



# Alternative Dispute Resolution

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# ALTERNATIVE DISPUTE RESOLUTION

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**Volume 5 Number 1**

**2017**

Alternative **Dispute Resolution** is a journal of the Chartered Institute of Arbitrators (Kenya Branch) published twice a year

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**Typesetting by:**

New Tech Edge Solutions Ltd,

P.O. Box 60561 - 00200,

Tel: +254 721 262 409/ 737 662 029,

Nairobi, Kenya.

**Printed by:**

Mouldex Printers

P.O. Box 63395,

Tel - 0723 366839,

Nairobi, Kenya.

**Published by:**

Glenwood Publishers Limited

P.O. Box 76115 - 00508

Tel +254 2210281,

Nairobi, Kenya.

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This Journal should be cited as (2017) 5(1) Alternative Dispute Resolution

**ISBN 978-9966-046-13-0**

## Editor's Note

Welcome to this Issue of the *Alternative Dispute Resolution Journal* (Vol. 5, No.1), a publication of the Chartered Institute of Arbitrators-Kenya Branch (CIArb-K).

Over the last few years, this Journal has been a fertile source of information, not only for established ADR practitioners and academics but also for the general readers who wish to familiarize themselves with the various ADR mechanisms. It is available both in hard copy and at <http://www.ciarbkenya.org/>. We, as the Editorial Team, strive to publish papers that unearth and address pertinent and emerging issues in the law and practice of ADR.

The Journal is peer reviewed and refereed so as to ensure the highest standards. It has a worldwide readership and it is a global platform for scholarly discourse on Alternative Dispute Resolution.

This is an exciting edition comprised of rich articles on the various ADR mechanisms contributing to the general theme of conflict management. This issue spans widely across the dispute resolution field, confronting subjects including, corporate governance disputes, finality of arbitral awards, challenges facing international commercial arbitration in Africa, regulation of online dispute resolution, statutory adjudication, the role of lawyers in alternative dispute resolution, arbitration vis a vis expert determination, the role of culture in commercial arbitration in Africa, among others.

While the use of ADR mechanisms in Kenya continues to gain popularity in aptly dealing with a wide range of issues, the same comes with many practical and legal concerns, which must continually be dealt with to ensure that they do not forestall the growth and uptake of these mechanisms which have continually gained acceptance within the formal framework in the country.

We encourage feedback from the readers and reviewers so as to meet the goal of continuous improvement.

CIArb-Kenya takes this opportunity to thank the publisher, contributing authors, Editorial Team, reviewers and all those who have made it possible to publish this Journal.

**Kariuki Muigua, Ph.D., FCIArb (Chartered Arbitrator)**

**Editor**

**Nairobi, March 2017**

# Alternative Dispute Resolution

A Journal published twice a year

Volume 5 Issue 1 - 2017

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*Consistency and Predictability of the Law versus Finality of the Arbitral Award: A Juridical Juxtaposition of Sections 32A, 35 and 37 of the Kenyan Arbitration Act - Wilfred Mutubwa*

**Consistency and Predictability of the Law versus Finality of the Arbitral Award: A Juridical Juxtaposition of Sections 32A, 35 and 37 of the Kenyan Arbitration Act**

*By: Wilfred Mutubwa\**

## **1.0 Introduction**

Arbitration seeks to dispose of disputes fairly, expeditiously and cost effectively. Arbitral awards are generally not used as precedents although some international arbitration institutions such as the, International Centre for Settlement of Investment Disputes (ICSID) periodically publish decisions of its arbitral panels.<sup>1</sup> The doctrine of *stare decisis* does not therefore generally find place in Arbitration.<sup>2</sup> Arbitral awards are generally made on merit and on a case to case basis, without a strict requirement for regard to precedent. Awards do not generally set precedents, although by application, coincidence and in practice; common law and even civil law trained lawyers who also sit as arbitrators generally consistently apply legal principles and reach similar conclusions in matters which are factually or contextually similar or near similar. This is because most disputes in arbitration always revolve around interpretation and application of general principles of the law of contracts, which are fairly similar across many jurisdictions.

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<sup>1</sup> Decisions of ICSID arbitral tribunals' decisions are published by the World Bank and can be sourced at <https://icsid.worldbank.org/apps/icsidweb/cases/pages/advancedserache.aspx>. The ICSID Review is a journal which discusses topical issues in international arbitration in light of decisions of the ICSID arbitral tribunals. The underlying rationale for the reporting and review seems to be the need to and importance of developing a consistent and predictable set of principles to be applied in international arbitration.

<sup>2</sup> The common law doctrine of *stare decisis* otherwise known as 'precedent' underlines, in its elementary application, that cases with similar facts, applying similar legal principles and contexts should ideally be decided in a similar manner or should attract a similar conclusion. In practice, decisions of superior courts, on a finding of law and a set of facts, is binding to inferior courts and tribunals which should apply the same test and reach similar findings, particularly where facts are fairly similar.



International arbitration finds attraction to transnational commercial people where national courts are either restrained by law or practice from interference with arbitration proceedings. Similarly, easy and quicker enforcement of arbitral proceedings attract commercial arbitration to certain parts of the world. Obviously, and therefore conversely, where court interference with arbitration, cumbersome and slow enforcement procedures exist, such destinations become unpopular with international business people who prefer arbitration as a dispute settlement mechanism. This is most relevant to Kenya, now that it seeks to position itself as the preferred destination for international capital and dispute Resolution.<sup>3</sup>

This article therefore explores the two competing concepts of consistency and predictability of the law through wider court intervention in arbitration, and of finality of the arbitral award by severely limiting their scrutiny by domestic courts.

## **2.0 Arbitration versus Litigation**

Commercial persons are attracted to arbitration as a means of resolving their disputes over litigation for several reasons. These reasons include its flexibility, costs effectiveness, expeditious disposal of disputes and the use of an expert neutral. But perhaps key among the attractive attributes of arbitration is its finality or perceived finality. Commercial business persons want a quick and final conclusion to their disputes.

The jury may still be out on whether commercial arbitration is cost effective. However, practitioners of both domestic and international arbitration are increasingly concerned with the time taken in arbitral proceedings, the costs associated therewith and the creeping of court litigation tendencies such as application of technical rules of procedure. These tendencies are largely blamed on lawyers and party representatives with legal backgrounds carrying their court room training and influences into arbitration. These

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<sup>3</sup> Through the Nairobi Centre for International Arbitration Act, 2013, Kenya seeks to set its capital, Nairobi, as the regional hub for international Arbitration. The Nairobi International Financial Centre Bill, 2016 seeks to establish Nairobi as the destination of choice for foreign direct investment.

developments have robbed arbitration of its lustre and given fodder to the critics and cynics of arbitration as a means of dispute resolution. Training and grounding in arbitration law and practice is therefore often an effort at lawyers unlearning their court room skills which are mostly unwelcome in arbitration. Whether this has been achieved is a discussion for another day.

Therefore, key among the distinguishing features of arbitration that seems to remain undisturbed by the infiltration of courtroom tendencies is its finality. Or is it? Most arbitration agreements (usually clauses in a contract) expressly underscore that the decision of an arbitrator or arbitral tribunal is final. But what exactly does finality of an Arbitrator's decision mean?

Arbitration agreements, of course, like any other contract between two private persons, are subject to the laws of the land. In this respect, the Arbitration Act 1995 (as amended in 2009) is the principal piece of legislation that regulates both domestic and international arbitrations conducted in Kenya or whose seat is appointed by either party agreement or default, to be Kenya.<sup>4</sup> Parties in arbitration are free to agree on how to conduct their arbitration and indeed, as to whether the findings of the arbitrator are subject to an appeal or not.<sup>5</sup> This free hand is referred to in arbitration parlance or jargon as party autonomy.

Party autonomy is however subject to public policy safeguards which may include compliance with rules of natural justice and requirements of legality of the agreement. It is therefore fairly clear that an agreement as to the finality of an arbitrator's decision or award must conform with or pass the public policy consideration test. Such test includes consistency with regulating statute such as the Arbitration Act. In other words, parties to an arbitration agreement cannot agree for the decision or award of an arbitrator being final when such agreement can be found to be contrary to or contravening the provisions of the Constitution of Kenya, or statute such as

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<sup>4</sup> Section 2 and 3 of the Arbitration Act, 1995

<sup>5</sup> Section 3(6) and 20 of the Arbitration Act, 1995.

*Consistency and Predictability of the Law versus Finality of the Arbitral Award: A Juridical Juxtaposition of Sections 32A, 35 and 37 of the Kenyan Arbitration Act - Wilfred Mutubwa*  
Arbitration Act. It is the public policy of Kenya that its constitution and statutes be observed and enforced.

It may therefore be argued, with merit, that an agreement on finality of an arbitral award which has the effect of bypassing or avoiding statutory and constitutional scrutiny of arbitral awards by courts is voidable for offending the public policy of Kenya.

### **3.0 The Doctrine of stare decisis and Consistency of the Law versus Finality of Awards: The Dilemma**

Some commentators have argued that the role of courts in arbitration is to ensure consistency and predictability of the law.<sup>6</sup> This is the essence of the doctrine of *stare decisis*, which is at the heart of the development of the English common law. Kenya, a recipient of the English common law, upon its colonization in 1897,<sup>7</sup> has developed its jurisprudence along the doctrine of precedent, hence its importance when considering the propriety of court intervention in arbitration.

#### **3.1 The English Position**

The debate as to the need for court intervention and its extent in Arbitration is as old as arbitration itself. Indeed, in England, from as far back as 1989, discourse as to the propriety and proportionality of court intervention or interference in arbitration has continued. The proponents of deeper court involvement in matters arbitration and in particular in interfering with the findings, on merit, of an arbitrator cite the need to develop common law and consistency in its application as a valid basis for expanding the areas in which

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<sup>6</sup> See for instance Wilfred A. Mutubwa, "The Making of an International Arbitration Hub: A critical Appraisal of the Nairobi Centre for International Arbitration Act, 2013" *The International Journal of Arbitration, Mediation and Dispute Management* Volume 82 Issue 2 May 2016 p. 135 at 139.

<sup>7</sup> The Judicature Act Cap. 8 (as amended in 2016) places the official date of receipt of English Law into Kenya as 12<sup>th</sup> August 1897 and requires courts to exercise their respective jurisdictions in conformity therewith. Section 3(1) (c) reads, in part; "... the substance of the common law, the doctrine of equity and the statutes of general application in force in England on the 12<sup>th</sup> August, 1897, and the procedure and practice observed in Courts of Justice in England at that date."

courts can interfere with arbitral awards. On the other hand, opponents of this approach and hence proponents of limited court intervention in arbitration, advance that the need to promote London as a preferred destination for settlement of international commercial disputes and its desirability as a transnational financial hub, do not outweigh the importance and hence the need for consistency and predictability of the common law. Indeed a third school of thought exists. This one urges both judicial restraint in matters arbitration and the need to develop the common law. This is a compromise position that suggests a balance between restraint and wider judicial intervention in matters arbitration, particularly the award. This debate remains unsettled.

