispute Resolution* (2013), 83.

¹⁷ See, Wanjala S (ed), *Law and access to justice in East Africa*, Claripress, Nairobi, 2004.

¹⁸ Nowaczyk P and Czech K, 'Rethinking costs and costs awards in international arbitration: A call for less criticism of arbitration costs, but improvement of costs allocation practices' 33 *ASA Bulletin*, 3 (2015), 494.

Excessive costs are currently considered one of the 'emerging threats to international commercial arbitration'¹⁹ having 'the potential to reduce the popularity, effectiveness and perceived legitimacy of this dispute resolution mechanism.'²⁰

The increasingly high costs of arbitration are now evidently taking a toll on the attractiveness of arbitration. The Lagos Multidoor Courthouse (LMDC) was established in Nigeria, through the public justice system, to offer alternative dispute resolution mechanisms to the members of the public. Arbitration is one of the mechanisms offered in LMDC.²¹ An empirical research by Dr Emilia Onyema into the effectiveness of the initiative in Lagos State in June 2012, indicated that the uptake of arbitration was low with the likely reason being higher costs:

Under the Schedule of Fees operated by the LMDC, resort to arbitration is more expensive. Walk-in parties opting for mediation pay Naira 10,000 (with those from court referrals paying Naira 2,500) as filing fee with a sliding scale of additional fees from Naira 20,000 while the indigent disputants may pay nothing to access the scheme. The lower filing fee payable by parties under the court referral scheme is because such disputes have already been filed at the Court Registry where filing fees would have been paid so that effectively referral to the LMDC involves paying additional 'filing' fees. For arbitration, there is no

¹⁹ Bagshaw D, 'Emerging threats to international commercial arbitration' 2 *Alternative Dispute Resolution*, 1 (2014), 21.

²⁰ *Ibid.*

²¹ Emilia Onyema, 'The Multi-door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC' (2013), 1.

fee waiver and the scale starts from Naira 100,000. Clearly, cost implications mean that for low value disputes or disputes involving one indigent party, mediation will be a more attractive option than arbitration. So cost of access may be one reason why arbitration take-up is very low under the LMDC scheme.²²

A survey conducted by PricewaterhouseCoopers and the Queen Mary University of London School of International Arbitration in 2013 on the industry perspectives in corporate choices in international arbitration noted that even though corporations continue to affirm the benefits of arbitration in the resolution of transnational disputes, 'Concerns over costs and delays in proceedings persist and in-house counsel are increasingly focused on getting value from the arbitration process.'²³ The findings on the choice of dispute resolution mechanisms revealed that businesses still prefer arbitration over litigation in the case of transnational disputes 'although concerns remain about the costs of arbitration.'²⁴

The choice and role of outside counsel is affected. According to the findings, corporations are increasingly involving in-house counsel in case management partly due to 'a desire to control costs better.'²⁵

²² Ibid 19.

²³ Queen Mary University of London School of International Arbitration and PricewaterhouseCoopers (PwC) (UK), 'Corporate choices in international arbitration: Industry perspectives' 2013 International Arbitration Survey, 1 <<http://www.arbitration.qmul.ac.uk/docs/123282.pdf>> accessed 16 May 2017.

²⁴ Ibid 4.

²⁵ Ibid.

Corporations are also employing lawyers with expertise and experience in dispute resolution in order to enhance their in-house capabilities.²⁶ The findings further reveal that even though costs are a repeated concern, the possibility of incurring high legal fees is not an important consideration in the decision whether to start arbitration.²⁷ However, this does not mean that costs have no place in the decision whether to arbitrate or not. The survey revealed that for some of the respondents, costs was an important factor leading them to opt out of arbitration: 'For respondents who considered arbitration not to be well suited to their industry, costs and delay were cited as the main reason more than any other factors.'²⁸ The survey concluded that the concerns in arbitration including those on costs are 'potentially damaging to the attractiveness of arbitration.'²⁹

The International Bar Association conducted a survey in 2015 on the current state and future of international arbitration. In the African region, 9 participants in 8 different countries answered the questionnaires. The countries were Nigeria, Ghana, Senegal, Rwanda, Kenya, Tanzania, Uganda and South Africa. On the question of what the users perceived to be the pitfall of arbitration, the findings of the survey revealed that costs were a major obstacle. This has a negative impact on arbitration in that parties prefer the commercial courts:

Generally, it was perceived that a significant obstacle to the growth of arbitration in Africa is the cost. This had the result that

²⁶ Ibid.

²⁷ Ibid 5.

²⁸ Ibid.

²⁹ Ibid.

many lower-value disputes which would be suited to arbitration were not being referred to arbitration. In countries where domestic commercial courts provide effective dispute resolution, such as Rwanda and South Africa, practitioners reported that domestic commercial courts were preferred over arbitration due to the costs involved.³⁰

In fact, the participants from West and Eastern Africa favoured online dispute resolution over the traditional arbitration due to time and cost savings.³¹

In the Asian-Pacific region, 55 participants in 14 countries participated in the survey. The countries were Australia, China, Hong Kong, Indonesia, India, Japan, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, South Korea, Thailand and Vietnam. In the case of Japanese companies and individuals, the question of costs played against arbitration – parties opted for litigation in domestic matters and only resorted to arbitration in transnational disputes.³² The observation was similar in the case of South Korea, where:

‘...companies and individuals also saw the high costs of arbitration as a potential pitfall for arbitration, and noted that domestic litigation is much cheaper and sometimes even faster.’³³

³⁰ International Bar Association, *The current state and future of international arbitration: Regional perspectives*, 2015, 40.

³¹ *Ibid* 44.

³² *Ibid* 47.

³³ *Ibid*.

In light of the general findings of the survey, the report warned that 'As the problem of increased costs and delay in arbitration appears to be a perennial complaint, steps need to be taken to address it; otherwise, arbitration may lose its attractiveness to users.'³⁴ The rising costs was seen as a 'threat' to arbitration, with some predicting 'a return to courts or ADR methods such as mediation.'³⁵ The role of the increasing costs in the decision by disputants to pick a dispute resolution mechanism, was seen as that of a 'disincentive' to arbitration.³⁶

Other forms of alternative dispute resolution mechanisms are also taking over the province of arbitration partly due to the increasing arbitral costs. Adjudication, for example, is more prevalent in construction disputes partly due to costs:

In the past, arbitration was the preferred method of dispute resolution in construction industry because it was cost-effective, expeditious and flexible compared to litigation. However, there has been a shift from arbitration because of the involvement of lawyers in the arbitration process. It has made arbitration lengthy and costly thus being no longer efficient and cost-effective. This has necessitated the shift to adjudication as the preferred method of dispute resolution in most standard forms of contract.³⁷

³⁴ Ibid 48.

³⁵ Ibid 66.

³⁶ Ibid 91.

³⁷ Karekezi P and Kariuki F, 'A case for statutory adjudication in Kenya' 5 *Alternative Dispute Resolution*, 1 (2017), 18.

The prevailing trend of increasingly high costs in arbitration is reducing the attractiveness of arbitration as a method of dispute resolution. It is, therefore, evident that 'arbitration long ago lost the claim to be "cheaper" than litigation.'³⁸ Today, its reputation is negatively affected by the excessive costs so that it is even now referred to as the '*Rolls Royce justice*'.³⁹

3.1 Current Costs Implications in Access to Justice in Arbitration

Access to justice can be viewed as 'a path travelled by a party who is experiencing a problem in its relation with another party.'⁴⁰ There are various paths available to a party, and each of these paths comes with costs.⁴¹ Therefore, since 'access to justice costs money',⁴² the fact that arbitral costs are increasingly high implies that some disputants are not able to access the appropriate forum to resolve their disputes.

Over the years, one of the most notable concerns in the justice systems globally⁴³ has been that the formal justice systems developed by the state have been ineffective and have in many instances led to delay and even

³⁸ Bagshaw (n 19) 23.

³⁹ Weintraub R, *International litigation and arbitration: Practice and planning*, Carolina Academic Press, Durham, 1994, 455.

⁴⁰ Assareh A, 'Forum shopping and the cost of access to justice: Cost and certainty in international commercial litigation and arbitration' 31 *Journal of Law & Commerce*, 1 (2012-2013), 8.

⁴¹ Ibid.

⁴² Ibid 4.

⁴³ Laibuta (n 16) 95.

denial of justice, due reasons including high costs.⁴⁴ This led to calls for the incorporation of alternative dispute resolution mechanisms in dispute resolution policies, laws and practices in order to enhance access to justice. The inclusion of alternative dispute resolution mechanisms, including arbitration enhances access to justice 'by creating more avenues for ventilating disputes and in effect contributes to societal development.⁴⁵ It is in this regard that access to justice is considered as including 'the use of informal dispute resolution mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable.'⁴⁶

The most pressing concern is that within the high costs of arbitration, the largest part comes from the cost of legal representation and the giving of evidence. For example, a 2015 report by a commission of the International Chamber of Commerce (ICC) formed to examine the decisions on costs in international arbitration found that an average of 83 percent of the total costs were incurred with respect to the representation fees, testimony by witnesses and expert evidence and other costs by the parties.⁴⁷ The arbitrator's fees amounted to an average of 15 percent of the total costs, while the administrative expenses of ICC amounted to an average of 2 percent.⁴⁸

⁴⁴ Ng'etich R, 'The rejected stone may be the cornerstone: A case for the retention of traditional justice systems as the best fora for community land disputes in Kenya' 1 *Strathmore Law Review*, 2 (2016), 142.

⁴⁵ Muigua and Kariuki (n 4) 6.

⁴⁶ *Ibid* 7.

⁴⁷ International Chamber of Commerce, *Decisions on costs in international arbitration: Commission report*, 2015, 3.

⁴⁸ *Ibid*.

This raises a question on the affordability of legal representation in arbitration and the implications on access to justice. The private nature of arbitration implies that the parties have to bear costs including: fees and expenses of the arbitrator; administrative charges of arbitral institutions, for example, for appointing arbitrators and monitoring arbitral proceedings; fees for hiring the facilities for the hearing; fees for transcription services; and interpreter's fees. In the end, the fees are 'substantial, not only in absolute terms but also compared to the amount in dispute.'⁴⁹ A party, therefore, will reasonably abandon arbitration for other means of dispute resolution. However, the question remains – what is a party to do if arbitration was the most appropriate mechanism which could ensure they could access justice? Does it mean they have been denied justice by virtue of the excessive arbitral costs?

The question of access to justice is even more critical in the case of international disputes:

Although resolving a domestic commercial dispute is costly, expenses involved with the resolution of international commercial disputes are even higher. Aside from substantive issues that are unique to international commercial disputes – such as procedural complexities and difficulty of enforcing judgments – parties to such disputes often need to hire counsel in more than one country, spend additional travel time, pay for translator and interpreter services, and incur additional general expenses. These expenses

⁴⁹ Buhler M, 'Awarding costs in international commercial arbitration: An overview' 22 *ASA Bulletin*, 2 (2004), 249.

tend to add up quickly. Indeed, in some cases they become so substantial that they overshadow the substance of the dispute.⁵⁰

Disputants who are financially weaker in comparison to their opponents feel the pinch even more since they must incur money to institute the proceedings and there could be a possibility that they may not emerge successful, and, therefore, have to bear the costs of the financially stronger party:

For a smaller party, the cost of conducting an international arbitration may seem daunting, as might the prospect of facing a large adverse costs award should it be unsuccessful in its claims. Traditionally, international commercial arbitration has attracted larger disputes between multinational companies, where concerns over costs might be less prevalent. However, with the ever expanding international marketplace and the continued trend towards using arbitration in international disputes, smaller entities are becoming more interested in using this process to resolve disputes. Therefore, ensuring that the cost of arbitration does not act as a deterrent for smaller parties is important.⁵¹

For smaller parties, the prospect of high arbitral costs could in some instances mean abandoning a claim against a party who is financially stronger, or having to settle a claim in the early stages even if the same is exaggerated:

⁵⁰ Assareh (n 40) 5.

⁵¹ Williams DAR and Walton J, 'Costs and access to international arbitration' 80 *Arbitration*, 4 (2014), 432.

The possibility of having to pay the costs of a larger respondent who has engaged a premium law firm might be enough to deter a smaller claimant from bringing a claim in the first place, even if their claims have merit.⁵²

Parties in such a situation may opt for truncated proceedings for the purpose of controlling costs⁵³ but the negative impact of truncated proceedings on access to justice remain. These issues must, therefore, be addressed in order to ensure that 'the wealthy do not have a monopoly on international private dispute resolution.'⁵⁴

The increasing costs and its effects on the attractiveness of arbitration and access to justice have long been noted, with arbitrators who required transcripts of testimony, post hearing briefs and other formalities being warned that they were contributing to 'a slow drift toward complexity, delay, expense, and injustice.'⁵⁵

These issues have been noted by some courts. A good example is the United States Supreme Court in *Green Tree Financial Corporation v Randolph*.⁵⁶ In this case, Randolph had instituted court proceedings despite the existence of a binding arbitration clause for disputes arising

⁵² Ibid 433.