Dr. O'Reilly summarised the dilemma as experienced in England on this matter by paraphrasing Lord Thomas, Lord Chief Justice of England and Wales, in the context of whether to permit more appeals to courts; on decisions emanating from arbitral awards or not, said he:

“That the restrictions on appeals implemented by the Arbitration Act 1979, as interpreted by Lords Denning and Diplock in *The Nema*, and codified in the Arbitration Act 1996, were unduly severe and that more appeals should be permitted to proceed to Court.<sup>8</sup>

Pertinently, Lord Thomas is reported to have further stated as follows:

*“In retrospect the UK went too far in 1979 and again in 1996 in favouring the perceived advantages of arbitration as a means of dispute resolution in London over the development of the common law; the time is right to look again at the balance.”<sup>9</sup>*

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<sup>8</sup> Dr. Michael O'Reilly “Rebalancing the Relationship between the Courts and Arbitration?” *The International Journal of Arbitration Mediation and Dispute Management* Volume 82 Issue 3 August 2016 ISSN: 0003-7877 p.220 at p.220.

<sup>9</sup> Dr. Michael O'Reilly “Rebalancing the Relationship between the Courts and Arbitration?” *The International Journal of Arbitration Mediation and Dispute Management* Volume 82 Issues August 2016 ISSN: 0003-7877 p.220 at p.221.

According to Dr. O'Reilly, Lord Thomas takes the view that the need for consistency in the law now seems to outweigh the commercial consideration of making London an attractive arbitration centre. Lord Thomas is thus quoted as saying:

"There is an increasing realisation... that what matters more to the centrality of the common law, particularly as developed in London, is its use as a basis for doing business. That is, in my opinion, a far more important consideration than the business of dispute resolution in London... the wider interest of the industry and of the common law in general would be much better served by more issues being resolved in court and the law thus developed and clarified.<sup>10</sup>

Lord Thomas seems to suggest that it may be useful for the consumers of arbitration as their preferred dispute resolution mechanisms and those who prefer London as their preferred abode for resolving their disputes, to encourage appeals to courts in London from arbitral awards. He also seems to suggest that with consistency and predictability in the law, consumers of arbitration in London have the added ability or advantage of being able to predict, with some measures or degree of accuracy, the outcome of their disputes and to align their business activities accordingly. Lord Thomas, to this extent may have a point, after all isn't it the role of law not only to resolve disputes but to forewarn potential disputants?

### **3.2 The Kenyan Context**

A similar dilemma abounds in the Kenyan context. In the Kenyan legal and jurisprudential development, common law or reliance on precedent seems to have somewhat dissipated. There is now an angling towards legislation to achieve clarity and consistency. Many common law principles have therefore

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<sup>10</sup> Dr. Michael O'Reilly "Rebalancing the Relationship between the Courts and Arbitration?" *The International Journal of Arbitration Mediation and Dispute Management* Volume 82 Issue 3 August 2016 ISSN: 0003-7877 p.220 at p.220.

found residence in statute and regulations.<sup>11</sup> Although the doctrine of precedent is not entirely lost, it is of less pre-eminence compared to the earlier days of British colonialism. For instance, Article 167(7) of the 2010 Constitution of Kenya is clear that only decisions of the Supreme Court bind the courts below. No similar provision of a cascading binding effect down the hierarchical order of the courts below the Supreme Court exists.

In essence post-independence locally developed principles and laws unique to Kenyan culture, which mirror and respond to its social political and economic experiences, have since emerged in many areas, leaving behind English common law. Alternatively, many principles developed in common law are now statutorily codified. As such, the need for consistency in the law and predictability in its application has in a way been achieved through statute. Again, the “received law” which is stuck at 1897 English Law has since evolved, even in England, and there is no justification in applying an archaic set of laws which even the mother country has since moved away from. Thus, unlike England, there seems to be no real need to preserve the consistency and predictability of the common law at the expense of finality of arbitral awards. Finality of arbitral awards and the attraction of Kenya as an arbitration centre can be said to be, in the Kenyan case, more important than the preservation or the advancement of common law principles.

One may also argue, with some force of persuasion, that by pegging the received law at 12<sup>th</sup> August 1897, the drafters of the Kenyan Judicature Act (Cap 8) expected Kenya to develop its own jurisprudence, statutes and principles of equity. Certainly 120 years later Kenya has since achieved these.

An appeal from the High Court and other tribunals to the Court of Appeal is provided for under Article 164(3) of the Constitution of Kenya. The Court of Appeal of Kenya has stated, time without number, that its jurisdiction is only exercisable if donated by written law and not mere agreement.

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<sup>11</sup> Michael Wabwile “The place of English law in Kenya” (2003) *Oxford University Commonwealth law Journal*, pp.51-80 and Michel Wabwile “The Future of the Common law in Kenya” (2002) 20-27 *East Africa Law Review* 20-32.

This provision which circumscribes the jurisdiction of the Court of Appeal of Kenya has been used to justify appeals from the High Court in matters arbitration despite the provisions of Sections 32A, 35 and 39 of the Arbitration Act. The said Section 39 of the Arbitration Act outlaws appeals from matters involving Arbitration unless the parties agree. It is instructive to note that section 39 only applies to domestic arbitrations.

#### **4.0 Statutory, Contractual and Jurisprudential underpinnings of Finality of Arbitral Awards**

Following the promulgation of the 2010 Constitution of Kenya, arbitration has ascended to take a prime spot in the Kenyan dispute settlement system.<sup>12</sup> In fact, courts and tribunals are now enjoined to promote Alternative Dispute Resolution (ADR), which includes Arbitration as a key feature.

The Arbitration Act, 1995 is the principal legislation governing both international and domestic Arbitration in Kenya.<sup>13</sup> Section 32A of Arbitration Act, 1995 emphasises the finality of Arbitral awards in the following succinct terms:

*“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, on no recourse is available against the award otherwise than in the manner provided by the Act.”*

An appeal on the merits of an award is therefore only permissible where the parties have, in writing, expressed their intention to do so before commencement of the arbitral proceedings. It is trite and settled law that the

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<sup>12</sup> Article 159(2) (c) on the manner of exercise of Judicial authority and legal system provides that “In exercising judicial authority, the courts and tribunals shall be guided by the following principles- ... (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);”

<sup>13</sup> Section 2 of the Arbitration Act 1995 reads: “Except as otherwise provided in a particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration.”

Kenyan court of Appeal only entertains appeals sanctioned by statute or written law.<sup>14</sup>

Recent jurisprudence emerging from Kenyan courts seems to underscore the substance of Section 32A of the Arbitration Act, 1995 on the finality of arbitral awards, none more than the Court of Appeal in its decisions in the case of *Anne Mumbi Hinga v Victoria Njoki Gathara*.<sup>15</sup> The court castigated the High Court for entertaining a challenge to an arbitral award in the following words:

*"We therefore reiterate that there is no right for any Court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or Court of appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act."*

In yet another decision in the case of *Kenya Shell Ltd v Kobil Petroleum Ltd*, the Court of Appeal restated the principle of finality of Arbitral Awards and put it thus:

*"The Act which came into operation on 2<sup>nd</sup> January, 1996 and the rules thereunder, repealed and replaced chapter 49 laws of Kenya, and the rules thereunder, which had governed Arbitration matters since 1968. A comparison of the two pieces of legislation underscores as important the message introduced by the latter Act, the finality of disputes and a severe limitation of access to courts. Sections 6, 10, 12, 15, 17, 18, 28, 35 and 39 of the Act are particularly relevant in that regard."*<sup>16</sup>

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<sup>14</sup> Article 164(3) the Constitution of Kenya provides:  
"The Court of Appeal has jurisdiction to hear appeals from-  
a) The High Court, and any other Court or tribunal as prescribed by an Act of parliament." (Emphasis supplied).

<sup>15</sup> [2009] eKLR.

<sup>16</sup> [2006] eKLR.



It seems to be settled by Kenyan superior courts of record that arbitral awards should be final, at least on their decision on the merits of the disputes. This writer has argued elsewhere that judicial scrutiny of an award through challenge proceedings is not always a bad thing.<sup>17</sup> Judicial scrutiny through challenge of awards may very well give a stamp of approval to an award and the process leading thereto. It also serves as a quality assurance mechanism which keeps arbitrators in check and alert as to possible questions, with respect to the process and manner in which the arbitration was conducted and its final product - the award.

So sacrosanct and important is the principle of finality of arbitral awards and the attendant limitation on court interference to international or transnational business persons, that its emphasis can also be gleaned from the most standard forms of arbitration clauses/agreements used locally and those that are popular in the realm of international arbitration. Examples abound.

The United Nations Commission on International Trade Law (UNCITRAL) Model law on International Arbitration, from which the Kenyan Arbitration Act substantially borrows, in Article 5, underwrites finality of Arbitral awards conducted under the UNCITRAL rules in the following terms:

*“In matters governed by this law, no Court shall intervene except where so provided in this law.”<sup>18</sup>*

Yet another popular standard form building contract, crafted by the Joint Building Council (JBC) of Kenya in its arbitration clause condition 45.10, underlines the finality of arbitral awards made under the said contract. The clause pertinently reads:

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<sup>17</sup> See for instance Wilfred A. Mutubwa, “The Making of an International Arbitration Hub: A critical Appraisal of the Nairobi Centre for International Arbitration Act, 2013” *The International Journal of Arbitration, Mediation and Dispute Management* Volume 82 Issue 2 May 2016 p. 135 at 139.

<sup>18</sup> Available at [www.uncitral.org](http://www.uncitral.org). Accessed on 27<sup>th</sup> January 2017

Similarly, the FIDIC Standard form of contract, preferred in most domestic and international engineering contracts, in its Arbitration (clauses 20.4, 20.6 and clause 9 of the Appendix) also emphasises the finality of arbitral awards, whether after Adjudication as a precursor thereto, or where parties proceed to Arbitration directly without first resorting to Adjudication. For instance, clause 9 to the appendix states:

*"Any dispute or claim arising out of or in connection with the Dispute Adjudication Agreement or the breach, termination or invalidity thereof, shall be finally settled under the Rules of Arbitration of the international chamber of commerce before arbitrator appointed in award ..... with these Rules of Arbitration."*<sup>20</sup>

On the international plane, the popular International Chamber of Commerce (ICC) Arbitration Rules and the Chartered Institute of Arbitration (CIArb) Arbitration rules similarly emphasise the finality of arbitral Awards. For instance Rule 9(A) of the CIArb Arbitration Rules, reads:

*"The Award shall be final and binding on all parties to the reference."*<sup>21</sup>

There seems to be statutory and jurisprudential unanimity with respect to the hallowed principle of finality of arbitral awards, both on the domestic and international plane. This principle lies at the heart of the choice of arbitration as the preferred mode of dispute resolution over traditional court litigation, absent which the very essence, and this most distinguishing feature of Arbitration will be lost.

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<sup>19</sup> Available variously including at [www.advertisimhouseafricalltd>books>fidic.org](http://www.advertisimhouseafricalltd>books>fidic.org). Accessed on 27<sup>th</sup> January 2017.

<sup>20</sup> Available at [www.fidic.org](http://www.fidic.org). Accessed on 27<sup>th</sup> January 2017.

<sup>21</sup> Available at [www.fidic.org](http://www.fidic.org). Accessed on 27<sup>th</sup> January 2017.

It is with the foregoing appreciation in mind that the next part of this paper interrogates Sections 35 and 37 of the Arbitration Act, 1995, which provisions pose an existential threat to the most important feature of Arbitration, which is finality of the Arbitral Award.

### **5.0 Duplicity and Inconsistencies in Sections 35 and 37 of the Arbitration Act 1995**

Finality of an arbitrator's decision or award is discernibly at two levels. First is the finality which implies that no right of appeal lies and second, is the finality on the merits of the decision or award. Section 39 of the Arbitration Act 1995 recognizes that an appeal from the Arbitrator's decision may only lie with the agreement of parties. The appeal contemplated by Section 39 aforesaid is both on points of law and merits of an award or decision.

International Arbitral Awards are thereby shielded from an assault by local Kenyan Courts. This is however further restricted by the same provision to only domestic arbitrations.

The finality of an arbitral award is subject to challenge and enforcement proceedings that may be taken out by an aggrieved party. Sections 35 and 37 of the Arbitration Act, 1995 are instructive to this end. Section 35 sets out the grounds upon which the High Court on application may set aside an award. A carbon copy of those very same grounds is recited in section 37. In essence, there is no difference in substance between section 35 and 37 of the Act, save that Section 35 refers to setting aside while Section 37 refers to recognition and enforcement of the award. Section 35 is time bound and bars the filing of an application for setting aside after three months from the date of publication of the award, while section 37 does not seem to have a time bar except for the operation of Section 4(1) (c) of the Limitation of Actions Act (Cap 22), which affects proceedings for the enforcement of arbitral award.<sup>22</sup>

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<sup>22</sup> Section 4(1) (c) of the Limitation of Action Act Cap. 22 reads:  
“(1)The following action may not be brought after the end of six years from the date on which the cause of action accrued-  
(a) Actions to enforce an award.”

The grounds for setting aside or refusal to recognize an arbitral award are six and do not go to the merit of the arbitrator's decision but are on technical competence of either the parties or the arbitrator, public policy considerations, ability of and scope of the arbitrator's mandate and remit; or that the award was induced or affected by fraud, bribery, undue influence or corruption.<sup>23</sup>

A careful and considered study of both Sections 35 and 37 of the Arbitration Act reveals several potential problems to the finality of Arbitral awards. But first, it is important to underscore how one exercises the right to setting aside of an arbitral award. Under Section 37(2) of the Arbitration Act, 1995 a party seeking to set aside an arbitral award has three months from the date of the publication of the award to apply for its setting aside. Failing which, under Rule 6 of the Arbitration Rules, 1997 promulgated by the Chief Justice of Kenya to give effect to court intervention in arbitration matters, either party can proceed ex-parte and seek the enforcement of the award.<sup>24</sup> The enforcement proceedings under Sections 36 of the Arbitration Act are preceded by a notice to all parties of filing of the original or certified copies of the award and the arbitration agreement. And now to the potential problems.

Note that even if a party does not challenge an award under Section 35 of the Act, such party still retains a right to challenge the same on the very same grounds during proceedings for the adoption and enforcement of the award. Yet the drafters of Rule 6 of the Arbitration Rules 1997 were oblivious to the text of sections 37 of the Act, which presumes that a party may object to the recognition and enforcement of an award on the basis of grounds provided therein, which grounds are in all manners a carbon copy of those under section 35. It therefore follows that enforcement proceedings under Rule 6 of the 1997 rules cannot be ex-parte as the rules seem to suggest.

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<sup>23</sup> Sections 35 and 37 of the Arbitration Act, 1995.

<sup>24</sup> Arbitration Rules 1997, subsidiary legislation published as Legal Notice No. 581 1997.

It is also glaringly possible that a party which has unsuccessfully sought the setting aside of an award under Section 35 of the Act would have a second opportunity to challenge the recognition and enforcement thereof, on the very same grounds, before the very same High Court. The only difference being that the latter effort will be at the recognition stage, but it still amounts to same thing. The net effect is that the latter applicant will have had an opportunity to circumvent the three months statutory time bar for undergoing an award set in section 35 of the Arbitration Act, 1995. As a result, while a chance still exists to challenge an award under section 37, even after lapse of the three months stipulated in section 35, an award cannot be said to be final or binding.

In the ultimate, one can discern glaring legislative lacunae in the framing of sections 35 and 37 of the Arbitration Act along with Rule 6 of its subsidiary enabling Arbitration Rules, 1997. In the upshot, the aforesaid internal inconsistencies and lacuna in the law is that the decision and award of the arbitrator is robbed of its finality. Commercial disputants may find themselves in a lengthy two tier setting aside and challenge litigation in Court, which forum they, by electing arbitration as their preferred dispute resolution mechanism, had hoped to avoid in the first place.

## **6.0 Conclusion**

Unlike the United Kingdom, the Kenyan position seems to favour the need to establish Kenya as an investment and arbitration hub over the need to test awards in domestic courts and to ensure consistency and predictability of the law. The high court in its decision in the case of *Prof. Lawrence Gumbo & Another vs Honourable Mwai Kibaki & Others* perhaps put it most aptly in the following words.

“Our Section 10 is based on the United Nations Model law on arbitration and all countries who have ratified it recognise and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the act and in most cases the intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to

*Consistency and Predictability of the Law versus Finality of the Arbitral Award: A Juridical Juxtaposition of Sections 32A, 35 and 37 of the Kenyan Arbitration Act - Wilfred Mutubwa*  
recognize this autonomy, we would become a pariah state and could be isolated internationally.”<sup>25</sup>

A balance in Court intervention and restraint should be struck so much s to check the arbitral process but also to allow to restrain its finality and expedition.

Sections 35 and 37 should be reviewed to rid the same of the inconsistencies and unnecessary duplicity in the court’s interference with final arbitral awards.

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<sup>25</sup> [2004] eKLR.

## **A Case for Statutory Adjudication in Kenya**

*By: Paul Karekezi<sup>1</sup> & Francis Kariuki<sup>2</sup>*

### ***Abstract***

*Construction industries around the world contribute significantly to any country's economy, but face many challenges. Some of the key challenges in the Kenyan construction industry are: delayed payments, late delivery of projects, poor quality and cost overruns. These challenges are closely linked to the oft-repeated basic principles of construction project success – balancing the time, cost, and quality parameters. All these challenges are inextricably linked to cash flow, which has been said to be the “life-blood” of the construction industry. In facing these challenges, construction disputes become inevitable.*

Construction disputes are typically resolved through the two traditional binding methods of arbitration and litigation. The efficiency of the dispute resolution method can significantly affect cash flow in the construction industry. Over time, the traditional binding dispute resolution methods have been criticised as becoming increasingly expensive and protracted. This adversely affects cash flow, which in turn affects timely delivery of construction projects and the quality of construction. The vicious cycle continues.

In looking for better solutions, more than a dozen Commonwealth jurisdictions have introduced legislation to help address payment issues through a speedy dispute resolution method called statutory adjudication, with a view to improving cash flow in the construction industry. These jurisdictions provide mechanisms for facilitating and regularising payments under the construction contract and the statutory right to refer disputes to adjudication. After nearly two decades, adjudication has been hailed as a

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‘runaway success’ and cash flow has, at least anecdotally, been acknowledged to have improved.

Construction disputes in Kenya are currently still resolved through traditional methods – primarily mediation followed by arbitration. Like in other jurisdictions, construction arbitration is inefficient and time consuming. It does not help address cash flow issues in construction projects. This paper investigates whether there is a case for statutory adjudication in Kenya. The paper shows that introducing such legislation in Kenya could help address the problems associated with payment in the construction industry. As a consequence, such legislation can help improve payment issues and alleviate the consequent associated ills of poor quality and delayed project delivery.

## **1.0 Introduction and Background**

In a number of developed countries, the construction industry is one of the largest contributors to their gross domestic product (GDP) and a major source of employment.<sup>3</sup> For example, in the UK, it is reported that the construction industry contributed 8.5% to the GDP and 8% in employment in 2008.<sup>4</sup> In developing countries, such as Kenya, the construction industry contribution to the GDP is lower at 4.8% but increasing rapidly.<sup>5</sup> However, the construction industry is unique in a number of ways. There are multiple and complex processes in construction normally guided by contracts. Projects are usually conducted in phases, at times by different players with diverse interests and involve large sums of money thus making conflicts inevitable.<sup>6</sup>

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<sup>3</sup> P.Gerber & B I Ong, *Best Practice in Construction Disputes-Avoidance, Management a*

<sup>4</sup> Available at

<[http://www.wates.co.uk/sites/all/modules/filemanager/files/PDF/L.E.K.\\_Construction\\_in\\_the\\_UK\\_Economy](http://www.wates.co.uk/sites/all/modules/filemanager/files/PDF/L.E.K._Construction_in_the_UK_Economy)>accessed on 5th May 2015.

<sup>5</sup> Available at <<http://www.kenyanbusinessreview.com/562/construction-industry-in-kenya/>>accessed on 30th September 2014.

<sup>6</sup> The National Assembly of Sciences, *Reducing Construction Costs: Uses of Best Dispute Resolution Practices by Project Owners*, Proceedings Report, Federal Facilities Council Technical Report No. 149 (National Assembly of Sciences).



Sometimes, these conflicts arise because parties involved in the contract are unable to manage the arising differences.<sup>7</sup> Most of these conflicts, if not well managed result in contractual disputes between consultants, clients, manufacturers, suppliers, contractors and subcontractors. The prevalence of these disputes has warranted the introduction of clauses in construction contracts, which seek to provide a mechanism for managing and resolving them.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup>

Certain jurisdictions such as United Kingdom, New Zealand, the Isle of Man, Ireland, Australia, Singapore and Malaysia have enacted legislation, which affords parties the right to refer construction disputes to adjudication.<sup>11</sup> In these jurisdictions, statutory adjudication was introduced to address the unique needs of the construction industry. For instance, in the UK, the Latham Report recommended the adoption of adjudication<sup>12</sup> due to the challenges that were facing the construction industry, including delayed payments to subcontractors and suppliers. These challenges were affecting the timely completion of projects in UK. The Report recommended the adoption of an adjudication system that was independent of the contract

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<sup>7</sup> HY Chong & MZ Rosli, *The behavior of dispute resolution methods in Malaysian construction industry*, (Industrial Engineering and Engineering Management, 2009).

<sup>8</sup> Ibid.

<sup>9</sup> JK Yates & JA Smith, 'Global legal issues for engineers and constructors,' *Journal of Professional Issues in Engineering Education and Practice*, 133 (3), 199-209.

<sup>10</sup> C. Dancaster, 'Construction adjudication in the United Kingdom: Past, present and future,' *Journal of Professional Issues in Engineering Education and Practice*, 134 (2), 204-208.

<sup>11</sup> P Gerber & B Ong, *Best Practice in Construction Disputes-Avoidance, Management and Resolution*, (LexisNexis-Butterworths 2013) 360.