⁵³ Ibid 432.

⁵⁴ Ibid 433.

⁵⁵ Lythgoe RF, 'On improving arbitration: The transcript trauma' *Monthly Labor Review* (1974), 47-50.

⁵⁶ 531 US 79 (2000).

between her and Green Tree Financial Corporation with respect to a financial transaction. Green Tea applied to the District Court of Alabama to compel arbitration, and the District Court agreed. Randolph appealed to the Court of Appeals for the Eleventh Circuit. The Circuit Court held that the agreement was unenforceable since it was silent on costs and would expose Randolph to 'steep' arbitral costs and in effect limit her ability to vindicate her statutory rights. On appeal to the United States Supreme Court, it was held that the agreement could not be held unenforceable since Randolph had merely claimed that arbitration would be expensive but did not tender evidence of such.⁵⁷ From this case it is clear that where it can be shown, by way of evidence, that the arbitral costs would prohibit one from vindicating their rights, a court would not hesitate to declare an arbitration agreement unenforceable. The only issue in this case was that Randolph did not meet the burden.

4.0 Conclusion and the Way Forward

The question of increasing costs, as already pointed out above, is one that cannot be ignored. Arbitration at local and international level must listen to the stakeholders if it is to continue growing and retain its place as a preferred dispute resolution mechanism. The following are some of the ways in which arbitral costs can be controlled.

The standards used in charging and awarding costs have to be harmonized and kept in check if arbitration is to retain its attractiveness and create a forum for parties to access justice. Today, there are varied practices with respect to costs and 'if left without an in-depth reflection, in the long run, the current not uniform standards may impede trust in international arbitration as well as obscure many of its undisputed

⁵⁷ *Green Tree Financial Corporation v Randolph* 531 US 79 (2000).

advantages.⁵⁸ Arbitral institutions and associations, therefore, have to take up this mandate and regulate what their members charge.

This is also a call to the parties who opt for arbitration to carefully consider the arbitration clauses or agreements they incorporate into their contracts. Arbitration clauses should no longer be the 'midnight clauses'. Parties should note that the arbitration clause gives them an opportunity to decide how the arbitral process will be conducted. It is better to agree on the conduct of the process when making the agreement since once the dispute arises, it will be hard for the parties to sit together let alone agree on how to run the process. They should avoid standard form clauses since such clauses come with serious cost implications.

The costs of representation need to be kept in check. This is especially in cases where lawyers are involved in the process, which is a majority of the cases. It is sad that in some instances the costs of representation are in the range of 81 to 94 percent of the total costs involved.⁵⁹

Parties to arbitral processes and arbitral institutions can also save on costs by examining the prospects of documents-only arbitrations. This shortens the process and has huge savings on costs since the parties do not incur the excessive costs of representations. Additionally, the fees to be paid to the arbitrator will reduce due to the elimination of the hearing time, and the costs of hiring the hearing venue. The arbitrator will go through the documents and seek clarifications from parties, if need be, through correspondence.

⁵⁸ Nowaczyk and Czech (n 18) 494.

⁵⁹ See, Mistelis L and Lew DM (eds), *Time and money: Pervasive problems in international arbitration*, Kluwer Law International, Alphen aan den Rijn, 2006.

The prospects of technological developments also need to be incorporated in order to dispense with some parts of the arbitral process. For example, in the case of an international arbitration, parties can strive to ensure that tele-conferencing is used in the case of witnesses of fact and expert witnesses from abroad. This will save the parties the costs of flight, hotel accommodations, and accompanying expenses.

Countries also need to enhance their local capacities with respect to expertise and institutional facilities for arbitrations. This will reduce the cost of having to use facilities of foreign arbitral institutions and expertise. African countries have experienced this problem for long. They have been 'exporting' their disputes to Europe to the extent that it is noted that the future of African arbitration is in Europe.⁶⁰ In the case of investment disputes involving African states, for example, it is observed that in over 99 percent of the African disputes, the representation is from the United Kingdom, the United States of America and France.⁶¹

⁶⁰ Wiles J, 'The Challenges of Arbitrating in Africa' London Seminar, 19 September 2012.

⁶¹ Edward Torgbor, 'Opening up international arbitration in Africa' Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa, Addis Abba, July 2015, 130.

Professional Mediation in Family Disputes: The Experience of FIDA Kenya

*By: Jemimah Keli **

Abstract

The article examines mediation as an alternative dispute resolution method in the context of family disputes. The article explores in depth the unique characteristics of mediation which make it the most suitable for resolution of family disputes. Mediation of family disputes is a worldwide practice with the American Bar Association taking lead in professional mediation practice in family and divorce disputes. The American Bar Association has established Mediators Practice Standards which can be a model for countries that are starting to appreciate mediation as a suitable dispute resolution method. Kenya is one such country having formally adopted mediation as a form of dispute resolution to be promoted by courts and tribunals under the 2010 Constitution. Prior to the 2010 Constitution, mediation was applied ad hoc by institutions like the FIDA Kenya members and by some lawyers, some of them trained by the Chartered Institute of Arbitrators. Unlike arbitration, which is anchored in the Arbitration Act of 1995, there is no statute governing mediation but for the Civil Procedure Act, which was amended to accommodate the court annexed mediation introduced in 2015.

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Some professional institutions like the Nairobi Center for International Arbitration and the Chartered Institute of Arbitrators have developed mediation rules to guide the practice. It is against this background that the paper is written to explore professional practice of mediation in family dispute and examine the experience of FIDA Kenya, which has applied mediation to resolve family disputes for over 10 years. The article seeks to promote the use of professional mediators in the resolution of family disputes in Kenya.

Key words:

Alternative dispute resolution, mediation, Mediator, parties, ethics, standards

1.0 Introduction

There are various ways of resolving disputes between parties including trial by courts, arbitration, mediation, traditional justice mechanisms, negotiation, adjudication and conciliation. The Constitution of Kenya, Article 159(3) recognizes the application of alternative dispute resolution methods such as reconciliation, mediation, arbitration and traditional justice mechanisms. Alternative dispute resolution mechanisms refer to any method of settling disputes outside courts.¹ This article discusses the use of mediation as an alternative method of dispute resolution in family disputes.

A commentator Joseph Grynbaum said, “*An ounce of mediation is worth a pound of arbitration and a ton of litigation*”.² The commentator emphasized

¹ See online dictionary definition of alternative dispute resolution, thefreedictionary.com.

² Dispute resolution quotes available at www.adrtoolbox.com.

the supremacy in effectiveness of mediation as a method of dispute resolution.

Mediation is basically assisted negotiation by a neutral third party. Mediation has been described as a structured settlement process facilitated by a neutral third party who engages in "shuttle diplomacy."³ Christopher Moore defines mediation as the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute."⁴ The article adopts this broad definition of mediation by Moore.

2.0 Characteristics of Mediation

Mediation is a unique process with special characteristics which give it an edge over other forms of dispute resolution methods in family disputes. Several authors⁵ have defined these characteristics which make mediation advantageous over other forms of dispute resolution. The special characteristics revolve around six C's being choices, calendar time, cost, confidentiality, control and closure.⁶

³ Brannen, D. (2012). "Why mediation is a preferred method of resolving disputes" Available at <https://www.fisherphillips.com>.

⁴ Moore, C. (1996). *The Mediation Process: Practical Strategies for Resolving Conflict*. P. 15, 2nd Edition, San Francisco: Jossey-Bass Publishers.

⁵ See Moore in *Ibid* 4; Kleiner, R. (2013). "10 reasons why mediation works", *Collaborative family law and mediation*, available at www.kleinerlaw.com; and Larsen, R.(2003). "Tipping points- Reasons why mediation works in complex family disputes. Available at <http://www.mediate.com>.

⁶ *Ibid* 4.

Choices - In mediation the parties involved have choices that don't exist in traditional adversarial litigation such as the place, date, time and ground rules, as well as the selection of the mediator. The parties also may leave the mediation at any time if they are not satisfied with the process and even resume the process at a later date. Finally, participants can also fashion remedies or compromises that may not be available in litigation.⁷ The ground rules make mediation respectful. Communication in litigation often becomes heated. Parties have to listen to opposing attorneys make negative statements about them. Discussion in mediation is monitored by the mediator and the parties agree to respectful dialogue.⁸

Calendar time- Court cases in majority of jurisdictions can take years to be processed through the judicial system – especially in these tough economic times, with budgetary limitations on courts and an overwhelming caseload. When parties agree to mediate, they can get their "day in court" much sooner.⁹ This is also the position in Kenya. The last Judiciary report of the financial year 2014- 2015 indicated that the High Court had 155,203 pending cases with 18,917 of the backlog being attributed to the Family division.¹⁰

Cost - Mediation can potentially cost far less than litigation. This is especially so if the parties get together early as they can engage in effective risk assessment of their respective cases. Full discovery is not necessary for the

⁷ Ibid 4.

⁸ Kleiner, R. (2013). "10 reasons why mediation works", *Collaborative family law and mediation*. Available at www.kleinerlaw.com.

⁹ Ibid 4.

¹⁰ Republic of Kenya, The Judiciary. (2014-2015). *The State of the Judiciary and the Administration of Justice, Annual Report*. Available at www.judiciary.go.ke.

parties to get a good feel of the likely outcome of a claim.¹¹ Mediation is currently being offered for free under the Court Annexed Mediation programme for family and commercial disputes at the Milimani law courts.

Confidentiality – The confidentiality clause is the backbone of mediation. Confidentiality must be observed strictly by the mediators. The exception to the confidentiality clause is where the law requires disclosure by the mediator of information from mediation or where the information relates to child abuse, child neglect, defilement, domestic violence or other related criminal purposes.¹²

“Absent a special sealing process, court records are open to the public. Thus, allegations of a complaint can be seen by competitors, creditors, customers, employees, even journalists and other parties not involved in the litigation. For example, sexual harassment allegations or offensive remarks by an executive may become news themselves. As every lawyer knows, there are (at least) two sides to every story and what may be written in a complaint does not always turn out to be true. But the damage from allegations that become public may be irreparable. Mediation may be successful in keeping such allegations private, which alone may make it an attractive alternative.”¹³

To enhance the confidentiality nature of mediation, the session is restricted to the parties and the mediator.¹⁴

¹¹ Ibid 4.

¹² See Rule 12(2) of the Mediation (pilot project) Rules 2015.

¹³ Ibid 4

¹⁴ Rule 12(4) of the Kenya Court Annexed Mediation Rules prohibits use of electronic devices of any nature to record mediation session.

Control-The number of choices in mediation results in the parties having more control over the process and outcome. Most important of all, the parties can decide if they want to settle or not. Significantly, a mediator is not empowered to unilaterally impose a remedy upon a party as a judge or an arbitrator may do under litigation and arbitration. This is a game changer in mediation. The parties must come up with their solutions. The role of the mediator is limited to facilitation of the negotiations.

Mediation allows each party to speak for themselves. No one knows your situation better than you. Having the opportunity to express your concerns is priceless.¹⁵

Closure - When the parties to a dispute agree at mediation to resolve their differences, they get closure.¹⁶ Mediation addresses underlying issues which the court does not. The underlying issues are critical in getting a lasting solution to the dispute and restoring relationships in some cases. In some cases the dispute is usually a camouflage of a relationship issue which if not addressed, the dispute is likely to recur. In family disputes, this a major advantage of mediation over all other methods. The parties are closely involved and despite everything, have a common goal - family harmony. They are generally going to have long-term relationships with the other parties.¹⁷

¹⁵ Ibid 9

¹⁶ Ibid 4

¹⁷ Larsen, R. (2003). "Tipping points- Reasons why mediation works in complex family disputes". Available at <http://www.mediate.com>.

Closure is also important in termination of marriages to protect the welfare of the children from the dissolved union.

3.0 Legal Framework on Mediations in Kenya

There is no specific legislation governing the mediation practice in Kenya. The application of mediation is however provided for under the Constitution and under various statutes.

The Constitution of Kenya provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle, *inter alia*, that alternative forms of disputes including reconciliation, **mediation**, arbitration and traditional dispute resolution mechanisms¹⁸ shall be promoted¹⁹.

There are various statutes providing for mediation as a method of dispute resolution under various disputes among them civil, land, trade disputes and family disputes.

3.1 The Civil Procedure Act

The Act²⁰ provides for procedures in civil suits which include commercial and tort law practice. Section 59A establishes the Mediation and Accreditation Committee whose main role is to facilitate the implementation of court annexed mediation in family and commercial disputes. The court, under Section 59B may on the request of the parties, or where it deems it appropriate to do so, or where the law so requires,

¹⁸ Subject to Article 159(3).

¹⁹ Article 159(2)(c).

²⁰ Chapter 21 Laws of Kenya.

direct that any dispute presented before it be referred to mediation. The Act provides that any settlement arising from a suit referred to any other alternative dispute resolution method by the court or agreement of the parties shall be enforceable as a judgment of the court. Most significant is that no appeal shall lie in respect to such judgment entered under decisions from mediation or any other alternative dispute resolution method.²¹

The Court has power to enforce private mediation agreements entered into with the assistance of qualified mediators. All what the parties need to do is to register the written and signed decision with the court.

This being the procedural law for civil disputes, it should be invoked to enforce any written decision arrived at under any of the alternative dispute resolution methods.

3.2 Land disputes

The Community Land Act under Section 40 provides for mediation as a method of dispute resolution as follows:-

- a. Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to mediation;*
- b. The mediation shall take place in private or in an informal setting where the parties participate in the negotiation and design the format of the settlement agreement;*
- c. The mediator shall have the power to bring together persons to a dispute and settle the dispute by structuring and managing the negotiation process and helping to clarify the facts and issues to help the parties resolve their dispute; and*

²¹ Section 59 (c) (3 and 4).

- d. *If an agreement is reached during the mediation process, the agreement shall be reduced into writing and signed by the parties at the conclusion of the mediation.*

The law gives a comprehensive framework for the mediation of disputes in community land. This is a commendable law as harmony and preserving of relationships is key for community members and mediation is a suitable method in the circumstances.

3.3 Family disputes under the Marriage Act

Section 64 provides for mediation of disputes in Christian marriages. The parties to a Christian marriage may seek the services of any reconciliation bodies established for that purpose that may exist in the public place of worship where the marriage was celebrated.

Section 66 provides that in dissolution of civil marriages, the court may refer a matrimonial dispute that arises to a conciliatory process agreed between the parties. The process is most likely to refer to mediation.

Section 68 provides for mediation of disputes in customary marriages. The parties to marriages celebrated under customary law may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of the marriage. The process of mediation or traditional dispute resolution is required to conform to the principles of the Constitution.

There is need for the Law of Succession Act to be amended to recognize mediation as the first option in resolving family disputes. This is because the courts are unable to address underlying issues leading to delay in resolution of the cases.

3.4 Trade disputes

The Labour Relations Act No. 14 of 2007 envisages the creation of the Conciliation and Mediation Commission to resolve trade disputes between employees and employers or employer and trade unions. The commission has not been put in place though an essential medium for prevention of prolonged strikes especially in essential services.

In conclusion, it is now settled that mediation is a suitable dispute resolution method for family disputes in Kenya and other types of disputes. The Constitution and some specific legislations have provided for the application of mediation in resolving disputes. There is need to amend all laws on family disputes to have mediation provided as the method for dispute resolution.

4.0 Best Practice and Standards in Mediation

There is need to establish standards and ethics for mediation practice in family disputes and divorce so as to ensure credibility of the processes. The most comprehensive standards from research were found under the American Bar Association (ABA) approved by the ABA House of Delegates in February 2001. The standards are drawn from prior codes of conduct for mediators and take into account issues and problems that have been identified in divorce and family mediation practice in America over the decades. The prevailing 2001 American Bar Association Model of standards of practice for family and divorce mediation are an improvement from the first American Bar Association mediation standards of 1984. The history of the 1984 model of standards for lawyer mediators in family disputes is that they were primarily developed for lawyers who wished to be mediators, a role at that time, thought

inconsistent with governing standards of professional responsibilities for lawyers.²²

The practice of professional mediation in Kenya gained momentum in 2010 following the promulgation of the Constitution which recognized alternative dispute resolution as a principle of judicial authority.²³ Time is now ripe for development of best practices in the practice of mediation by the various relevant professional bodies like the Chartered Institute of Arbitrators and the Law Society of Kenya.

The salient features of the 2001 American Bar Association Model of standards of practice for family and divorce mediation are as follows:-

Mediation is based on the principle of self-determination by the participants. This essentially relates to party autonomy in mediations; A family mediator shall be qualified by education and training to undertake the mediation; A family mediator shall facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate; A family mediator shall conduct the mediation process in an impartial manner; A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator. The participants shall be free to retain the mediator by an informed, written waiver of the conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the participants; A family mediator shall fully disclose and explain the basis of any compensation, fees and charges to

²² Schepard, A. (2000). "The Reporter's forward", Annexure to the 2001 American Bar Association model standards of practice for family and divorce mediations. Available at <https://www.americanbar.org>.

²³ See Article 159(2)(c).

the participants; A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge; A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants; A family mediator shall assist participants in determining how to promote the best interests of children; A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly; A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly; A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reason; A family mediator shall be truthful in the advertisement and solicitation for mediation and lastly a family mediator shall acquire and maintain professional competence in mediation.²⁴

The 2001 ABA model standards are simple and few but effective in guiding the practice.

According to Moore,²⁵ having reviewed a number of ethical standards developed by mediation professional associations, the codes of standards in various jurisdiction share common traits by requiring the mediator to be neutral and impartial, to avoid conflict of interest, to obtain informed consent for their engagement from the parties, to maintain

²⁴ Standards I-XIII.

²⁵ Ibid 1.

confidentiality, to reject cases which are beyond their expertise and to be truthful in advertising their services and fees.²⁶

In developing family disputes mediation standards in Kenya it will be important to factor in the family disputes mediation standards from other jurisdictions like the 2001 American Bar Association Model of standards of practice for family and divorce mediation, the provisions of the Constitution, the relevant marriage laws, children law and the law on succession.

5.0 FIDA Kenya Experience in Family Disputes

The Federation of Women Lawyers in Kenya (FIDA Kenya) applies mediation in its access to justice program to solve family disputes. According to the FIDA Kenya officer in charge of the mediation clinic²⁷, mediation is applied in majority of family disputes that have no criminal element. These include marriage disputes, child custody and maintenance, matrimonial property disputes, land and inheritance disputes. FIDA Kenya avoids mediation for divorces and in cases that are characterized by violence or threats of harm. FIDA Kenya only engages certified mediators from the various mediation training institutes.

5.1 Mediation process at FIDA Kenya

The mediation process at the institution is standardized and entails basically seven stages.

²⁶ Glaser, T. (2005). Conflict Research Consortium Book Summary in Moore. C. (1996). *The Mediation Process: Practical Strategies for Resolving Conflicts*, 2nd ed., San Francisco: Jossey-Bass Publishers.

²⁷ The author interviewed Irene Ochola a staff at FIDA Kenya and 3 mediators offering mediation services at the organization

Stage one is the introduction of the mediator to the parties. The parties then introduce themselves. The mediator then seeks consent of the parties in writing to facilitate the mediation and also sets ground rules. The rules include confidentiality of the process and the behaviour of the parties during the sessions. Setting of ground rules is an important stage as the parties in family disputes are often at loggerheads and are inclined to disrespect each other. The ground rules also help facilitate a level playing ground which is important to address power imbalance common in family relations.

Stage 2 is referred to as the narration stage. The mediator gives opportunity to the parties to present their case in the dispute. This is akin to making opening statements. In all cases the claimant begins by stating why they sought mediation and their facts. The other party is given opportunity to respond and state their facts. Parties are not allowed to disrupt each other in making their opening statements.

Stage 3 involves determination of interests- the mediator having heard the parties and sought clarifications on the facts as stated, will confirm the interests of the parties by summarizing his or her understanding of the dispute.

Stage 4 the mediator will assist the parties to develop a list of issues to be resolved.

Stage 5 is the brainstorming stage. The mediator will facilitate the parties to generate options on the issues. This may include separate caucus with the individual parties in different rooms.

Stage 6 involves the selection of durable options. The mediator, being the neutral facilitator, will help the parties to pick realistic options towards

amicable resolution of the dispute. The mediator may, for example, guide parties on principles of the law like the best interest of the child. In child custody dispute the mediator may indicate to the parties that it is in best interest of a child aged below 14 years to be under custody of the mother. The mediator remains neutral throughout the session.

Stage 7 is closure. The mediation will result in an agreement on all issues or partially or fail. The mediator draws up the agreement if the parties reach a settlement which they sign at the sitting. The agreement once signed is binding and can be enforced by registration in the court.

5.2 Documentation:

FIDA Kenya has developed several documents to document the mediation process. There is the mediation agreement form and the evaluation form. The agreement form entails a confidentiality clause and consent by the parties to the mediator facilitating the process. The parties evaluate the mediation process after closure of the process by completing an evaluation form.

5.3 Mediation success story

The disputes subjected to mediation at FIDA Kenya are family disputes like child custody and maintenance, matrimonial conflicts in which the couples are staying together but no violence is involved, and land disputes especially in land inheritance matters and estate administration. Some disputes are deemed in-appropriate for mediation like divorce, separation, spouse violence and child abuse. These are referred to the police and courts.

The author is a mediator with FIDA Kenya and has mediated over 20 cases at FIDA Kenya in the past two years. The success rates over the mediated cases were over 80%. In an interview with the officer in charge

of the mediation clinic at FIDA Kenya²⁸, it was reported that the mediation clinic has been operational for over 10 years at the FIDA offices based at Nairobi, Mombasa and Kisumu offices. The mediation process at FIDA Kenya was the first professionalized mediation in the country with mainly lawyer mediators conducting the sessions. The mediation at the organization has been successful in resolving family disputes about marriage, child maintenance and land disputes. In 2015, FIDA Kenya sent out 1491 mediation invitations out of which 484 were conducted with 305 successful.²⁹

The statistics prove that that mediation is an excellent ADR opportunity in family disputes. It is trusted in the delicate family disputes and gives hope in restoration and healing of families. Success stories in FIDA include the fast resolution of family disputes, substantially reducing the case load at the Children Courts in the country as many cases are resolved outside court and resolution of land inheritance disputes at the Nyanza region where there is wife inheritance of traditionally marginalizing widows. Most important in the success story of FIDA Kenya in mediation is the access to justice by her clients most of whom are indigent women.

Interviews with three mediators with FIDA Kenya reveals that it is a noble project and indeed over 30 mediators in the country offer their services on pro-bono basis to the organization. Challenges in the process include, failure of the male parties to turn up for mediation sessions and limited funding for mediation hence low capacity. Majority of the family mediators under the Court annexed mediators owe their experience to

²⁸ Ibid.

²⁹ Ibid 10 at p. 98.

FIDA Kenya mediation program and some like Gladys Wamaitha³⁰ continue to offer mediation services to FIDA clients. Gladys Wamaitha facilitated the first family dispute mediation case to be settled successfully under the court annexed mediation.³¹

In order for mediation to thrive in the justice sector, there is need for standards to regulate the practitioners. Currently there are several bodies regulating mediation in the country. These bodies are the Mediation Accreditation Committee under Judiciary, the Chartered Institute of Arbitrators, Strathmore Dispute Resolution Centre and the Nairobi International Arbitration Center. The bodies have mediation practice rules who share similar characteristics essentially confidentiality, voluntary process, party autonomy and education and competence of the mediator.

Mediation is now taking another shape in Kenya under the Judiciary court annexed mediation. A deviation from mediation norms under the court annexed mediation is the compulsory subjecting of parties to mediation under court directions.

6.0 Conclusion

Mediation in family disputes is highly recommended to restore relations and for harmony of the families. The FIDA Kenya experience has contributed to professionalizing the practice and with the court annexed mediation on family disputes, it is time standards for the mediators

³⁰ An Advocate and family disputes mediator at FIDA Kenya and accredited mediator under the Judiciary pilot program.

³¹ See Online Business Daily dated 23rd May 2016 "Judiciary's Mediation initiative takes root as first case is resolved in a month". Available as <http://www.businessdailyafrica.com>.

applicable across all the institutions were put in place. There are various laws as seen from the discussion recommending mediation as a method of dispute resolution and for family disputes specifically the Marriage Act. There is need for the standards to address the conduct of mediations under the Marriage Act as this is a new area. Previously mediations were not invoked in divorce proceedings as this was seen as parties colluding to divorce. There is need to involve all relevant bodies and practitioners like FIDA Kenya in drafting the standards.

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Natural Resource Dispute Resolution: Promoting Peace and Security through Alternative Dispute Resolution

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Abstract

This paper makes a case for natural resource dispute resolution where there is a likelihood of escalation of natural resource conflict. The paper argues that the benefits of dealing with the conflict through alternative dispute resolution mechanisms such as mediation outweigh the costs of non-action. The paper concludes that there is need for increased public participation in natural resource governance to reduce the need for costly disputes that may call for natural resource dispute resolution.

1.0 Introduction

Across the world, some countries are endowed with resources, and have never experienced large-scale natural resource conflict, for example Botswana, Chile and Norway.¹

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¹ Elena Chirkova, 'How Institutions Affect Development in Resource-Based Economies' (Carnegie Moscow Center 2017) White Paper <<http://carnegie.ru/2017/04/19/how-institutions-affect-development-in-resource-based-economies-pub-68715>> accessed 3 May 2017; Michael Lewin, 'Botswana's Success: Good Governance, Good Policies, and Good Luck' in Punam Chuhan-Pole and Manka Angwafo (eds), *Yes Africa Can: Success Stories from a Dynamic Continent* (World Bank 2011) 88 – 89 <http://siteresources.worldbank.org/AFRICAEXT/Resources/258643-1271798012256/YAC_chpt_4.pdf> accessed 3 May 2017.