<sup>12</sup> P. Coulson, *Coulson on Construction Adjudication*, (2nd edn, Oxford University Press, 2011).

administration.<sup>13</sup> In addition, the Report sought to ensure that courts were to be used as a measure of last resort in dealing with arising disputes. In Australia and Singapore, the enactment of statutory adjudication was as a consequence of the economic downturn experienced in those countries, leading to delayed payments in the construction industry.<sup>14</sup>

In the developed economies including UK and Australia, the main contractor is ultimately responsible for the construction and delivery of the project. However, subcontractors and suppliers provide between 80-90% of the work associated with the project.<sup>15</sup> On the other hand, in Kenya the involvement of subcontractors and suppliers is much more limited and therefore delayed payment to subcontractors and suppliers is not as detrimental to the completion of a project as it is in developed economies.

Stalling of projects in Kenya arises from non-payment to the main contractor by the employer, who invariably is the government, since public sector projects by far account for the bulk of the construction industry. Delayed payments by the Kenya government have been a major problem, which has nearly brought the industry to its knees. The principal reason for the government's failure to make payments in a timely manner is the significant construction cost overrun on nearly all publicly funded construction projects. This presents a different problem from that experienced in the UK and other developed economies, where statutory adjudication was adopted, in the sense that delayed payments in those jurisdictions was mainly between private parties; e.g. private developers, contractors, subcontractors and suppliers.

The prevalent dispute resolution mechanism in the construction industry in Kenya is arbitration, which as stated above does not engender itself to quick resolution of disputes. In an effort to address this problem, the Kenya Branch of the Chartered Institute of Arbitrators (CI Arb (K)) published Adjudication

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<sup>13</sup> Para. 5.17 (2) of the Latham Report.

<sup>14</sup> KL Stehbens *et al*, *Partnering in the Australian Construction Industry: Breaking the Vicious Circle*.

<sup>15</sup> Gerber & Ong (n1) 353.

Rules for the Construction Industry in 2003, which provide for decisions to be made in a period not exceeding 28 days. Whilst these rules were in the main adopted by private parties, the government did not adopt them.

The Public Procurement and Disposal Act of 2015, makes it mandatory for large contracts, wholly financed by the government, to adopt the 4th Edition of the *Fédération Internationale des Ingénieurs – conseils* (FIDIC) Conditions of Contract, 1987 reprinted in 1992, which require disputes to be resolved by arbitration. For smaller works wholly financed by the government, the dispute resolution mechanism entails adjudication in the first instance followed by arbitration in the event of dissatisfaction with the adjudicator's decision. However, unlike statutory adjudication, the adjudicator's decision is neither binding nor final and only binding where neither party refers the dispute to arbitration within 28 days of the adjudicator's decision.

For projects jointly funded by the government and multilateral development banks or other international finance institutions, the MDB Harmonised Edition of the FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, are adopted in the majority of contracts. The dispute resolution mechanism provided for in this form entails reference to a Dispute Adjudication Board (DAB) in the first instance, whose decision is binding on the parties, albeit temporarily.<sup>16</sup> However, until recently after the ruling by the Court of Appeal of Singapore in the *Persero* case,<sup>17</sup> it was debatable whether non-compliance with a DAB decision, which is not final and binding, could be referred to arbitration. Following this ruling, coupled with the FIDIC Guidance Memorandum,<sup>18</sup> it is now accepted that enforcement of a DAB decision under the FIDIC Red Book, can be referred to arbitration whether binding or final and binding, without the need to review the merits of the case.

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<sup>16</sup> See Clause 20.7 of the MDB Harmonised Edition of the FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer.

<sup>17</sup> *Perusahaan Gas Negara TBK v CRW Joint Operation* [2015] 4 SLR 364.

<sup>18</sup> FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract dated 1<sup>st</sup> April 2013.

The prevailing dispute resolution mechanisms in Kenya deny contractors, subcontractors and suppliers the ability to obtain timely redress and therefore affect their ability to finance projects. This has in turn negatively impacted the quality and timely delivery of construction projects.

## **2.0 Major Challenges Facing the Construction Industry in Kenya**

### ***2.1 Delayed payments***

A key challenge facing the construction industry in Kenya is delayed payment to contractors and subcontractors. Delayed payments to contractors is prevalent in the public sector as well as in the private sector, but the majority of cases of unpaid amounts are in the public sector. As an example, in September 2013, the three road agencies, namely the Kenya National Highways Authority (KenHA), the Kenya Rural Roads Authority (KeRRA) and the Kenya Urban Roads Authority (KURA), owed members of the Road and Civil Engineering Contractors Association (RACECA) over USD 300 million (or 0.54% of GDP).<sup>19</sup> The total amount owed by these agencies to contractors, consultants and suppliers was in the region of 1% of GDP.

As a consequence of delayed payments by employers, a number of contractors and subcontractors were forced to stop work and retrench staff because they were not able to increase their facilities with banks. The Central Bank of Kenya (CBK) stated in its 2013 report that commercial bank loans amounting to nearly USD one billion (about 2.2% of GDP) had not been serviced for more than three months by the end of December 2013. CBK attributed this situation mostly to delays by the government to pay contractors' bills.<sup>20</sup>

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<sup>19</sup> See Construction Business Review, 20 September 2013 – available at <<http://www.constructionkenya.com/2977/road-agencies-owe-kenyan-contractors-sh22bn/>>accessed on 12th December 2014.

<sup>20</sup> See Business Daily, 2 February 2014 – available at <<http://www.businessdailyafrica.com/Bad-loansjump-to-Sh80bn-over-late-pay-to-contractors/-/539552/2170046/-/q1trawz/-/index.html>>accessed on 12th December 2014.

## ***2.2 Late delivery of projects***

As a direct consequence of non-payment by employers in a timely manner, contractors invoke provisions in the works contracts, which allow them to either slow down the works or suspend the works altogether. For example, in 2013 members of RACECA suspended 60 government road projects and retrenched 5000 staff.<sup>21</sup> Stalling of projects is also prevalent in the building sector as well. Furthermore, as a consequence of poor cash flow, contractors are not able to invest in new equipment, which affects their ability to maintain high levels of productivity due to frequent plant and equipment breakdowns. A study by Msafiru Atibu Seburu<sup>22</sup> shows that over seventy per cent of projects in Kenya are likely to incur time overruns of over fifty per cent.

## ***2.3 Poor quality***

Cases of buildings collapsing and premature failure of road infrastructure in Kenya have been on the increase. The main reason for this is the use of substandard materials and poor workmanship.<sup>23</sup> Whilst the use of substandard materials and poor workmanship can be attributed to lack of regulatory oversight, it is submitted that delayed payments to contractors and subcontractors also contributes to this –contractors and subcontractors would tend to source the cheapest materials and labour they can get away with if their cash flow is severely constrained.

## ***2.4 Cost overruns***

Cost overrun is a problem affecting projects both in the public and private sectors. Whilst some of the causes of costs overruns can be attributed to poor

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<sup>21</sup> See Standard Digital News, 20 September 2013 – available at <http://www.standardmedia.co.ke/article/2000093908/road-contractors-say-state-owes-themsh22b> accessed on 10th October 2014.

<sup>22</sup> An investigation into factors causing delays in road construction projects in Kenya – available at <http://erepository.uonbi.ac.ke/bitstream/handle/11295/27557/Abstract.pdf?sequence=1> accessed on 10th October 2014.

<sup>23</sup> J. Kuta, J. & D. M. Nyaanga, DM, 'Effect of quality of engineering materials on construction and quality of buildings – A case study of Nairobi, Kenya', 20 January 2014 available at <http://www.primejournal.org/PJSS/pdf/2014/feb/Kuta%20and%20Nyaanga.pdf> accessed on 10<sup>th</sup> October 2014.

design, which leads to variations, delayed payments account for the larger part of costs overruns. Delayed payments result in employers having to incur interest payments, and where projects are suspended, additional costs are incurred in terms of prolongation costs. It is not unusual for costs overruns on public sector funded projects to exceed thirty per cent of the original contract price.

In view of the foregoing, CIArb (K) has for the last four years been driving the initiative to introduce a law providing for a right to adjudication in construction projects. This initiative culminated in the drafting of an Adjudication Bill that was presented to parliament in 2011 but later withdrawn in the same year because it was found wanting in many aspects. For example, the scope of application is not stated. In addition, Section 4 of the Bill provides that parties to a contract or agreement who wish to have any dispute referred to adjudication are to include an adjudication clause in the contract or agreement. This provision is not in line with the principles of statutory adjudication adopted in other jurisdictions where a mandatory right to adjudication must be included in the relevant construction contract. Further, the Bill fails to take into consideration the unique needs of the construction industry in terms of the major role of the government in the industry. To date, a review of the Adjudication Bill is yet to be undertaken.

### **3.0 What is Adjudication?**

In everyday language, the term 'adjudication' is understood to mean a process of hearing and resolving a dispute before a court or administrative agency.<sup>24</sup> However, of late, it is becoming a common term used and referred to in legal as well as engineering/construction fraternity.

In the Kenyan context, and indeed in other parts of the world, adjudication may not be all that unfamiliar to most players in the construction industry. In many engineering/construction contracts, the engineer/architect/contract administrator acts as the first line of dispute resolution between the employer and the contractor. Even if there are no such express

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<sup>24</sup> S Wild, *Webster's New World Law Dictionary* (Wiley Publishing, Inc. 2006) 14.

stipulations in a particular contract, it can be implied that the contract administrator has to undertake this function, if need be, as part of his 'quasi-judicial' duty under the contract.<sup>25</sup>

### ***3.1 Principles of Construction Adjudication***

Construction Adjudication (hereinafter referred to as "Adjudication") is fundamentally a system for the expeditious resolution of construction disputes, particularly progress payment disputes that arise during the course of a construction project.

Unlike arbitration or litigation, adjudication is a temporarily binding dispute resolution process. It is temporarily or more commonly referred to as "*provisionally*" binding because the decision can subsequently be revised by an arbitrator or a judge.

Adjudication provides a right to go before an adjudicator for an interim decision on a dispute at any time. The adjudicator is appointed quickly and is required to carry out an expert determination within a limited period of time. The parties are required to abide by his decision until it is overturned in subsequent litigation, arbitration or by agreement. In certain instances, adjudication provides a right of suspension on account of non-payment of interim certificates - the contractor could 'go out and stay out' until he was paid. Further, adjudication provides a general prohibition on conditional payment obligations.

The basic idea is 'pay now, argue later' (or perhaps more accurately, 'argue it quickly now, abide by the interim decision on that quick argument, and have the full argument in litigation/arbitration later after you have paid'), which secures cash flow, if necessary on the back of a 'quick and dirty' interim

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<sup>25</sup> See Fenn & Gameson (eds), 'Construction Conflict Management and Resolution,' at 359 and also para 5.9B Chapter 4 Book 3: Pre-Contract Award Practice by Ir. Harbans Singh K.S. at 261-283.

review, whilst preserving the parties' underlying right to obtain a final decision in due course.<sup>26</sup>

The provisional nature of adjudication, coupled with its strict timelines, have the object of ensuring that the works are not impeded by disputes and that a dispute, which may otherwise affect the relationship between the parties, is resolved in such a manner that the parties are “forced” to put the matter behind them and to get on with the remainder of their relationship.<sup>27</sup> Consistent with that, an adjudicator tends to maintain relationships on site. The parties are able to separate their disputes into smaller questions. Therefore, less rides (in terms of money, time and ego) on each of them.<sup>28</sup>

### ***3.2 Adjudication Mechanisms***

The most common forms of adjudication encountered in practice in the construction industry are namely:

#### *3.2.1 Consensual or Voluntary Adjudication*

Under consensual or voluntary adjudication, parties agree to submit their dispute or difference to adjudication either orally or in writing, in the majority of cases. The agreement should stipulate the nature of dispute or difference to be referred to adjudication, the method of appointing the adjudicator, the preferred adjudication procedure and possibly any default provisions. This is not a common dispute resolution process in the construction industry but is prevalent in small private sector construction projects, particularly in the developing world.