Others, for example Nigeria, Sudan, Bolivia, Equatorial Guinea, Chile and the Democratic Republic of Congo are riddled with aggravated natural resource conflict resulting in instances of violence, often attributed to the ‘natural resource curse’.² The divergence between these two sets of countries all with the common factor of natural resource endowment needs to be examined so that countries yet to discover natural resources can sidestep the resource curse. Literature suggests that it is not the presence or absence of natural resources in a country that leads to conflict but rather the biological predisposition for humans to disagree, and weak governance structures and institutions for benefit sharing.³ This paper responds to a growing need to increase the body of knowledge and develop expertise on the link between natural resources and conflict as a means to contribute to solutions and promote peace and security.⁴

2.0 Is the Natural Resource Curse Likely to Befall Kenya?

The first oil discovery in Kenya was announced in 2012 in Turkana County by Tullow Oil PLC, an Anglo-Irish London-based oil exploration

² Ragnar Torvik, ‘Why Do Some Resource-Abundant Countries Succeed While Others Do Not?’ (2009) 25 *Oxford Review of Economic Policy* 241, 241; Elena Chirkova (n 2); Jeffrey A. Frankel, ‘The Natural Resource Curse: A Survey of Diagnoses and Some Prescriptions’ (Harvard Kennedy School 2012) 19 <https://wcfia.harvard.edu/files/wcfia/files/jfrankel_natural_resource_curse.pdf> accessed 5 May 2017.

³ Eric Blanco Niyitunga, ‘Are Natural Resources a “Curse” or a “Blessing”?’ *Joburg Post Online* (24 February 2017) <<https://www.joburgpost.co.za/2017/02/24/are-natural-resources-a-curse-or-a-blessing/>> accessed 5 May 2017.

⁴ Michael Keating, ‘A Way Forward for Natural Resource Conflict Resolution’ (*Chatham House*, 6 August 2015) <<https://www.chathamhouse.org//node/18327>> accessed 3 May 2017.

and production company operating in partnership with Africa Oil Corp., a Canadian oil and gas company.⁵ A study on the likelihood of the natural resource curse befalling Kenya conducted between November 2012 and June 2013 forms the basis for this paper.⁶ The prospects of the oil exploration and extraction were largely unknown at this time and the projects were in their initial stages. In April 2017, the joint venture partners, Tullow Oil PLC with a 50% stake, and Africa Oil Corp. and Maersk Oil & Gas A/S⁷ with 25% stake each, announced the drilling of other appraisal wells, after the drilling of the successful Erut-1 exploration well in January 2017.⁸ Kenya relies heavily on oil imports,⁹ even in 2017 when the efforts at exploration and drilling herald the

⁵ Tullow Oil PLC, 'Ngamia-1 Oil Discovery in Kenya Rift Basin' (26 March 2012) <<http://www.tulloil.com/media/press-releases/ngamia-1-oil-discovery-in-kenya-rift-basin>> accessed 3 May 2017; Africa Oil Corp., 'Operations Update - 2012 Third Quarter Report' (*Africa Oil Corp.*, 2012) <<http://www.africaoilcorp.com/s/operations-update.asp?ReportID=741005>> accessed 3 May 2017.

⁶ Alvin Gachie, 'An Examination of the Natural Resource Curse: Oil Discovery in Kenya, Natural Resource Conflict and CSR Provisions in the Oil Industry Law' (LLB Dissertation, University of Nairobi 2013) <http://law-school.uonbi.ac.ke/sites/default/files/chss/law/law/Absract_0.pdf> accessed 11 April 2017.

⁷ Maersk Oil & Gas A/S is a Danish oil and gas company owned by the Maersk Group, after Maersk acquired 50% of Africa Oil interests.

⁸ Keith Hill, 'Africa Oil: Kenya Operations Update' (*Africa Oil Corp.*, 26 April 2017) <<http://africaoilcorp.mwnewsroom.com/press-releases/africa-oil-kenya-operations-update-tsx-aoi-201704261092790001>> accessed 3 May 2017; Neil Ford, 'Kenya: Large-Scale Oil Production Moves a Step Closer' (*African Business Magazine*, 8 February 2017) <<http://africanbusinessmagazine.com/fN9oK>> accessed 3 May 2017.

⁹ Republic of Kenya, 'Signing of the Lease Agreement Between Kenya Pipeline Company Limited Adn Kenya Petroleum Refineries Limited' (*Ministry of Energy and Petroleum*, 7 March 2017) <<http://www.energy.go.ke/index.php/2016-01-19-17-44-19/news/262-signing-of-the-lease-agreement-between-kenya-pipeline-company-limited-and-kenya-petroleum-refineries-limited.html>> accessed 3 May 2017.

production of up to 2,000 barrels per day for export planned beginning June 2017.¹⁰ The question of whether the natural resource curse is likely to befall Kenya resulting in natural resource conflict and calling for natural resource dispute resolution, is therefore relevant.

3.0 Research Methodology

The research setting was in Nairobi County, Kenya. The research method used was a sample survey. The study sought to determine public opinion on the possibility of natural resource conflict arising in Turkana following the discovery of oil. The study involved 105 randomly sampled respondents within the age range of 19 year and 60 years. Structured, closed-ended questionnaires were distributed and filled in by the respondents in the presence of the researcher. Of the 105 questionnaires distributed, all 105 were successfully completed and returned, resulting in a response rate of 100%. Questionnaires were coded and data entered into and analysed using data entry and analysis software, and the results presented using descriptive statistics and charts.

¹⁰ Republic of Kenya, 'Principal Secretary Kamau Clarifies Why Crude Oil From Lokichar Will Be Transported by Road to Mombasa' (*Ministry of Energy and Petroleum*, 2017) <<http://www.energy.go.ke/index.php/2016-01-19-17-44-19/news/239-principal-secretary-kamau-clarifies-why-crude-oil-from-lokichar-will-be-transported-by-road-to-mombasa.html>> accessed 3 May 2017; Republic of Kenya, 'Kenya Will Be an Oil Exporting Country in June 2017' (*The Presidency*, 24 August 2016) <<http://www.president.go.ke/2016/08/24/kenya-will-be-an-oil-exporting-country-in-june-2017/>> accessed 3 May 2017; Constant Munda, 'New Find Takes Kenya Closer to Billion Barrels of Crude Oil' *The Star, Kenya* (Nairobi, Kenya, 28 January 2017) <http://www.the-star.co.ke/news/2017/01/18/new-find-takes-kenya-closer-to-billion-barrels-of-crude-oil_c1489372> accessed 3 May 2017; Faith Mwema, 'Tullow Company to Start Oil Production in 2017' <<http://www.ku.ac.ke/kutv/tullow-company-start-oil-production-2017/>> accessed 3 May 2017.

4.0 Results

There are different parties with a claim to rights and access to natural resources, presenting a number of diverse interests. These stakeholders include the local communities, governments, rebel groups, and outside actors such as international organisations as well as local and foreign businesses.¹¹ In this study, respondents were asked which of three parties – foreign investors, local investors or the Turkana community – stand to gain from the oil exploration and extraction in Turkana. This question supports a view that where a party perceives that their claim to rights and access to the natural resource is not fulfilled, then a conflict may arise. According to 69.5% percent of the respondents, foreign investors benefit most from the process of oil extraction in Turkana. One respondent voiced concern that:

“...rich corrupt leaders will take the chance to use prospecting rights, oil extraction rights, processing etc to enrich themselves. Thus, the trickle-down effect to the community may be minimal.”

This was against a 1% view that the local investors would benefit from the process. One of these respondents stated:

“The foreign investors are likely to be the biggest beneficiaries of the oil extraction since Kenya does not have the equipment.”

¹¹ United States Institute of Peace, ‘Natural Resources, Conflict, and Conflict Resolution’ (United States Institute of Peace 2007) A Study Guide Series on Peace and Conflict for Independent Learners and Classroom Instructors 7, 8
<<https://www.usip.org/sites/default/files/file/08sg.pdf>> accessed 4 May 2017.

Another said:

“It might improve the economy if well utilised, but the government and few investors will benefit the most to the exclusion of majority of Kenyans.”

Most respondents observed that the Turkana community would benefit the least from the oil extraction process (83.8%). None of the respondents saw the Government as a possible party to be disenfranchised (0%).

| | Frequency of responses | Percentage of respondents | Cumulative Percentage |
|-------------------|------------------------|---------------------------|-----------------------|
| Foreign investors | 2 | 1.9 | 1.9 |
| Local investors | 15 | 14.3 | 16.2 |
| Turkana community | 88 | 83.8 | 100.0 |
| Total | 105 | 100.0 | |

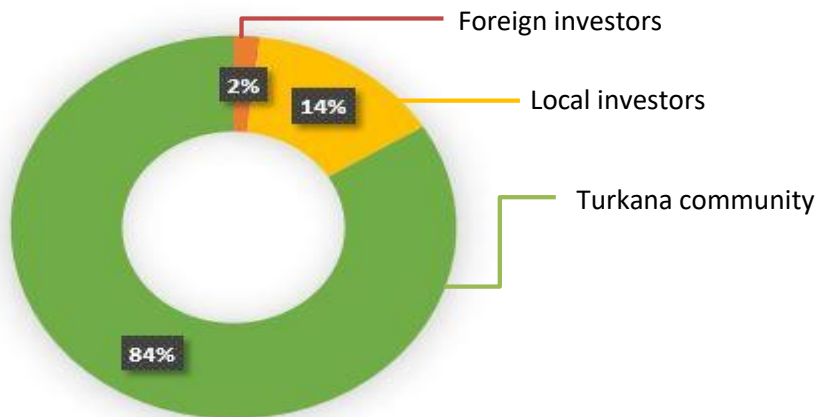


Figure 1: Party likely to benefit the least from the oil extraction process in Turkana

While 41% of the respondents held the view that it was “likely” that there would be conflict in Turkana as a result of the extraction of oil, only 9.5% held the view that conflict was “not likely”. In the words of one of the respondents:

“(The) (b)enefit is substantial but the risk of conflict is high and (conflict will therefore) most probably occur.”

| | Frequency of responses | Percentage of respondents | Cumulative Percentage |
|-------------|------------------------|---------------------------|-----------------------|
| Not likely | 10 | 9.5 | 9.5 |
| Likely | 43 | 41.0 | 50.5 |
| Very Likely | 34 | 32.4 | 82.9 |
| Definitely | 18 | 17.1 | 100.0 |
| Total | 105 | 100.0 | |

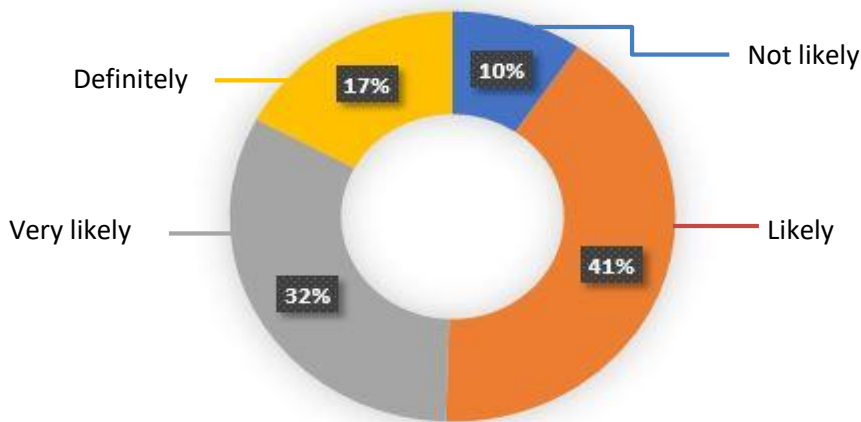


Figure 2: Responses on the likelihood of natural resource conflict in Turkana County, Kenya

This section has summarised the findings of the study on whether it is likely that the natural resource curse will befall Kenya. The following section discusses natural resource conflict and natural resource dispute resolution, suggesting that with the public opinion that conflict may arise due to the discovery of oil, the methods of resolving the conflict should be considered.

5.0 Natural resource dispute resolution: Anticipating conflict in Turkana, Kenya

Forty-one percent (41%) of the respondents anticipated conflict to arise in Turkana as a result of the discovery of oil. Conflict related to discovery of oil is one category of natural resource conflict. Natural resource conflicts are 'disagreements and disputes over access to, and control and use of, natural resources'.¹² Due to the finite nature of natural resources, when one party intends to access, control or use the resource in one way and this use competes with another party's access, control or use, the competing interests may lead to a natural resource conflict. Natural resource conflicts also emerge where a party or group's interests are not taken into consideration in the formulation of policy, programmes or projects.¹³ For example, in *Friends of Lake Turkana Trust v Attorney General & 2 others*,¹⁴ a natural resource litigation case, the interests of the Kenyan and Ethiopian Governments and state agencies to produce hydroelectric

¹² Violet Matiru, 'Conflict and Natural Resource Management' (Food and Agriculture Organization of the United Nations 2000) 1 <<http://www.fao.org/forestry/21572-0d9d4b43a56ac49880557f4ebaa3534e3.pdf>> accessed 3 May 2017.

¹³ Ibid.

¹⁴ *Friends of Lake Turkana Trust v Attorney General & 2 others* [2014] Environment and Land Court at Nairobi ELC Suit No. 825 of 2012, eKLR.

power through construction of dams in Ethiopia conflicted with the interests of the local community in Kenya, who claimed that the construction in River Omo, a dominant source of water for Lake Turkana, would adversely affect the lake and its ecosystem.

According to the Constitution of Kenya, 2010, the term ‘natural resources’ refers to “the physical non-human factors and components, whether renewable or non-renewable, including (a) sunlight; (b) surface and groundwater; (c) forests, biodiversity and genetic resources; and (d) rocks, minerals, fossil fuels and other sources of energy”.¹⁵ While the *Friends of Lake Turkana Trust* case may be categorised as a water-based and energy-based conflict, natural resource conflicts also emerge from a diverse range of scenarios comprised of competing interests over the management of natural resources.

Natural resource conflicts, as with other conflicts, may either be settled through coercive processes such as litigation or arbitration or may be resolved through non-coercive processes such as negotiation, mediation, or facilitation.¹⁶ This paper focuses on natural resource dispute resolution as the use of non-coercive processes to manage natural resource conflicts. These mechanisms seek to go to the root of the issue, therefore giving a framework for sustainable conclusions.¹⁷ With non-coercive processes

¹⁵ Constitution of Kenya 2010, Art 260.

¹⁶ Kariuki Muigua, ‘Natural Resources and Conflict Management in East Africa’, *1st NCMG East African ADR Summit* (2014) 8 <https://profiles.uonbi.ac.ke/kariuki_muigua/files/natural_resources_and_conflict_management_in_east_africa-1st_east_african_adr_summit_final.pdf> accessed 20 September 2016.

¹⁷ Kariuki Muigua, ‘Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation’ (2016) 4 *Alternative Dispute Resolution* 1, 20.

which are interest-based and not position-based, parties may be brought to an agreement where there is cooperation, co-management and conservation of the natural resource; aspects which are essential to ease conflict and foster peace.¹⁸

Mediation is an attractive natural resource dispute resolution mechanism. For example, in Bougainville, Papua New Guinea, conflict arose as the local community was concerned about the harmful environmental and health effects of a copper mining project and inadequate benefit sharing.¹⁹ A mediation process involving government representatives and rebel forces was initiated and conducted by two mediators, and resulted in a peace agreement that set the stage for amicable provision for the parties' interests in further action in the area.²⁰ In the study supporting this paper, 83.8% of the respondents perceived that the Turkana community would benefit least from the oil exploration and extraction, and 1.9% of the respondents held the view that the foreign investors would have the least to lose. From this, it is evident that the perception of who gains and who loses, whether accurate or not, suggests that the different stakes at play which are rooted in varying interests, may lead to an overlap of positions, causing conflict. In the event of a conflict, interest-based mediation may lead to an agreement that incorporates the different parties' interests. However, once there is a full-blown conflict,

¹⁸ United States Institute of Peace (n 11) 10 - 12.

¹⁹ United Nations Department of Political Affairs and United Nations Environment Programme, 'Natural Resources and Conflict: A Guide for Mediation Practitioners' (United Nations Department of Political Affairs and United Nations Environment Programme) 61
<http://www.unccd.int/Lists/SiteDocumentLibrary/Publications/2015Feb_UNDPA_UNEP_NRC_Mediation_full.pdf> accessed 4 May 2017.

²⁰ Ibid 61 - 63.

there may be need for a more coercive process such as arbitration or litigation,²¹ to allow for enforcement of the decisions of the tribunal or court.

Land is a natural resource that is closely related to oil and gas extraction. The use of traditional dispute resolution mechanisms for natural resource dispute resolution with a particular focus on land disputes, has been well documented.²² In many countries in Africa, for example Liberia, Nigeria, Botswana, Rwanda, Ethiopia, Kenya, Sudan, and South Africa, dispute resolution by the elders in a community is the accepted method of handling land disputes.²³ While on one end there is the argument that the

²¹ Kariuki Muigua, 'Natural Resource Conflicts in Kenya: Effective Management for Attainment of Environmental Justice' (2015) 33 <<http://www.kmco.co.ke/attachments/article/168/Natural%20Resource%20Conflicts%20in%20Kenya%20Effective%20Management%20for%20Attainment%20of%20Environmental%20Justice.pdf>> accessed 5 May 2017.

²² Kariuki Muigua, 'Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya 2010' <<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf>> accessed 24 February 2016; Dominic Tuobesaane Paaga and Gordon Dandeebo, 'Assessing the Appeal of Traditional Dispute Resolution Methods in Land Dispute Management: Cases from the Upper West Region' (2014) 4 *Developing Country Studies* <<http://www.iiste.org/Journals/index.php/DCS/article/viewFile/13468/13791>> accessed 11 April 2017.

²³ Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities', *Learning from Africa* (2015) 1 <<https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/francis-kariuki.pdf?sfvrsn=0>> accessed 11 April 2017; Daniel Ogbaharya, 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR)', *23rd Annual International Association of Conflict Management Conference* (2010) 17 - 18 <<https://poseidon01.ssrn.com/delivery.php?ID=73107011408410502912002708001609512705806207109208405703100512307800800112502711109905702902309910912502308810002600711408812604005706203306308312100300902306500400607306601007111512006110098098121104025127098102065090024121075009015030095110006023121&EXT=p>>

nature of land disputes changes over time, and the traditional dispute resolution mechanisms should be adapted to include modern considerations so that they are effective in arriving at peaceful and sustainable conclusions,²⁴ the importance of traditional dispute resolution mechanisms cannot be understated.²⁵ Not only in matters to do with land is local knowledge and traditional ways of doing things relevant; disputes related to forests, biodiversity and genetic resources may also be incorporated under the disputes that may be resolved more sustainably through adopting indigenous knowledge into the processes.²⁶ Traditional dispute resolution mechanisms may, however, need to be balanced in terms of participation of women and youth, who in various communities are excluded from the natural resource dispute resolution processes.²⁷

df> accessed 4 May 2017; Ben Odigbo, Robert Anuforo and Rose Odigbo Ada, 'Curbing Social Inequalities And Gender-Based Injustices In Igboland: The Role Of Public Relations And Alternative Dispute Resolution (ADR) Bodies' (2013) 10 IOSR Journal of Business and Management 29.

²⁴ Maria Emanuel and Tumpe Ndimbwa, 'Traditional Mechanisms of Resolving Conflicts over Land Resource: A Case of Gorowa Community in Northern Tanzania' (2013) 3 International Journal of Academic Research in Business and Social Sciences 214, 214.

²⁵ Francis Kariuki (n 23) 1.

²⁶ Alfonso Peter Castro and Kreg Ettenger, 'Indigenous Knowledge and Conflict Management: Exploring Local Perspectives and Mechanisms for Dealing with Community Forestry Disputes', *Compilation of Discussion Papers from the E-Conference on Addressing Natural Resource Conflicts through Community Forestry* (United Nations Food and Agriculture Organization 1996)
<<http://www.fao.org/docrep/005/AC696E/AC696E09.htm>> accessed 11 April 2017.

²⁷ Eugene Wanende, 'Assessing the Role of Traditional Justice Systems in Resolution of Environmental Conflicts in Kenya' (Master of Arts in Environmental Law, University of Nairobi 2013) 48, 49, 53, 72, 75, 76

A participatory process that involves all stakeholders and uses different natural resource dispute resolution and settlement processes, may ultimately result in a durable and sustainable conclusion to a natural resource conflict. Where the likelihood of a conflict is identified, putting in place legal and institutional frameworks that factor in these considerations would contribute to achieving peace and security.

6.0 Conclusion

The benefits of dealing with natural resource conflicts using alternative dispute resolution mechanisms such as mediation outweigh the costs of allowing the gravamen to escalate unsolved or mitigating the impact of an escalated dispute. A critique of this assertion is that natural resource dispute resolution mechanisms are employed only when a dispute has arisen, and sometimes damage may have already been done. However, if natural resource disputes are anticipated, where structures are put in place to deal with the issue based on the likelihood that a conflict would occur,²⁸ then all parties may minimise the possibility of a dispute. These structures should include increased public participation in natural resource governance to reduce the need for costly disputes that may call for natural resource dispute resolution. Where disputes do arise, a cocktail of the different natural resource dispute settlement and natural resource dispute resolution mechanisms should be employed depending on the nature of the matter.

<http://erepository.uonbi.ac.ke/bitstream/handle/11295/60007/Wanende_Assessing%20the%20role%20of%20traditional%20justice%20systems%20in%20resolution%20of%20environmental%20conflicts.pdf?sequence=3> accessed 5 May 2017; Kalifa Keita, 'Conflict and Conflict Resolution in the Sahel: The Tuareg Insurgency in Mali' (US Army War College 1998) 13 <<http://ssi.armywarcollege.edu/pdffiles/pub200.pdf>> accessed 5 May 2017.

²⁸ Jeffrey A. Frankel (n 3) 20.

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29. Tullow Oil PLC, 'Ngamia-1 Oil Discovery in Kenya Rift Basin' (26 March 2012) <<http://www.tulloil.com/media/press-releases/ngamia-1-oil-discovery-in-kenya-rift-basin>> accessed 3 May 2017
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Demystifying Arbitrability of Disputes in Kenya

*By: Peter Muriithi**

1.0 Introduction

Arbitration is an adjudicative process in which the parties present evidence and arguments to an impartial and independent third party who has the authority to hand down a binding decision based on objective standards.¹ The disputes could be of commercial or non-commercial nature, while the parties might be individuals, organization or states.² In arbitration there arises the fundamental question of whether all disputes are arbitrable? This is referred to as arbitrability.

Arbitrability can be described as the question of whether the subject matter can be arbitrated or whether the particular dispute must be resolved in court.³ It involves a determination of the types of disputes which may be resolved through arbitration and those which cannot be resolved through arbitration but by courts of law.

Arbitrability may be either: objective or subjective. Objective arbitrability arises where the law provides that certain disputes involving sensitive issues of public policy or national interest should be settled by national courts as opposed to arbitration. These are restrictions to arbitration on

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1. Jacob K Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR (*International Journal of Humanitarian and Social Sciences*, Vol. 1 No. 6; June 2011) p. 221

2. Book Review Title: Settling Disputes through Arbitration in Kenya Author: Dr. Kariuki Muigua.

3 Margaret L. Moses, The Principles and Practice of International Commercial Arbitration. Pg 68.

the basis of the subject matter.⁴ The Arbitration Act under Section 37 1(b) (i) seems to provide for Objective arbitrability⁵.

On the other hand, Subjective arbitrability arises when the national laws of a state restrict or limit the scope of matter that can be settled via arbitration.⁶ Subjective arbitrability does not relate to the quality of the subject matter in dispute. This may arise for instance where arbitration is challenged on the basis that one of the parties to the dispute is a state entity which is not allowed to enter into arbitration under national laws. It is not explicitly clear whether we have adopted an objective or subjective attitude towards arbitrability in Kenya.⁷

The question of arbitrability of disputes is usually raised by the aggrieved party. Where the issue of arbitrability is raised before the arbitral tribunal itself it has jurisdiction to make a determination of the issue save that, the court has power to review the determination where an aggrieved party approaches it within thirty days of the decision.⁸ The issue of arbitrability may arise at various points:⁹

4. Francis Kariuki, Redefining “Arbitrability”: Assessment of Articles 159 & 189 (4) of the Constitution of Kenya

⁵ .Arbitration Act Cap 49 1995.

⁶William Grantham, “The Arbitrability of International Intellectual Property Disputes”, (Berkeley Journal of International Law, Vol. 14 Issues, 2012), p. 178.

⁷.See Supra note 3

⁸ Githu Muigai , Arbitration Law & Practice In Kenya (Law Africa Publishing(K) Ltd)Pg. 69.

⁹ Bernard Hanotiau, The Law Applicable to Arbitrability (Singapore Academy of Law Journal 2014), p. 875

- i. it will often be invoked in the first place before the arbitral tribunal which will decide on itself, in accordance with the principles of kompetenz-kompetenz
- ii. the party which deems the dispute not to be arbitrable may present it to the court and the court will have to decide upon the objection raised by the defendant on the basis of the arbitration agreement
- iii. the non-arbitrability may also be invoked before a court as a ground for setting aside procedure.
- iv. the objection of non arbitrabilty may be raised by a defendant before the court deciding on the recognition and enforcement of the award.