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<sup>26</sup> J. Bowling, *Has the Time Come for Mandatory Adjudication in Hong Kong*, paper given to members of The Society of Construction Law Hong Kong in Hong Kong on 27 June 2013 available at <[www.scl.hk](http://www.scl.hk)> accessed on 20th April 2014.

<sup>27</sup> Gerber & Ong (n10) 352.

<sup>28</sup> J. Bowling, *Has the Time Come for Mandatory Adjudication in Hong Kong* (n21).



### *3.2.2 Contractual adjudication*

Unlike consensual or voluntary adjudication, contractual adjudication entails incorporation of a clause in a construction contract providing for disputes to be referred to adjudication. The majority of the construction disputes cases referred to adjudication worldwide have so far been under contractual adjudication processes. The reason for this is the ubiquitous standard forms of contract, such as New Engineering Contract (NEC) form of contract, FIDIC forms of contract, The Joint Contracts Tribunal (JCT) forms of contract, etc. which provide for disputes to be referred to adjudication in the first instance.

Contractual adjudication can be “ad hoc”, where an adjudication tribunal or board is constituted whenever a dispute arises, or “standing” where the adjudication board is constituted at the commencement of the contract and remains in place until the contract is completed and all disputes (if any) are determined.

### *3.2.3 Statutory adjudication*

Statutory adjudication is a form of adjudication, which is mandated by law where legislation dictates what disputes can be adjudicated, the procedure to be followed, the default provisions, etc. Statutory adjudication legislative regimes differ across Commonwealth jurisdictions but share the common objective of enhancing security of payment, by eliminating unfair contractual terms and practices, and providing a fast and economical means of resolving disputes as they arise during the course of construction.<sup>29</sup>

Gaitskell<sup>30</sup> concluded that after the introduction of Adjudication in 1998 and the Civil Procedure Rules came into force on April 26 1999 in the UK, there was an impact upon other forms of dispute resolution, with the number of trials in the Technology and Construction Courts and arbitrations declining.

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<sup>29</sup> Gerber & Ong (n10) 358.

<sup>30</sup> Gaitskell, R. (2007), “International statutory adjudication: its development and impact’ Construction Management Economics.

A more recent study by Kennedy, Milligan, Cattanach & McCluskey (2010),<sup>31</sup> concluded that the adjudication process in the United Kingdom is still very well regarded by the construction industry as an effective means of resolving construction disputes, albeit with some limitations.

### ***3.3 The Adjudication Procedure***

Whether the adjudication process is contractual or governed by statute, the general procedure encompassing the principal steps is discussed in brief below.

#### *3.3.1 Appointment of the Adjudicator*

There are three ways of appointing an adjudicator:

- a) He/she may be named in the Contract;<sup>32</sup> or*
- b) Agreed by the parties and appointed by them;<sup>33</sup> or*
- c) If a) and b) above do not apply, by default, by an independent third party, commonly referred to as the Adjudicator Nominating Body (ANB).<sup>34</sup>*

In the case of (c), should the ANB fail to appoint an adjudicator within the stipulated period, the whole process must begin again.

A number of standard forms of contract include as part of their adjudication provisions, an Adjudicator's Contract or Agreement and Adjudication procedures.<sup>35</sup> The Agreement usually sets out the duration of the

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<sup>31</sup> Kennedy, P., Milligan, J., Cattanach, L. and Mucluskey, E. (2010), 'The development of Statutory Adjudication in the UK and its relationship with construction workload' available at - <http://www.gcu.ac.uk/media/gcalwebv2/ebe/content/COBRA%20Conference%20Paper%202010.pdf>, accessed on 10 January 2015.

<sup>32</sup> See World Bank Smaller Works Contract.

<sup>33</sup> See Clause 20.2 of MDB Harmonised Edition of the FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer.

<sup>34</sup> Such as Section 21(b) of CIPAA.

<sup>35</sup> See General Conditions of Dispute Adjudication Agreement, FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, 1999.

appointment, scope and extent of authority and remuneration and method of payment. The agreement also sets out the essential qualifications of the person being appointed the adjudicator, which is usually in the form of a warrantee by the adjudicator that he/she is:

- i. Experienced in the work which the Contractor is carrying out under the Contract;*
- ii. Experienced in the interpretation of contract documentation;*
- iii. Fluent in the language for communications defined in the Contract; and,*
- iv. Devoid of conflict of interest.*

### *3.3.2 Occurrence of a Dispute*

An adjudication process is initiated upon the occurrence of a dispute on a matter that has been mutually agreed expressly by the parties or required by legislation to be subjected to adjudication.<sup>36</sup> The party referring the dispute to adjudication gives written notice of its intention to do so. In the case of England and Wales, the *Scheme*<sup>37</sup> lays out the minimum content of the notice of adjudication, which includes a description of the nature of the dispute, details of where and when the dispute arose and the nature of the remedy being sought. Statute may prescribe additional minimal details.

It should be noted that unless the dispute in question falls within the scope of disputes agreed by the parties or allowed by law to be subjected to adjudication, it cannot be referred to adjudication. Such matters would be resolved through other forums such as arbitration or litigation.

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<sup>36</sup> Section 108 of the Housing Grants, Construction and Regeneration Act 1996.

<sup>37</sup> See Paragraph 1(3) of the Scheme for Construction Contracts (England and Wales) Regulation 1998.

### **3.4 Conduct of the Adjudication**

#### *3.4.1 Commencement of Adjudication*<sup>38</sup>

Upon the official receipt of a notice of reference to adjudication, the adjudicator has to establish that the dispute is of the same nature, as he believed it to be when he was appointed. Further, he must satisfy himself that the matters referred are within the ambit of the notice of adjudication. In the event a matter that is not identified in the notice of adjudication is included in the referral, it would be outside the adjudicator's jurisdiction, and if he makes a decision on such a matter, that decision would not be enforceable.

#### *3.4.2 Submissions by the Parties*<sup>39</sup>

In addition to submissions made by the parties, the adjudicator can require both parties to provide him with oral or written statements setting out the matters in dispute on which his decision is required and any other relevant documents or information to assist him reach a decision.

#### *3.4.3 Meetings with the Parties*<sup>40</sup>

As noted above, the adjudicator can take proactive steps to obtain as much information as possible to ensure that his decision, when made, reflects the contractual obligations and rights of the parties under the contract. In the same spirit, he may hold a meeting with the parties if deemed necessary.

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<sup>38</sup> D. Simmonds, *Statutory Adjudication – A Practical Guide* (Blackwell Publishing Ltd. 2003) 50.

<sup>39</sup> J L Riches & C Dancaster, *Construction Adjudication* (2nd edn Blackwell Publishing, 2004) 224.

<sup>40</sup> *Ibid* 226.

#### *3.4.4 Investigation of Facts and the Law<sup>41</sup>*

The adjudicator does not have an obligation to investigate the facts and the law.

However, he has an obligation to set the procedure for the adjudication. Whilst the adjudicator can ascertain the facts from submissions made by the parties, investigating the law may require him to take positive action because he has an obligation to ascertain the rights and duties of the parties under the contract.

#### *3.4.5 Taking Advice<sup>42</sup>*

As noted above, essential qualifications of the adjudicator include technical knowledge of the matter in dispute and ability to interpret contract documentation. However, there may be instances where the adjudicator may require advice of a technical or legal nature. In such instances, he may do so, with the agreement of the parties.

### ***3.5 The Decision***

Having reviewed all the relevant submissions, details, clarifications, etc., the adjudicator makes a decision. The decision must be set out in a logical format and should be reasoned unless otherwise agreed by the parties. Most standard contracts and statutes do not prescribe the format of a decision. Riches and Dancaster<sup>43</sup> have suggested that a decision falls conveniently into four distinct sections as follows:

- i. The introduction, which sets out what the document is, who the parties are, the nature of the contract, how the adjudicator was appointed and the like.*
- ii. The section that identifies the detail of the issues that the parties require the adjudicator to decide and sets out the adjudicator's conclusions in*

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<sup>41</sup> Ibid 228.

<sup>42</sup> Ibid 229.

<sup>43</sup> Riches & Dancaster (n32) 252.

*respect of each.*

- iii. The decision itself, which summarises the conclusions reached and sets out what each party has to do and when. This will also, if appropriate, set out the adjudicator's conclusions relating to the costs of the adjudication.*
- iv. Finally, the concluding words, which will include the adjudicator's signature and the date.*

The decision must then be communicated to the parties within the time frame expressly stipulated in the contract, in the statute, or in its absence, within a reasonable time. Should the decision be given outside the stipulated timeframe, it becomes unenforceable.<sup>44</sup> Similarly, should the adjudicator fail to give his decision, certain standard contracts provide for the matter to be referred to arbitration<sup>45</sup> and certain statutes provide for the parties to refer the matter to another adjudicator. In these circumstances, the adjudicator is deemed to be in breach of contract and he is not entitled to receive any fees.

### ***3.6 Enforcement of the Decision***

Experience to date shows that courts are supportive of adjudication and would ordinarily enforce an adjudicator's decision. However, there are differences in attitudes of courts in various jurisdictions. For example, UK courts would enforce a decision even when the decision could be wrong on the basis of fact or law, provided the adjudicator addressed the right question.<sup>46</sup> The attitude of the courts in Australia's East Coast is different particularly after the 2010 decision of the New South Wales Court of appeal in *Chase Oyster Bar v Hamo Industries Pyt Ltd*,<sup>47</sup> which considerably widened the ability to challenge an adjudicator's decision for judicial error.

### **4.0 Statutory Adjudication in other Jurisdictions**

In the United Kingdom, the need for statutory adjudication framework arose in the late 1980s/early 1990s. This was the time of a general recession, which had hit the construction industry hard in the UK. Consequently, the wider

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<sup>44</sup> *Ritchie Brothers (PWC) Ltd v David Philip (Commercials) Ltd* [2005] SLT 341.

<sup>45</sup> Clause 20 of FIDIC.

<sup>46</sup> *Nikko Hotels (UK) Ltd v MEPC PLC* [1991] 2EGLR 103.

<sup>47</sup> [2010] NSWCA 190.

financial constraints meant that contractors and sub-contractors were starved of cash flow. In addition, there was concern about the high number of construction disputes, the length of time it took to resolve those disputes, and their cost.<sup>48</sup> These problems mattered because the construction industry was an important contributor to the GDP. For example, in 1993 the value of output of the construction industry in the UK represented 8% of the GDP. Litigation and arbitration could not provide a timely remedy to construction disputes.