Kariuki Muigua, in his book,¹⁰while agreeing with the statement that ‘not all disputes are arbitrable’ emphatically opines that, as a general rule, matters are arbitrable when they refer to economic or disposable private rights. This implies that there is a limitation as to the nature of matters to which parties may agree to submit to arbitration. The rationale of this limitation is that arbitration is a dispute resolution system arising out of an agreement of the parties. Hence, it is a private mechanism of dispute resolution and individuals who are not public officers are engaged to arbitrate.¹¹

It is on this basis hence that there is no justification, therefore to allow for arbitration to intervene where the subject matter of the dispute is such as affects public or general interests as jurisdiction in such matters is the preserve of the judiciary. Matters affecting public interest include

¹⁰ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, page 33

¹¹ *Ibid* No. 10 page 33

criminal offences public interest disputes amongst others.¹²

Further expounded Arbitrations relate to contractual disputes, any dispute or difference is amenable to arbitration, regardless of the nature of the underlying cause of action. The only restriction is that arbitration is only available to resolve issues of a private law nature. This flows from the contractual basis of arbitration, which means that public law matters, matters relating to legal status, cannot be determined by arbitration. It is on this basis that the following for example are not arbitrable: Marital status, validity of patents, status of a public right of way, bankruptcy or insolvency matters, criminal liability and judicial review of administrative decisions.¹³ However, it worth pointing out that the arbitrability of criminal matters in Kenya has since been challenged.¹⁴

From the onset it is clear that only where disputes entail private rights and do not affect the general public are the parties at liberty to waive the right to engage the judiciary and use arbitration. Usually through the parties having an arbitration agreement formulated in accordance with the Arbitration Act 1995.¹⁵

2.0 Judicial Elucidation of Arbitrability of Disputes

Below is a judicial enunciation in regard to which disputes are arbitrable and those that are not:

¹² Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, page 34

¹³ Susan Blake, Julie Browne & Stuart Sime, *A practical approach to, Alternative Dispute resolution* page 398-399.

¹⁴ See the case of *Republic v Mohamed Abdow Mohamed* [2013] eKLR.

¹⁵ *Ibid* No. 12

In the Australian case of : *MetrocallInc -v-Electronic Tracking Systems Pty Ltd* [2000] NSWLR Comm 136it was held that:“*disputes over statutory and constitutional rights could not be determined by private persons or arbitrators as such disputes were not arbitrable.*”

In the case of: *Nedermar Technology BV Ltd V Kenya Anti-Corruption Commission & Another* [2006] eKLR it was held that: “*...However, what is arbitrable depends on the public policy of the countries or states and may differ from contrary to country or state to state...To conclude whether or not a particular type of dispute is arbitrable under a given law is substantially a matter of public policy for that law to determine. On the other hand, public policy variesfrom one country to the next and also changes from time to time. The effect of the specific exclusion ofpublic law by the Agreement is a critical question for this court and the arbitral Tribunal*”

In the case of: *Midland Finance & Securities GlobetelInc v Attorney General & another* [2008] eKLRit was stated that: “*... Arbitrability involves determining which types of dispute may be resolved by arbitration and whichbelong exclusively to the domain of the courts. National laws establish the domain of arbitration. And inthis case it is the English law which will determine what is arbitrable. Arbitrability is a matter of publicpolicy for each state.*”

In other words whether or not a particular type of dispute is arbitrable under a given law is in essence a matter of public policy for that law to determine. And public policy varies fromone state to the next.”

In an endeavour to establish whether all disputes are arbitrable or not, below is an analysis of the relevant statutes (national law) and how they have been interpreted by Kenyan Courts and various writers.

3.0 Local Regime Governing Arbitrability of Labour Disputes

Under the Constitution of Kenya 2010, the basis of alternative dispute resolution is Article 159 2(c). One such method recognized by the Constitution is Arbitration. It is portrayed as one of the principles that will guide the Court and Tribunals in their exercise of Judicial Authority.¹⁶ It is provided that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted.

The caveat to use of traditional dispute resolution mechanisms is under Article 159(3) which provides that so long as the mechanisms do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law. Though the Constitution under Article 159 2(c) recognizes Arbitration as a means of solving disputes it fails to give the limitation to its application. The Constitution of Kenya 2010, as illustrated above only expressly under Article 159(3) give limitation to traditional dispute resolution mechanisms.

The scope for the application of A.D.R, has been extensively widened by the Constitution with Article 189 (4) stating that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

These are the key provisions that form the Constitutional basis for the application of A.D.R in dispute resolution in Kenya, whose import is that

¹⁶ Article 159 2(c) of the Constitution: Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

A.D.R can apply to all disputes and hence broadening its applicability. It is also a clear manifestation of the acceptance of A.D.R as a means of conflict resolution in all disputes. ¹⁷

Be that as it may, the reading of the provisions of the Constitution indicate that they do not expressly provide for those disputes that can or cannot be arbitrated.

In giving effect to the provisions of the Constitution, courts have overtime encouraged use of arbitration as a means of solving disputes. In the case of: *Carol Adhiambo Olelavs Asterisk Limited*¹⁸: Judge James Rika stated the following: "...The Claimant should submit to the arbitration process, and not seem to want to use the Court to stall a dispute settlement mechanism chosen by the Parties on a particular aspect of the employment relationship. The Court in exercising judicial authority, is guided by certain principles under Article 159 of the Constitution, among them the promotion of voluntary dispute settlement mechanisms such as Arbitration. "

4.0 Arbitrability of disputes as expounded by the Arbitration Act Cap 49

Section 3(1) is not conclusive in its definition of Arbitration as it states that "arbitration" means any arbitration whether or not administered by a permanent arbitral institution.

In regard to arbitrability the Act does not directly lay out the requirement for arbitrability. However, there are some matters which are universally agreed to be beyond the scope of arbitration.

¹⁷ Kariuki Muigua, Court Annexed ADR in the Kenyan Context Pg 1.

¹⁸ Cause Number 1049 of 2011eKLR 2014

This means that there are disputes which are as a matter of practice that are not arbitrable. These include criminal matters, public interest disputes, and land disputes among others. In particular among other claims most countries disallow Arbitration of disputes that are criminal in nature, disputes concerning Intellectual property, Competition (Anti-trust) claims, real estate, domestic relations and Franchise relations. An arbitration agreement in respect of these types of disputes is not enforceable¹⁹.

The Act (Cap 49) does not clearly define what is arbitrable but in an attempt to address Arbitrability, Section 37(1)(b) of the Arbitration Act, provides for refusal of recognition or enforcement of the arbitral award if the High Court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or (ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

In light of the above, the Act (Cap 49) does not address directly the issue of arbitrability of various disputes, but rather gives a guideline on the determination of arbitrability of various disputes. One can then argue that in determining arbitrability of labour disputes, using the Arbitration Act one should consider:

- a) *Whether or not the subject matter of the dispute in question is capable of settlement by arbitration under the law of Kenya?*
- b) *If arbitrating the dispute in question will be contrary to Public Policy of Kenya?*

For example, the courts decide what then amounts to public policy and is the subject matter too sensitive to be arbitrable?

¹⁹ Dr Kariuki Muigua, *Settling Disputes through Arbitration in Kenya (Glenwood Publishers Ltd)* Page 33-34.

Judge J.G Nyamu, in the case of: *Nedermar Technology BvLtd Vs. The Kenya Anti-Corruption Commission and the Attorney General of Kenya*,²⁰in determining what amounted to Public Policy the court stated that "...Public policy broadly includes principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. Public policy narrowly means the principle that a person should not be allowed to do anything that would tend to injure the public at large..."

4.0 International Legal Regime Governing Arbitrability

The UNCITRAL Model Law on International Commercial Arbitration of 1985 (hereinafter Model Law) to which Kenya is party, and upon which most of its Arbitration laws are based on, recognises that not all disputes can be arbitrated. Article 1(5) of the model law verbatim provides that it shall not affect any other law of a State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law. This leaves Model Law countries with the discretion to define the bounds of arbitrability in their states.

The reading of this provision indicates that Model Law recognises that there are certain disputes that a country can recognize is non-arbitrable. It does not proceed to define those disputes that are regarded as arbitrable and those that cannot be arbitrated. As indicated above, the Model Law countries are left with power to exercise discretion and in its laws outline those matters

Albert Jan van den Berg's, in his article analyzing the issue of arbitrability under, *the New York Convention of 1958*, states "...Article V(2)(a) permits a

²⁰ Petition 390 of 2006 eKLR [2006]

court to refuse enforcement of an award on its own motion if the subject matter of the difference is not capable of settlement by arbitration under its law. ²¹This ground can be deemed superfluous as the question of the non-arbitrable subject matter is generally regarded as forming part of the general concept of public policy set forth in Article V(2)(b). The non-arbitrability of a subject matter reflects a special national interest in judicial, rather than arbitrable resolution of a dispute. The non-arbitrable subject matters differ from country to country. The question of a non-arbitrable subject matter is raised in a relatively small number of cases under the Convention. It has led to a refusal of enforcement in a very few cases only”²²

This implies that the issue of arbitrability is left at the discretion of the states. In expounding on this *Homayoon Arfazaden's* view with regard to Arbitrability under the New York Convention is that the enforcing court under the Convention Article V (2) (a) should refuse to enforce " *Only if under the laws of the forum subject matter of the dispute is expressly reserved to the mandatory jurisdiction of (the) court to the exclusion of Arbitration*".²³

5.0 Conclusion

In Kenya there is no black and white position in regard to Arbitrability of disputes. The law under the Arbitration Act only guides the courts in determining which matters are to be regarded as arbitrable or not. It is my view that there is need for the law to be amended for it to expressly deal with arbitrability of disputes in Kenya. It ought to be amended to explicitly provide for those matters that can be regarded as arbitrable or

²¹ Albert Jan van den Berg's Article, 'The New York Convention of 1958: An Overview page 19

²² Ibid No.20

²³ Homayoon Arfazadeh, Arbitrability under the New York Convention: the LexFori Revisited 17 Arb. Int. 73, 83(2001).

non-arbitrable. It is clear from the above analysis that not all disputes are arbitrable.

Mitigating Risks for Government: The Role of Mediation in Dispute Resolution

*By: Bernard Kuria**

1.0 Introduction

The article critically analyses the role of mediation in dispute resolution and suggests ways the government can mitigate risks through the use of mediation. The risks include adverse judgments, awards and strained relations between investors and the government. The government can utilize mediation to address potential disputes arising in commercial contracts, termination of employment, procurement and provision of services. The role of government lawyers has evolved in the twenty first century. They play a critical role in various technical departments, government ministries, and state departments in pursuit of ensuring provision of legal service to the government and people of Kenya. With a new Constitutional framework, government lawyers are faced with multiple and complex mandates of delivering effective and efficient service. Government lawyers have to take cognizance of emerging trends of resolving conflict through mediation in order to mitigate risks. The world is moving away from the adversarial system of dispute resolution. It is on this basis that the author recommends sensitization and training of government agencies and particularly the Office of the Attorney General, of the benefits of exploring mediation as alternative dispute resolution mechanism pursuant to Article 159(2) of the Constitution.

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2.0 Background

Throughout history individuals, communities, and states have searched for methods of resolving disputes in a constructive and peaceful manner.¹ When responding to conflict, there is nothing new about mediation. Mediation has been used in different parts of the world and has a rich history. It is used in diverse areas such as personal conflict, organizational and group conflict, policy and environmental conflict.² Mediation is an ideal way of dealing with differences and resolving conflicts between disputants. This is the main reasons why studies of mediation has proliferated the judicial system in the last three decades.³

There has been a worldwide interest in mediation as a form of Alternative Dispute Resolution (ADR).⁴ ADR covers a wide range of methods used to resolve disputes other than the traditional adversarial court system such as mediation, arbitration, conciliation, arb-med and med-arb.⁵ Different jurisdictions such as Australia, United States of America, United Kingdom, Singapore and Nigeria have all developed court-

¹ Kariuki Muigua, *Resolving Conflicts Through Mediation* Nairobi, (Glenwood Publishers Limited, 2012), p.4.

² Bercovitch, Jacob, *Resolving international conflicts: the theory and practice of mediation*. Lynne Rienner Publishers 1996.

³ Julie Macfarlane, “The Mediation Alternative” *Rethinking Disputes: The Mediation Alternative* (London: Cavendish Publishing company, 1997) at pg 2.

⁴ United Nations, ‘Mediation Plays a Vital Role in Preventing Conflict, Settling Disputes’, 23 May 2012,
<http://www.un.org/apps/news/story.asp?NewsID=42067&Cr=mediation&Cr1#.UE2wgbJIRbw>, accessed 20 April 2017.

⁵ Kariuki Muigua, *Resolving Conflicts Through Mediation* Nairobi, (Glenwood Publishers Limited, 2012), p.4.

annexed mediation structures. Mediation is a form of ADR that is widely used. In Kenya, mediation is not a new concept. The idea of having parties in dispute turning to a third party to help them solve their problem is obvious in African tradition and culture.⁶ Mediation is as old as humankind. It is found in our day to day life. In our society, we witness intervention of third party facilitators who help in resolving disputes between clans, family and neighbours.⁷ Where mediation is practised, people who are respected in society such as chiefs and elders mediate in civil cases. However, America and Singapore have been on the forefront in the recent past in developing commercial and family mediation that demonstrate versatility of mediation as a form of dispute resolution mechanism.⁸

The term mediation is open to debate. The underlying characteristics in the definition of mediation are that it involves intervention of a third party into a conflict between disputants; it is a non-binding, non-violent and non-coercive form of intervention, extension of conflict management; and a voluntary and consensual form of conflict management which allows disputants to remain in control of the outcome of the process and ad-hoc procedure.⁹

Mediation is a structured process whereby two or more disputants attempts by themselves, on voluntary basis, to settle their dispute with

⁶ J. Burton, *Conflict: Resolution and Prevention*, (London: Macmillan, 1990).

⁷ *Ibid* note 5.

⁸ Bercovitch, Jacob. *Resolving international conflicts: the theory and practice of mediation*. Lynne Rienner Publishers 1996.

⁹ Kariuki Muigua, “Court Sanctioned Mediation in Kenya – An Appraisal” (2015) 19-20.

the assistance of a mediator.¹⁰ The process may be initiated by the disputants or ordered by the court. The Civil Procedure Act defines mediation as “an informal and non-adversarial process where an impartial mediator encourages and facilitates resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within course of judicial proceedings related thereto”.¹¹

The mediator’s role is to focus the disputants on the process and the need to find common ground.¹² The mediator assists parties steer the dispute to a peaceful resolution and find mutual interest. A mediator is a third party who is asked to conduct mediation in an impartial, effective and competent way.¹³ A mediator aims to offer a solution to the conflicting parties’ dispute by facilitating mutual concessions.¹⁴

Mediation is taking root as an alternative mechanism in dispute resolution in Kenya. The Constitution introduces ADR as a dispute resolution mechanism.¹⁵ Mediation is voluntary, informal and a consensual process where a neutral third party helps parties in dispute to reach a negotiated settlement.¹⁶ There is a misconception that

¹⁰ Ibid.

¹¹ Civil Procedure Act, Cap 21, Laws of Kenya. Section 2.

¹² Robert A. Baruch Bush and Joseph Folger, *The Promise of Mediation: Responding To Conflict Through Empowerment and Recognition* (1994), at 81-95.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Constitution of Kenya 2010. Government Printer. Article 159(2)(b).

¹⁶ Ibid note 5

mediation is, in effect, an informal arbitration. Truth be told, mediation does not seek to establish fault or liability. Mediation focuses on helping disputants find solutions to their own problems.¹⁷ The intervention of a third party helps the disputants in finding their own options which is of mutual benefit. Mediation is believed to work in a dispute where parties have had a prior relationship and they have an interest in maintaining the relationship. The resolution process is owned by the parties, they are at liberty to express their self-interests freely during mediation in order to reach a negotiated outcome.¹⁸

3.0 Mitigating Risks for Government

Government has a role to play in ensuring that citizens have access to justice. The success of ADR in our jurisdiction is pegged on keeping out unnecessary litigation from our court system. This will promote an efficient judicial system. The Judiciary has taken an active role in the use of mediation in commercial and family disputes. On 4th April 2016, the Judiciary launched the Court-Annexed Mediation Project in both Family and Commercial division at Milimani Law Courts, Nairobi. The Mediation (Pilot Project) Rules 2015 provide that every civil suit instituted in court is to be subjected to screening by a Mediation Deputy Registrar and those cases found suitable are referred for mediation.¹⁹

¹⁷ B. Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995).

¹⁸ Bercovitch, Jacob. *Resolving international conflicts: the theory and practice of mediation*. Lynne Rienner Publishers 1996.

¹⁹ The Mediation (Pilot Project Rules), 2015 Section 4.

The government is a stakeholder in Kenya's judicial system. Therefore, cases against government or where government is a party to the dispute can be referred to court-annexed mediation. This highlights a shift from the adversarial system towards development of ADR. There is a perception that government cannot engage in mediation as they are seen to be 'compromising' proceedings instead of determining them on merit. The truth is that Mediation is not a process of compromise. The Attorney General has encouraged government departments and ministries to consider and use mediation to settle disputes.

In the past, a lawyer was considered a hired gun who would do anything for the client. However, times have changed and parties and their lawyers owe the court a duty to cooperate during litigation.²⁰ Lawyers and the court have learnt to think constructively from an early stage of dispute resolution about the real issues in a case. Parties have to find a mechanism to resolve the dispute without resorting to lengthy and expensive litigation.²¹

For government lawyers, governments come and go. They are tasked with protecting the rule of law. However, if the lawyer becomes embroiled in trivial details of the government policy, and becomes attached with its achievement, their personal reputation for independence and legal advice may be questioned.²² This puts the office

²⁰ Craig Pollack, "The Role of the Mediation Advocate: a User's Guide to Mediation", 73(1) *Arbitration* 20, (2007), p 20-23.

²¹ Julie Macfarlane, "The Mediation Altranative" *Rethinking Disputes: The Mediation Alternative* (London: Cavendish Publishing company, 1997) at pg 2

²² James Mangerere, Colloquium Conference for State Counsels 2017. Safari Park Hotel 18th April 2017.

of the government lawyer at risk of being diminished. Governments are concerned with implementing the manifesto upon which they were elected during election, thus the importance of legal form and process may sometimes elude them.²³ The office of the Attorney General and government lawyers should always play a critical role in ensuring observance of the rule of law within government. Government should expect frank legal advice that criticizes their policy ambitions and upholds the rule of law. A good government lawyer should know when to draw the line between giving legal and policy advice. In most cases, government lawyers are sidelined and kept in the dark during policy development and are only engaged when there is a matter before court against the government. The law is concerned with expression of law and the law is the business of lawyers. Therefore, government lawyers should be engaged in details of policy development and implementation to avoid enacting bad law.

Government lawyers should learn that political and policy crises will arise when carrying out their mandate.²⁴ Therefore, when it comes to resolution of disputes in a government legal contest, winning does not matter; what really matters is how you win. Mediation as a form of dispute settlement mechanisms can be used by government to mitigate risks because it isolates disputed issues in an attempt to develop options that accommodate disputants' needs.

²³ Ibid.

²⁴ Ibid.

4.0 The Role of Mediation in Dispute Resolution

Disputes against government are not static. They vary in terms of parties, responses, situations, intensity and escalation. These are some of the features that influence context of disputes and affect the outcome or course the dispute takes. Mediation is influenced by context of the dispute.²⁵ The rules, beliefs, behaviours and attitudes that make up a dispute have an effect on the process of mediation.²⁶ Mediation as a voluntary process has no fixed pattern and may be as distinct as the parties involved. Therefore, for mediation to be successful, the process must be responsive and adoptive to the disputants. It must take into account the wider picture of the dispute and reflect different issues, situations and parties.²⁷

Mediation and other forms of Alternative Dispute Resolution mechanisms provide disputants with an opportunity to engage in negotiations at an early stage of dispute before costs are incurred.²⁸ Mediation appreciates that many disputes revolve around three kinds of issues that concern parties namely substantive, emotional and pseudo-substantive.²⁹ Therefore, the outcome of mediation is not certain because

²⁵ G. R. Berridge (2010), *Diplomacy: Theory and Practice* (Basingstoke: Palgrave MacMillan).

²⁶ *Ibid.*

²⁷ Bercovitch, Jacob. *Resolving international conflicts: the theory and practice of mediation*. Lynne Rienner Publishers 1996.

²⁸ Kheel, T. W. (2001). *The Keys to Conflict Resolution. Proven Methods for Resolving Disputes Voluntarily*. Four Walls Eight Windows. New York.

²⁹ *Ibid.*

it requires parties to think sensibly and reassess their position in a rational way. Win-win situations are achievable in mediation through sensible decision making. This saves legal cost and avoids delay in delivery of justice.

Despite the shift in the way disputes are resolved, many government lawyers have not caught up with the new ways of solving disputes. With the launch of court-annexed mediation, few lawyers are trained in the art of mediation.³⁰ There are less than 65 mediators accredited by Mediation Accreditation Committee (MAC) in Kenya. This indicates that mediation is still seen as inappropriate by lawyers and parties in disputes. Lawyers take mediation sessions as an opportunity to intimidate an opponent rather than a means of resolving the dispute.³¹ In addition, they bring the worst features of the adversarial lawyer during mediation sessions. They fail to listen to what the other party is saying, argue their client's case and fail to explore possible outcomes or solutions.³² This destroys communication between the disputants. There is need for law schools, law firms and government institutions to train their lawyers in the art of mediation. The skill of mediation and negotiation is invaluable in legal practice and every sphere of life.

Mediation is a tool that can be widely used in conflict resolution, especially when parties are unwilling to compromise from their

³⁰ Kariuki Muigua, "Court Sanctioned Mediation in Kenya – An Appraisal" (2015) 19-20 <http://www.ciarbkenya.org/assets/court-sanctioned-mediation-in-kenya.pdf> Accessed 21 April 2016.

³¹ C. Pollack, "The Role of the Mediation Advocate: a User's Guide to Mediation", 73(1) *Arbitration* 20, (2007).

³² *Ibid.*

position.³³ In addition, it is applicable where there is distrust between disputants, or where there are underlying differences that present additional barriers. The United Nations has recognized that Mediation plays a vital role in preventing conflict.³⁴

Mediation plays a role in dispute resolution by creating a platform to address issues through dialogue as opposed to resorting to violence and use of force.³⁵ It helps mitigate disputants' attitudes of hostility and mutual distrust while at the same time encouraging them to accept principles of justice and fairness. Therefore, mediation helps disputants re-examine their positions. This assists in steering disputants to a more flexible and reasonable position to explore solutions and options that they may have been previously ignored.³⁶

The critical point to consider during mediation process is that the disputants must be willing to take part in the mediation process and be ready to negotiate with the other side. In instances where government is a party to a dispute, government sanctioned mediators may not be suitable for such a conflict situation. Independent or neutral mediators may be more suitable to work in a conflict where negotiation between the government and other disputants has reached a deadlock.

³³ United Nations, 'Mediation Plays a Vital Role in Preventing Conflict, Settling Disputes', 23 May 2012, <http://www.un.org/apps/news/story.asp?NewsID=42067&Cr=mediation&Cr1#.UE2wgbJIRbw>, accessed 20 April 2017.

³⁴ Ibid.

³⁵ B. Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995).

³⁶ Ibid.

5.0 Conclusion

Mediation as an alternative dispute resolution mechanism is effective in managing disputes because the process is owned by the parties. Disputants are at liberty to express their self-interests freely in order to reach a negotiated outcome. Government lawyers owe a significant duty to the government and general public. Therefore, it's crucial for them to be trained and sensitized in the art of mediation in order to mitigate risks against government.

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Court Annexed Mediation in Kenya: A Mediator's Reflections

By: Wilfred A. Mutubwa

1.0 Introduction

Mediation is not new in Africa. It has been with us since the advent of disputes. Aside from negotiation, mediation is perhaps the oldest of dispute resolution mechanisms preferred in resolving conflicts in pre-colonial Africa. It remains the rock of ages, defying the passage of time.

However, mediation is relatively new in the formal judicial and civil dispute resolution structures in Kenya. The promulgation of the Constitution of Kenya in the year 2010 heralded a new era and dramatically changed the dispute resolution landscape of Kenya. Alternative Dispute Resolution (ADR) mechanisms, including mediation, have now gained constitutional acknowledgement.¹ Mediation has been mentioned in the Constitution itself and in post 2010 statutes,² albeit at times in a misplaced sense.

It is not until the year 2015 that the Court Annexed Mediation took off. This was a culmination of at least four years of preparatory work³.

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¹ Article 159 now expressly enjoins Courts and tribunals to embrace and promote ADR in its dispensation of Justice. ADR is therefore recognized as a principle of exercise of judicial authority.

² Such as Article 189(4) of the Constitution of Kenya 2010; Section 40 of Community Land Act. .

³ Kariuki Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya* (2015) Glenwood at 100-115.

Amendments to the Civil Procedure Act⁴ introduced Mediation under Section 81(2) (f) in 2012. Section 59 of the Civil Procedure Act was also amended to introduce aspects of mediation in an effort to streamline the Court process. This formed the foundation of Court Annexed Mediation, upon which the enabling regulations were later promulgated.

This paper offers a reflection on the challenges, prospects and problems of the pilot project from the perspective of an accredited mediator who has participated in the pilot project. It offers an assessment of the court annexed mediation project, two years after its launch, with the hope of impacting policy with the possibility of improving and strengthening the program in anticipation of its eventual national roll-out, which will hopefully happen shortly.

2.0 Statutory Basis for Court Annexed Mediation

Section 59 B (1) of the Civil Procedure Act empowers the Court to refer matters to Mediation upon the request of a party or where the court deems it appropriate. The Mediation is conducted by a person duly accredited by the Mediation Accreditation Committee (MAC) and which committee maintains a list of accredited mediators.⁵ The parties have the first opportunity to agree on the appointment of one of the mediators on the Mediation Accreditation Committee's register, failing which the Mediation Registrar makes a default appointment. The Mediation settlement agreement is reduced into writing and signed by the parties. The agreement is thereafter registered in Court and is binding and final

⁴ By the Statute Law (Miscellaneous Amendments) Act No. 12 of 2012.