As a consequence, on 5th July 1993, it was announced in the House of Commons that there was to be a Joint Review of Procurement and Contractual Arrangements in the construction industry. The Review was done by Sir Michael Latham, and a report entitled 'Constructing the Team,' published in July 1994. This Report is what is famously referred to as the Latham Report. The two most radical aspects of the Latham Report concern the introduction of a 'Construction Contract Bill' and recommendation of a mandatory type of dispute resolution known as adjudication.

According to Gerber and Ong, these two recommendations struck at the very heart of the security of payment problem, and endorsed for the first time the use of adjudication in resolving construction disputes. The UK heeded to the recommendations of the Latham report by enacting the Housing Grants, Construction and Regeneration Act, 1996 and supported by a 'Scheme' for Construction Contracts. The 'Scheme' is imposed into a construction contract, if the contract's adjudication regime falls short of the minimum standard set down by section 108 of the Act.<sup>49</sup>

The Act provides a statutory regulation of payment regimes, such that every construction contract was required to have the following: an adequate interim payment mechanism; clear deadlines for giving any notice that an interim certificate would be paid with reasons; a statutory right of suspension

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<sup>48</sup> Coulson (n11)4.

<sup>49</sup> Section 114, HGCRA96.

and a general prohibition on conditional obligations.<sup>50</sup> Secondly, it provides that every construction contract had to provide for interim adjudication of disputes as they arose under the contract.<sup>51</sup>

- i. Adjudication under the Act is provided as follows:
- ii. *a right to go before an adjudicator for an interim decision on any dispute, at any time;*
- iii. *quick appointment of adjudicator within 7 days of being required;*
- iv. *the adjudicator would carry out interim expert determination, rather than being a judge or arbitrator;*
- v. *adjudication was essentially a short form, summary procedure, lasting no more than 28 or 42 days; and*
- vi. *the parties were required to abide by his decision until it was overturned in subsequent litigation, arbitration or by agreement.*

The underlying philosophy of the HGCRA96 is to facilitate cash flow by allowing a framework for 'pay now, argue later.' Following the HGCRA96, other Commonwealth countries have enacted statutory adjudication regimes. The features of each of the other regimes contain, to a great extent, the features in the English Act, in that the law stipulates a set of mandatory requirements for interim payments for 'construction contracts,' backed by a right to go for adjudication. The two-pronged statutory adjudication architecture is meant to, *inter alia*, ensure cash flow during the course of construction, strengthen the contractual chain and apply to a wide variety of 'construction contracts.'<sup>52</sup>

Notwithstanding, the fact that most Commonwealth countries have based their adjudication laws on the UK model, there are marked differences across the various regimes. For instance, under the UK model, adjudication is available for 'any dispute' arising out of the contract,<sup>53</sup> and there is 'no qualification, no limitation, upon the nature, scope and extent of the disputes

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<sup>50</sup> Section 110, Housing Grants, Construction and Regeneration Act, 1996.

<sup>51</sup> Section 108.

<sup>52</sup> Gerbler & Ong (n10) 353.

<sup>53</sup> Gerbler & Ong (n 10) 371.



that can be referred to adjudication under a construction contract.’<sup>54</sup> In Australia, in both the East Coast and West Coast models, adjudication is only available for payment disputes, and in the case of the East Coast Model, only to ‘upstream’ payment disputes. Further, the UK model is not purely statutory as the New Zealand or Malaysia models. As pointed out, the UK model sets out the minimum standards that every construction must contain, and if a contract does not contain the minimum content, then the ‘scheme’ under the Act applies.

#### ***4.1 Features of Statutory Adjudication Regimes***

In most jurisdictions with statutory adjudication frameworks, the law stipulates a set of mandatory requirements for interim payments for ‘construction contracts,’ backed by a right to go to adjudication. In addition, most of the laws apply to the construction industry and with exception of a few countries; the laws deal with payment disputes only. In relation to payments the critical features that are contained in the law are:

- i. A general prohibition of conditional payments/ ‘pay-when-paid’ clauses;
- ii. A right to progress payments;
- iii. A process for valuing progress payments; and,
- iv. A right to suspend work for non-payment.

Regarding the provision for adjudication for expeditious resolution of construction disputes, most regimes have the following features:

- i. A right to adjudication that is anchored in statute;
- ii. Adjudication is provided as a form of expert determination and the adjudicator is not bound by the rules of evidence and other legal technicalities;
- iii. The adjudication procedure is fast-tracked in that the adjudicator is quickly appointed and his decision is rendered expeditiously;

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<sup>54</sup> Coulson (n11) 67.

- iv. An adjudicator's decision is binding in the interim, meaning it must be complied with until it is overturned by a court judgment or an arbitral award later on;
- v. There are strong legal mechanisms for ensuring compliance with the adjudicator's decision.

The above features are critical in the establishment of a statutory adjudication framework that is apt for the construction industry in Kenya.

### **5.0 The Kenyan Adjudication Bill, 2011**

Based on the above, it is clear that Kenya does not have a law providing a right to adjudication in the construction sector. Further, the Draft Adjudication Bill that was prepared by the Kenyan Branch of the Chartered Institute of Arbitrators does not contain the above crucial features of statutory Adjudication. In addition, the paper has observed the following regarding the Bill:

- i. Generally, the Bill is poorly drafted with numerous typos, grammatical and syntactical errors;
- ii. The title of the Bill is ambiguous;
- iii. The scope of the Bill is too wide. It is an omnibus Bill that is not limited to the construction industry. Global practice shows that the Bill should deal with payment disputes in the construction industry and provide for a right to adjudication. The Kenyan Bill seems to apply to any dispute, from any sector of the economy;
- iv. The purpose of the Bill is not clear from the law;
- v. The types of contracts that the Bill applies to are not discernible from a reading of the Bill;
- vi. The Bill does not provide a right to go to adjudication. Adjudication under the Bill is contractual; and
- vii. The Bill does not address the crucial aspect of payment.

### **6.0 Is There a Need for Statutory Adjudication?**

As a consequence of the above, and in view of the fact that existing laws in Kenya neither adequately address payment issues nor provide a mechanism

for quick resolution of disputes in the construction industry, and yet the industry contributes some 4.8% of the country's GDP, it is submitted that there is an urgent need to enact an Adjudication law.

### **7.0 Recommended Amendments to the Bill**

Due to the weaknesses and inadequacies in the Adjudication Bill 2011, there is need for an entirely new Bill that is germane to the Construction industry in Kenya. The general recommendations regarding the proposed Bill are:

- i. The Bill should apply to the construction industry and deal with payment disputes only. This should be reflected in the title of the Bill to ensure it is not an omnibus Bill as the current one;
- ii. The purposes and objects of the Bill should be clear and succinct. The New Zealand Act is a good precedent in drafting the purpose;
- iii. The Bill must define the contracts it applies to. It is suggested that it should apply only to 'construction contracts.' A construction contract should include an agreement, in relation to construction operations, to do work or provide services ancillary to the construction contract such as: architectural, design, archaeological or surveying work, engineering or project management services, or advice on building, engineering, interior or exterior decoration or on the laying-out of landscape;<sup>55</sup>
- iv. Statutory payment regime: to deal with the cash flow problem the proposed Bill must provide for:
  - a) a right to suspend works for non-payment;
  - b) a general prohibition on conditional payment provisions such as 'pay-when-paid' clauses;
  - c) an interim payment mechanism that establishes a right for progress payments; and
  - d) a process for valuing progress payments.

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<sup>55</sup> The Irish Construction Contracts Act 2013 provides a good basis for defining a construction contract.

- v. Mandatory right to adjudication: the Bill must provide parties to a construction contract the right to refer payment disputes to adjudication. However, unlike the Australian East Coast Model, which narrows the scope of adjudication to 'upstream' payment disputes only, the proposed Bill should allow for claims to be made both upstream and downstream;
- vi. The proposed Bill must provide for a pre-adjudication payment system;
- vii. The proposed Bill should provide the minimum standards only rather than being a wholly statutory regime;
- viii. The proposed Bill should not impose costs. Each party should bear its own costs. As already indicated, costs impose a fetter on a party's right to refer disputes to adjudication;
- ix. The proposed Bill should allow for very limited grounds for challenging an adjudicator's decision;
- x. It is recommended that the timeframe within which the adjudicator is to render a decision should be tightened and fixed at 28 days. Leaving an opening for extending the time as contained in the Bill gives an employer the opportunity to expressly stipulate a longer period in the contract within which to refer the dispute to adjudication, thus going against the spirit of statutory adjudication laws;
- xi. Unlike the Irish Act, which provides that the Cabinet Secretary should appoint the adjudication panel, it is recommended that appointment of adjudication panels be left to registered professional associations and bodies involved in the construction industry, in order to avoid conflict of interest – the government will continue to be the dominant player in the construction industry in Kenya for the foreseeable future; and
- xii. Due to the predominant role of the government in the construction sector, it is recommended that the Bill provided for penal sanctions in the law to compel government departments to only initiate projects for which adequate budgetary provision has been made so that payment can be made timeously. Further, it would also ensure

that projects, where the Employer is responsible for the design, are not let until such time as competent design and tender documentation are available, in order to minimize incidences of variations.

## **Shifting of Gears: The Evolving Role of Lawyers in Alternative Dispute Resolution Processes**

*By: Eunice Lumallas\**

### **1.0 Role of Lawyers in ADR- An Introduction**

*“When you take a knife away from a child, give him a piece of wood to play with”*

-so goes proverb from Luyia community in Kenya<sup>1</sup>. Failure to provide the alternative, a piece of wood, may result in either one of the following actions: - the child nagging or crying incessantly and insisting on having that very knife, thereby being a nuisance. Given the stick, although she may not like it at the outset, in the fullness of time, the child may get to accept and love it, perhaps even more than the knife, and to the parent, it is a good thing, for is it not safer to play with the stick instead of a knife?

For years the trial lawyer has had training requisite to a gladiator, a fighter and trickster. A typical court is a war zone. It is adversarial and a trial lawyer will use all means possible to ensure that her client wins a case; it is a battle between lawyers. In this system, the lawyer has the duty to act fervently and devotedly for his client. Such passionate and zealous advocacy means that the lawyer will often search for all favorable evidence, law and facts, to destroy or insulate her client from all unfavorable evidence. Winning a case often brings fame and fortune to a lawyer. The downstream effect of the scenario is that often this search for a good fee note, fame and fortune has led to the churning up of merchants that masquerade as true lawyers, judges for hire, and a corrupt judicial system with dwindling levels of public trust.

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<sup>1</sup> **Luhya/Luyia** are a Bantu ethnic group in Kenya who live in the western side of the Country

Human existence is synonymous with that of conflict. Therefore, when well managed and resolved, conflicts have been found to be beneficial and lead to benefits in society including innovation, better co-existence and growth or development.

Disputes, which are what end up in courts, are by products of unresolved conflict, and are clear and well defined in terms of issues at stake.

The modern lawyer ought to be equipped with the requisite tools and skills to be utilized in the process of resolving conflicts, particularly in the face of an increased appreciation and use of alternative dispute resolution mechanisms in the world today and further, in light of an impatient and at times, increased temperamental modern life. This way, the modern lawyer can contribute to stability and national development.

On 4<sup>th</sup> April, 2016, the Kenyan Judiciary launched court annexed mediation (CAM) to resolve family and commercial related disputes on a pilot project basis.

Through the pilot project, the Kenyan Judiciary will go through a process of assessing what disputes are best resolved by mediation and whether resolution of disputes through mediation is cost effective, efficient and valuable. To conduct the mediations are judiciary approved <sup>2</sup>accredited mediators.

It has emerged that many lawyers are experiencing work as Counsel in mediations for the first time through the pilot project. In some of the mediations conducted, mediators have often reported having encountered

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<sup>2</sup> As accredited by the Mediation Accreditation Committee (MAC), a committee established under section 59A of the Civil Procedure Act (Chapter 21, Laws of Kenya). The appointment of the current Committee members was made by the Hon Chief Justice through Gazette Notice No 1088 of 2015. Chaired by the Chairman of the Rules Committee, Hon Justice Alnashir Visram (JA), MAC is charged with the mandate to among others maintain a register of qualified mediators. As at September 2016, the number of accredited mediators by the Judiciary stood at 65.

nervous faces of Advocates when asked to do that which lawyers are not often trained to do, that is, to be quiet and to give parties a chance to talk. This often throws lawyers a back; they are after all paid, primarily, to talk.

## **2.0 Choice of Mode of dispute resolution: Resolving Disputes in Courts &/or through ADR**

ADR has been credited with certain benefits over litigation including that processes are flexible, effective, responsive and accessible, they emphasise on balanced solutions for both parties (often referred to as win-win settlement) and meet psychological needs of parties. ADR is seen as effective in terms of meeting the requisite solutions for existing problems, for instance in business matters requiring business solutions as opposed to legal solutions. Additionally, ADR provides a formula for conduct of future relations, an advantage which is not available to parties through the court system which emphasises on blame, fault and punishment. ADR also ensures mere clarity of issues and unearthing of truth, and thereby gives victims a voice, and provides a more innovative range of solutions which are likely to be more durable due to participation and ownership by the parties. ADR is priced as encouraging self-reflection and even peaceful termination of relationships.

Noticeably, ADR has been proven capable of resolving a wide range of disputes beyond the confines of commercial and family disputes, the scope of which certainly involves criminal matters through such systems as the victim-offender mediation or restorative justice, well developed in the western Nations.

Moving slightly away from the skills of a gladiator, and adapting to the changing judicial climate, resolving disputes through ADR sets up a lawyer to be ultimately seen as a “good guy”, a much welcome positive enhancement for those in the noble profession.

Once a decision is made to resolve a dispute through ADR, a lawyers duty may arise either as;-



- i. Counsel representing a party once a dispute emerges and throughout the ADR process;
- ii. Counsel coming in while the dispute is underway to represent a party; or
- iii. Counsel hired to review the settlement agreement before it is adopted by the court.

The traditional roles of a lawyer still exist in ADR as a lawyer is expected to represent the best interests of the client, counsel the client, which includes encouraging and guiding the client, and advising the client on substantive and procedural law. The paradigm shift is however located in the conceptual foundation which is that in an ADR set-up, *all parties are expected to be responsible for the resolution of the dispute*;\_invariably, this implies that dispute resolution is therefore not lawyer-centered.

### **3.0 To Have or Not to Have: the Question of Legal Representation at a Mediation**

When deciding on the necessity of an Advocate as a representative in any mediation, parties ought to consider how effectively they understand the process by themselves, and how effectively they can communicate. They also have to check on any handicaps or hindrances to anticipated effective communication. This is because participation is party specific and is expected to be active at the mediation. A party shouldn't for instance be under the influence of alcohol or drugs or for any reasons have memory impairment the existence of which may render a settlement agreement null.

Parties must also be aware of the nature of the case, of themselves and of their opponent and examine the "balance of power"; the question therefore of whether each party has reasonably comparable power in the relationship to engage competently in mediation is an important one because an effective lawyer in a mediation may contribute to any power imbalance by helping parties to keep focus on the process within the correct legal parameters.

A lawyer may choose either one of two styles of representation at the mediation, passive (observe) or active (direct). When a lawyer chooses the

passive representation, he merely observes the sessions and advises during breaks, including advice on an appropriate time to take a break or to caucus. This passive observation method is credited with affording parties the greatest opportunity to take part in collaborative problem solving. This method is best where one party is unrepresented by counsel and also where there exists a continuing relationship between parties, by work or by blood.

On the other hand, where parties have no close and or continuing relations, where there is power imbalance or where a party is under the influence of alcohol drugs or medication, direct lawyer participation may be more appropriate.

### ***3.1 Mandatory Ethical Considerations***

#### *a) Good Faith*

Under most codes of conduct for mediators, most are encouraged to act in good faith. In a mediation scenario, this good faith principle is extended to and expected of lawyers and clients as well. All parties in mediation ought to act in good faith in their attempt to achieve settlement of the dispute.

#### *b) Confidentiality*

Confidentiality is a key requirement in mediation. Anything that is said or done in a mediation is strictly confidential. A lawyer is required to maintain confidentiality. Mediators often require all parties to sign a mediation agreement before the commencement of mediations and one of the clauses of the agreement is commitment to confidentiality. Accordingly all information and documents disclosed during the mediation, including any draft offers or counteroffers, are confidential and privileged between parties to the mediation, a lawyer must not disclose any information disclosed during the mediation unless all parties to the mediation agree, or unless he/she is compelled by law to make such a disclosure. A lawyer is expected to keep confidential and not to reveal to the other parties or their legal representatives information disclosed by the mediator or party during private sessions (caucuses) unless with the approval of the mediator and party involved.

The role of the Advocate can be viewed as relevant in three stages with respect to a mediation process: - *before the commencement of mediation, during the mediation and after the mediation process.*

### ***3.2 The Role of the Advocate before Commencement of Mediation***

At this stage, a good ADR lawyer would meticulously explain to his client nature of the mediation process including any relevant laws or rules of mediation, how a mediation session is conducted, possible ground rules and the possible length of the process.

The lawyer would then help her clients choose a 3<sup>rd</sup> party neutral or a mediator, and may do this, for instance, by looking at the arbitrator's skills and experience. She may peruse a mediator's resume, confirm whether or not such a mediator is accredited, and also check on issues of bias and neutrality. At this point, the Advocate will also assess and discuss the fee involved; both hers and the mediator's fees and costs.

Before the mediation, the lawyer ought to consider rules of confidentiality and ensure that such rules are established by the parties and the mediator at the pre-mediation conference. Further, the lawyer should advise their clients about good faith considerations in mediation proceedings and what it means to act in good faith.

The Advocate advises their client on the nature of the case and applicable substantive law and on the issue of timing of the process. For instance, should the process be expedited as so as not to risk hardening of positions or should it be delayed until, perhaps the completion of a discovery process?

A good lawyer should advice on a range of expected and acceptable outcomes of the mediation process and otherwise, on the alternative range of possible outcomes, should the matter be litigated in court. They should take the party through a risk assessment process in the mediation. Invariably, the ADR legal representative, at this point, aptly understands that his role is evolved, principally to that of an adviser.

### **3.3 Role of Advocate during the Mediation Process**

A lawyer should first confirm that as counsel in a mediation, they are committed to the process and will be available. This is because mediation sessions can take inordinately long hours, full days even.

The lawyer in mediation guides her client in negotiating by encouraging the client to express themselves openly and clearly and to define their interests. They will advise the client on when and how to gather and share necessary information that will enable the parties to make an acceptable decision and to compromise, where possible. Further, during the mediation, a good counsel will advise her client on when to take a break, when to calm down or even for the opportunity to consult the lawyer for additional information and advice. The lawyer discusses in creative fashion solutions and options available in the circumstances and the potential consequences of each option, and takes the client through the possible outcomes if agreement is not reached through mediation. If a lawyer suspects the other parties to the mediation are acting in bad faith, this may be raised privately with the mediator.

Ultimately, the lawyer manages the legal process for the party while mediation is being conducted, keeping the party informed of important dates, responding to and filing necessary pleadings, and conducting discovery.

Further, during the mediation, a lawyer may supplement the party's comments and highlight the issues to be decided upon. Lawyers are however cautioned against talking on behalf of parties at the mediation since a mischievous party may refuse to acknowledge a drafted settlement if she can place responsibility for that agreement at the palms of the lawyer. This is particularly a risk where lawyers participate directly and actively in mediations as opposed to the passive observer participation.

Additionally, lawyers are cautioned against raising objections or other mainstream trial advocacy antics such as cross examining the other party, as

some lawyers have been observed to attempt to do in mediations, which are non-adversarial in nature.

Some mediators prefer to meet parties separately (caucus) with a view to exploring bottlenecks to settlements and seeking to brainstorm on options, alternatives and consequences. A lawyer at the caucus would ensure that the process flows and that issues dealing with confidentiality are adhered to.

Finally, a lawyer assists a party to complete the legal process when mediation is concluded, whether mediation resulted in a complete, partial or no agreement. If a settlement is arrived at, a lawyer assists the party in reviewing the terms of any mediated agreement before appending her signature, in ensuring a party understands all the terms of the agreement and in preparing that agreement itself to ensure that it is unambiguous in terms and capable of being enforced.

### ***3.4 Role of an Advocate after the Mediation Process***

If full or partial agreement has been reached, the lawyers for both parties may request that the agreement be entered as a court order. If there is no agreement or only a partial agreement has been reached, the lawyer assists the party in continuing the process, which eventually will dispose of the entire case through trial or further settlement efforts.

In terms of levels of enforcement of the mediated agreement, since mediation is voluntary in nature and parties actively collaborate in reaching the settlement, they often take responsibility for the outcome. When parties take responsibility for the settlement, they are likely to abide by the terms reached and comply.

Thus, it is rarely necessary to take any action to enforce a mediated agreement. If and when necessary, the lawyer assists the party in enforcing the terms of the agreement as any other written contract.

While the stick is safer than a knife to relieved parents in the child analogy, so also is justice sweeter than the truth and the law in mediation for all parties involved. In adversarial court scenarios, evidence, the law and procedures may support the path to justice but that never guarantees “true justice” as can be obtained, directly and owned by the parties, as is possible in an alternative justice system scenario like mediation.

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## **Recent Case Studies of Corporate Governance Disputes in Kenya**

*By: James Muruthi Kihara<sup>1</sup>*

### ***Abstract***

*The writer herein showcases how corporate governance conflicts in select major corporations in Kenya have resulted in disasters. He further considers the necessity of incorporating alternative dispute resolution policies at boardroom level to avert conflicts. This article explores how consensus based dispute resolution, especially mediation, can help resolve corporate governance disputes and, consequently, contribute to improving corporate governance practices, strengthening investor confidence, supporting business continuity, and reducing the costs resulting from disputes.*

### **1.0 Introduction**

A company upon registration becomes a legal person and acquires juristic status recognized in law, which makes it capable of owning property, suing and being sued with perpetual succession and having a common seal. The concept of legal personality of a company is however an aberration, since a company does not, in the real sense of the word, have a mind, will or hands of its own. Of necessity, therefore, a company has to act through human agents.

Corporate governance is about how companies are controlled and managed. One of the prevalent concerns in the present times relates to the principles which determine corporate successes and failures<sup>2</sup>. Corporate success has been variously attributed to pursuit of excellence,<sup>3</sup> mastering the art of

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<sup>2</sup> Shukla M. Corporate failures: Why Organizations Fail to Learn. Article available at [http://www.reocites.com/madhukar\\_shukla/corpfailures.html](http://www.reocites.com/madhukar_shukla/corpfailures.html).