⁵ Section 59B (2) of the Civil Procedure Act. Also see Rule 6(1) of the Mediation (Pilot Project) Rules, 2015.

- no appeal therefrom lies- and the settlement is enforceable as an order of the Court.⁶ Should the mediation process fail, the Court shall set down the matter for hearing and determination in the ordinary course of its civil processes.

The Mediation (Pilot Project) Rules 2015 were published on 9th October 2015 and are meant to be applied in the Family and Commercial Divisions of the High Court of Kenya at the Milimani Law Courts, Nairobi where the Court Annexed Mediation is being tested on a pilot basis. Suits filed in the Family and Commercial Divisions of the High Court after the commencement of the pilot project are put through a mandatory screening by the Mediation Registrar of the Court and those found proper may be referred to mediation. The Registrar, having found a case suitable for mediation, nominates three mediators from the MAC Register of Mediators and proposes the names to the parties to appoint one⁷. It is instructive to note that all timelines set out in the Civil Procedure Rules cease to run upon commencement of the mediation process⁸. Mediations are expected to take 60 days with the possibility of an extension not exceeding 10 days being granted by the Mediation Deputy Registrar. Reasons for an extension may include the complexity of the issue, number of parties or by consent of parties.⁹

The foregoing part of this paper only serves to give an introduction to the legal basis and background to court annexed mediation in Kenya. It also illuminates the conceptual and contextual backdrop to the substantive

⁶ Section 59B (3) of the Civil Procedure Act.

⁷ Rule 6(2).

⁸ Rule 6(1).

⁹ Rule 7.

part of this article, which will now follow. This paper shall highlight some of the challenges, problems and prospects of the Court Annexed Mediation Project as experienced by a mediator.

3.0 Challenges Faced by the Court Annexed Pilot Project

3.1 Transition from Screening to Appointment

The preachers of the gospel of mediation emphasise informality as its distinguishing feature. Mediation is sold on the dispute resolution marketplace as an informal and flexible mode of settlement of disputes. The irony therefore is that this informal process is now being predicated upon formal rules of procedure and practice. Some may argue that this removes from mediation its most significant element of informality.

First, the process of determining what matters are amenable to mediation under the pilot scheme is left to the discretion of the Mediation Deputy Registrar. Upon being satisfied of its fitness for mediation, the deputy registrar sends a list of three Mediators selected from the register and allows the parties to elect one as mediator. Thereafter the mediator is not formally appointed until the parties have prepared case summaries and submitted them to the Mediation Deputy Registrar.

The net effect of the above said formalities attendant to the process before a matter can reach the mediator can be gleaned from the statistics of the matters disposed of in the pilot project. For instance in the Family Division, of the 497 cases screened and found suitable for mediation only 102 have proceeded to the stage of appointment of a mediator and 49 have been concluded. This represents a 20.5% transition rate.¹⁰

¹⁰ According to the Family Division Mediation Deputy Registrar, Hon. Kendagor Caroline.

Whereas case summaries serve a vital role in giving the mediator a preview of the dispute and may also help focus the mediation, they do not necessarily address the real questions in issue. Hence, their requirement before the commencement of arbitral proceedings, in my view, only serves to create a clog in the expeditious disposal of mediations.

Mediations are supposed to be relatively expeditious as opposed to arbitration or litigation. This principle is one of the reasons for the piloting of mediation as an appendage to the court system. It is an attempt to reduce the backlog in the court system. To introduce a case management tool or system that transfers the backlog from the judge or court registry to the Mediation Registrar is therefore in itself an anti-thesis to the objectives of mediation and the entire project.

In my own experience, case summaries serve very little functional utility, if at all. In the practical sense of things, with advocates preparing case summaries, the same tend to, more often than not, take the shape of pleadings in formal court cases. This, perhaps, is to be blamed on the training of lawyers or indeed a lack of even basic understanding of mediation by most advocates—a problem on its own.

The case summaries may also convolute or obfuscate the process by introducing issues, which in actual terms are not central to the dispute. Mediation is really for parties and for parties to forge their own tools, with the mediator as an aid, so as to surmount their issues. In my own experience, opening statements by parties serve a better functional utility for mediators over case summaries.

Opening statements are actually as informal as mediation seeks to be. The opening statements are made in the presence of all disputants who are

able to see the raw emotions, elicit the slant and accent on what the parties consider important and as a result may move the disputants closer to resolution than printed words on pieces of paper.

The option in the rules to allow parties to agree to a mediator from a list of three presented to them by the mediation deputy registrar, also serves to further delaying the determination of the dispute than it does to foster the voluntarisms of the process.

The freedom of choice of a third party neutral exercised by parties need not be specific to the appointment of a particular individual. It is enough that the institution of the MAC has established the qualification and competence of members in its register. In other words, all qualified and accredited mediators on the MAC list are competent to serve as mediators in any dispute falling within their respective areas of accreditation.

Again, as a weakness that originates from advocates who more often than not have the conduct of mediations on behalf of parties, the trend witnessed is always for a party to appoint, or propose for appointment, a mediator whom they can associate with or whom they believe may slant towards their case. This is obviously misconceived. I say misconceived because mediators do not determine or decide disputes but only facilitate the same for the parties.

The transition of a matter from screening to appointment of a mediator should not last more than 14 days. The requirements that parties elect a mediator and file case summaries, only serve to delay the process and have in turn led to a low transition and settlement rate. Mediation registries should not experience backlogs nor should we transfer backlog from court to mediation. The true impact of the pilot project can only be felt if the transition to mediation is swift.

4.0 The Role of Advocates in Mediation

Advocates are an indispensable cog in the wheels of the administration of Justice. Being one of them, I would be the last to state otherwise. However in relation to mediation, their role remains dubious and has indeed come into sharp focus.

As it invariably happens, advocates act for their clients and are often under express or ostensible instructions to press for the best outcomes possible for their clients. In our jurisdiction, advocates represent disputants in every sphere of dispute resolution yet very few are trained in mediation, let alone Alternative Dispute Resolution (ADR). Advocates can pose not only a challenge but a nightmare to the uninitiated mediator. Most advocates assume that the mediator is akin to a Judge or arbitrator and will try to impress him with facts in favour of their clients while suppressing "weaknesses in their client's case", not knowing that in mediation, those weaknesses could very well pose as strengths. The concepts of confidentiality of mediation proceedings and lack of a formal record, particularly in the court annexed process, astounds many lawyers who appear for parties in the mediations I have conducted. Right from case summaries through the mediation meetings and the settlement agreement, advocates vehemently plead their client's respective cases, make applications for the mediator's consideration, seek for matters to be captured on record or engage in a manner that is clearly suspicious of their counterparts, and even at times suspicious of the mediator.

To some mediators, the advocates' presence may seem obtrusive or even inimical to the objectives of mediation. As mediators, we are trained to understand that the process is party driven with party generated solutions. An intransigent advocate may stand in the way of a settlement. However, employing tact and the skill of persuasion, a mediator may

convert advocates into useful allies. Advocates involved in mediation can also make the mediator's life far much easier and task lighter if they possess basic training in mediation.

The lack of training in mediation by most advocates in Kenya is only compounded by the adversarial nature of training and dispute resolution in which lawyers have always thrived. The less formal soft skills required in mediation are therefore alien to the average Kenyan lawyer. This presents a handicap to the mediation process as more time is taken educating the advocates on their role in mediation and the essential elements of confidentiality and informality of the process.

Although converts are slowly but surely being won in these areas, the progress is still too slow to report or to positively affect the pilot scheme. Advocates remain disputatious and some view mediation as an affront to their area of operations. It is needless therefore to emphasise the need for training of lawyers on mediation should the Court annexed scheme succeed. Some advocates also view mediation as another effort at a reduced opportunity to maximise on legal fees in a brief and will therefore engage in every manner of tactics to scuttle the process, including raising jurisdictional objections on the mandate and constitutionality of the mediator and the mediation process! Most advocates, including some of very high standing and long practice, sadly have no knowledge of mediation or are clueless of even the existence of the pilot project rules, while others have stunted knowledge of the same and at a very elementary level.

Training and sensitization of both advocates and members of the public, which two groups forms the most substantial portion of stakeholders in the pilot project, should have been undertaken prior to or concurrent with the rolling out of the pilot project. Seminars, in conjunction with the

Law Society of Kenya Continuous Professional Development Committee, would have been an ideal forum for introducing court annexed mediation to legal practitioners. The need for training and equipping of lawyers with mediation skills is important because members of the public rely on their advice and skills in deciding whether or not to engage in mediation. Disputants, even those who are literate, will always seek their counsel's advice on the forum for dispute resolution. An advocate who is not confident enough, for lack of knowledge, will always discourage his client from mediation, not because of mediator's insufficiencies but the said advocate's inadequacy.

A fair assessment of the success or failure of the pilot project cannot be made in the context of its implementation in an environment where lawyers representing parties are not equipped with the necessary tools necessary in assisting mediators resolve their client's disputes. Such training, I believe, will precipitate a culture of embracing mediation by legal practitioners and by effect and extension, their clients, as opposed to an obstructive approach by counsel.

4.1 Remuneration

Mediation consumes time and resources attendant thereto. The body of mediators engaged in the pilot project are few. As a consequence, the investment in time by these professional persons is enormous. As a pilot project, it is of course appreciated that the largely donor supported project cannot meet the realistic remuneration of professional mediators. However, as a preposition, based on the belief that the project will be extended to cover the entire country, it is important that a proper remuneration structure, acknowledging the professional time and intellectual resource invested in mediation, be put in place. The roughly \$200 paid to a mediator regardless of how long the mediation takes is grossly inadequate by any standard or stretch of the benevolence and

magnanimity of mediators, considering that most mediations take at least 20 hours to conclude.

Commercial mediation could save parties significant sums of money and costs besides freeing up time to engage in their principal commercial activities. As a result, commercial mediation as a business support service, just like arbitration, should be cost effectively priced. In the absence of scales for remunerating mediators, the CIArb Kenya Mediation Fees Guidelines can be a convenient point of reference and beginning point. An hourly rate that meets the expectations, both of the parties and mediators will attract the interest of serious professionals into mediation and keep costs of dispute resolution reasonable. It is a fine balancing act, between the realities of professional service, retention of competent professional persons and cost effective access to justice.

5.0 Mediation Facilities and Administrative support

Currently the mediation pilot project is hosted at the NCIA and the Judiciary Milimani Courts at Nairobi. The project does not have its own facilities. Sufficient rooms and support services such as computers and printers are crucial for mediation. As the project grows with a possibility of a national roll out, mediation rooms, computers, refreshments and other necessities will undoubtedly become a growing challenge. With such growth, the need for a properly furnished mediation centre will increase. Currently, the space constraints, lack of support in terms of facilities and personnel mean that only a handful, maybe up to 3 mediations can be conducted in a day. If mediation is to witness the growth and deserved effect, the entire country, or at least the high court stations throughout the country should be able to host multiple mediations at a go.

Mediations can be long drawn out affairs which require adequate rest, recreation and private session rooms for use by parties and the mediator. Many a time mediators are without typing and printing facilities and often when settlements are reached, the mediator is forced to adjourn so as to seek secretarial or printing services. Many mediations also involve multiple parties. In some mediations I have experienced up to sixty people attending. Challenges as to their accommodation almost invariably arise.

Kenya still has a significant population of illiterate people who can only communicate in their mother tongue. Whereas the judiciary has translators in its employment, the same cannot be said of the pilot project. With its lean and overstretched staff, who also serve in other capacities in the judiciary as clerks and magistrates, the pilot project suffers an acute shortage and administrative frailties which require urgent redress.

Plans should therefore be put in place for a mediation centre with the necessary facilities to support this most important aspect of dispute resolution just in the same manner as the judiciary has engaged in ambitious court construction projects throughout the country. My recommendation is that for every court house built, in the court house, at least six mediation rooms be availed with a minimum of four support staff each.

6.0 Conclusion

New frontiers and legal vistas have been opened through the etching of ADR and mediation into the Kenyan Justice system through the Constitution of Kenya 2010 and enabling legislation. The Mediation pilot project offers a breath of fresh air into the stuffy court corridors previously fraught with case backlog, delays, cobwebs of dizzying

technical rules of procedure and worryingly high costs. The Mediation Pilot Project has demonstrated that mediation can and does deliver timely, cost effective and practical justice. However, the teething problems that accost and bedevil the process must be timeously addressed so as to avoid regressing the gains so far achieved by mediation through the pilot project. The challenges addressed above are by no means exhaustive. Indeed, a pilot project is a test run or dress rehearsal, where hitherto unanticipated hiccups may come to the fore and be addressed in readiness for the main roll out.

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