<sup>3</sup> Peters, TJ and RH Waterman, Jr, In search of Excellence. New York: Harper Row, 1892.



corporate change and transformation,<sup>4</sup> transformational leadership,<sup>5</sup> focus on core competence, time-based competition and fast-cycle capabilities, achieving total customer satisfaction, managing quality lean manufacturing technologies and continuous improvements.<sup>6</sup> These insights address the issue of corporate failures only by exception, effectively implying that failures result from the absence of one or more of the above attributes.<sup>7</sup> Corporate failures have been attributed to reasons which are both external (e.g., competition, changes in government regulations, scarcity of inputs, etc.) and internal (e.g., managerial incompetence, structural rigidity, lack of leadership, etc).<sup>8</sup>

Corporate Governance refers to the manner in which the power of a corporation is exercised in the stewardship of the corporation's total portfolio of assets and resources with the objective of maintaining and increasing shareholder value and satisfaction of other stakeholders in the context of its corporate mission. <sup>9</sup>

While conflict management can have positive results and help define the important issues needing resolution, full-blown disputes are always bad news for a company. They can lead to poor performance, scare investors, produce waste, divert resources, cause share values to decline, and, in some cases, paralyze a company. It is not surprising, then, that many corporate disputes have been settled outside of the courts, and that companies are increasingly resorting to alternative dispute resolution (ADR).<sup>10</sup>

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<sup>4</sup> Tichy, N, *Managing Strategic Change*. New York: John Wiley & sons, 1983.

<sup>5</sup> Tichy, N and MA Devanna, 'The Transformational Leader,' New York: John Wiley & Sons, 1986.

<sup>6</sup> Suzuki, K, *The New Manufacturing Challenge: Techniques for Continuous Improvement*. New York: Free Press, 1987.

<sup>7</sup> Ibid, note 2.

<sup>8</sup> Ibid note 2.

<sup>9</sup> *Principles for Corporate Governance in Kenya*, Private Sector Initiative for Corporate Governance pg 1.

<sup>10</sup> *Mediating Corporate Governance Conflicts and Disputes*, Eric M. Runesson and Marie-Laurence Guy.

As is clear from the list of examples compiled by the Organisation for Economic Co-operation and Development (OECD), the concept “*corporate governance disputes*” is varied and includes many types of disputes each with its own dynamics and focus.

## **2.0 Categories of Corporate Governance Related Disputes<sup>11</sup>**

*Self-interested transactions:* typical examples include related party transactions, insider trading, and conflicts of interest by board members, executives and senior management.

*Annual accounts:* typical examples include disputes between shareholders and the board and/or auditor over the (withholding of) shareholder approval.

*Nomination/appointment of board members:* typical examples include disputes between shareholders and the nomination committee and/or the board over nomination and/or appointment of board members/executives, as well as regarding the criteria for nomination/appointment.

*Remuneration/bonuses board members:* typical examples include disputes between shareholders and the remuneration committee and/or the board over remuneration and/or bonuses of board members/executives, as well as regarding the criteria for remuneration/bonuses.

*Share valuation:* typical examples include disputes between shareholders and the board and/or auditors on the valuation method in case of (a) squeeze out, and (b) share/bond issues.

*Takeover procedures:* typical examples include disputes between shareholders and boards regarding terms and conditions of a proposed takeover, and/or compliance with internal (articles of association) and/or external (listing rules, securities legislation etc.) rules.

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<sup>11</sup> L. Bouchez and A. Karpf, Exploratory Meeting on Resolution of Corporate Governance-Related Disputes. Stockholm: OECD, March 2006. Available at: <http://www.oecd.org>.

*Disclosure requirements:* typical examples include disputes between shareholders and boards regarding compliance with (non-) financial disclosure requirements.

*Corporate control (in M&A transactions):* typical examples include; disputes between shareholders and boards regarding a proposed acquisition or disposal of a substantial part of the company's assets.

*Minority shareholders rights:* typical examples include disputes between majority shareholders and minority shareholders in squeeze out scenarios or on nomination/appointment of board members.

*Bankruptcy / suspension of payments:* typical examples include disputes between shareholders and/or bondholders and boards and/or receivers in corporate restructuring.

*Share/bond issues:* typical examples include disputes between shareholders/bondholders and boards on dilution issues.

*Discharge of individual board members/executives:* typical examples include disputes between shareholders and board members/ executives on individual discharge regarding their performance in the past financial year.

*Mismanagement:* typical examples include disputes between shareholders and boards on supposedly mismanagement of the company.

*(Non-) compliance with corporate governance codes;* typical examples include: disputes between shareholders and boards on the application of 'comply or explain' principles as provided in corporate governance codes.

### **3.0 The Cooper Motors Corporation Dispute**

The boardroom wars at Cooper Motors Corporation (hereinafter CMC) have brought to the fore the caliber of management board members who run many public and private institutions in Kenya. While many organisations have successfully managed to institute independent boards of directors, most of

Kenyan companies are run by directors who wield immense powers and use these powers to dictate the way the company is to be run. The Capital Market Authority (hereinafter CMA)<sup>12</sup> in September 2011 suspended Cooper Motor Corporation from trading its shares at the Nairobi Stock Exchange in a move meant to protect its investors.

The battle at CMC started in mid-September 2011 when the Chief Executive Officer, Bill Lay convened a press conference and made a list of accusations that brought boardroom wars into the public eye. Days earlier, Peter Muthoka had been replaced as CMC chairman by Joel Kibe, on grounds of conflict of interest, as his logistics firm Andy Freight Forwarders, had had a clearing monopoly with CMC. Lay also accused Andy Forwarders of overcharging the motor dealer by Kshs. 2 billion in the last five years. Further, Lay accused two former CMC directors of holding Kshs. 240 million in an offshore account in Jersey. Mr. Lay subsequently cancelled Andy's contract with CMC.

A Report by South African Forensic Audit Firm Webber Wentzel<sup>13</sup> indicated that CMC broke almost all the rules on corporate governance, grossly misreported their books of accounts, and authorised financial transactions without following the rules. The report states that CMC Motors had neither a company secretary nor an independent chairman - contrary to the rules of operations which are binding on a listed firm.

CMC also commissioned its own investigation conducted by PricewaterhouseCoopers (hereinafter referred to as PwC) on some of the issues raised. The Webber Wentzel and PwC investigation reports noted

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<sup>12</sup> The CMA is a statutory agency charged with the prime responsibility of regulating the development of orderly, fair and efficient capital markets in Kenya. It licenses and supervises market intermediaries, conducts on-site and off-site market surveillance and enforces compliance, and promotes market integrity and investor confidence.

<sup>13</sup> The Capital Markets Authority undertook a preliminary investigation on the issues raised which noted certain deficiencies with regard to CMC and thereafter commissioned an independent investigation which was conducted by Webber Wentzel of South Africa.

several inadequacies and failures with regard to CMC and its director's individually and collectively.

After the release of the audit report by Webber Wentzel, a five-member commission was set up by the CMA to receive submissions from current and former CMC board members accused of irregular dealings at the company. Persons mentioned adversely in the audit report would be expected to present their defense to the committee.

All persons adversely mentioned in the investigation reports had also been given an opportunity to be heard pursuant to Section 26 of the Capital Markets Act. The opportunity to be heard was accorded by an Ad Hoc Committee of the CMA Board comprised of three independent members and two members of the board of Capital Markets Authority, all of whom were professionals of high standing, chaired by Honourable Justice (Rtd) Aaron Ringera. The Committee was appointed under Section 14 (1) of the Capital Markets Act. All the directors (current and past) who were invited to appear, presented themselves before the Ad hoc Committee except Peter Muthoka, Richard Kemoli, Joseph Kivai and Jeremiah Kiereini. The final report (Hereinafter referred to as The Ringera Report)<sup>14</sup> which was finally released by CMA in early August 2012, took stern action against present and past directors of CMC.

#### **4.0 Suspension and Removal of Members of the Board**

In March 2012, Mr. Peter Muthoka, the largest shareholder in CMC, and a co-director were toppled in a fresh boardroom coup engineered by the Capital Markets Authority<sup>15</sup>. Mr. Muthoka and Joseph Kivai, who represent Andy Forwarders, were removed by a majority vote that also ushered in CMA's three nominees to the board. The three were appointed to serve as non-executive directors in the caretaker board after CMA directed so. It was argued that the move was a nullity that had no basis in law. The methods by

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<sup>14</sup> Report and Resolutions of The Board of the Capital Markets Authority regarding the investigation into the affairs of CMC Holdings Limited Dated August 3, 2012. Available on the CMA website <http://www.cma.or.ke>.

<sup>15</sup> Ibid.

which a director of a public company can be removed are clearly defined in the Company's Act Section 185 and CMA is not the enforcer of that law.<sup>16</sup> The directive by CMA was aimed at protecting the minority shareholders of the company.

A legal question arose as to what extent a regulatory agency can interfere with the affairs of a private company. In a suit<sup>17</sup> filed by Andy Forwarders against CMA, the Petitioner argued that CMA's decision dated 11<sup>th</sup> October, 2011 purporting to require the CMC Board of Directors not to hold an extraordinary general meeting (EGM) was in direct breach of the statutory duty imposed upon CMC Directors by virtue of Shareholders' interest under Section 132(1) of the Companies Act<sup>18</sup> and was in violation of Article 40 of the Constitution<sup>19</sup> and was therefore invalid. It was the Petitioners view that Section 11(1) (d) of the CMA Act<sup>20</sup> did not permit the Respondent to stop shareholders from holding meetings. The section, which referred to protection of investor rights, according to the Petitioner, was in vague and ambiguous terms.

The CMA was of the view that there was nothing sacred about the right conferred by Section 132 of the Companies Act and the Court was entitled to interfere where there was an abuse of this right. Section 11(1) (d) and (c) of the CMA Act mandates the regulator to intervene to protect Investor Interests. Further, Section 37 of the CMA Act provides that where the provisions of the CMA Act are in conflict with those of any other Act, the CMA Act provisions prevail. The High Court faced with the above challenges was inclined to rule in favour of the regulator in its ruling dated 16<sup>th</sup> November 2012.

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<sup>16</sup> Chapter 486 of the Laws of Kenya, The Companies Act, Revised Edition 2009 (1978), Section 185.

<sup>17</sup> High Court of Kenya at Nairobi Petition No. 216 of 2011, *Andy Forwarders Services Limited v Capital Markets Authority & another*.

<sup>18</sup> The Companies Act, Chapter 486, Revised Edition 2009 (1978), Laws of Kenya

<sup>19</sup> The Constitution of Kenya, 2010

<sup>20</sup> The Capital Markets Act, Chapter 485A, Laws of Kenya

The appointment of a non-independent chairman at CMC was in breach of corporate governance guidelines 3.2 (iii), which stipulates that the chairman of a listed company should be independent and non-executive.

#### ***4.1 Appointment of Interim Board of Directors***

On 15<sup>th</sup> May 2012, CMA appointed an interim Board at CMC, raising arguments as to whether the regulator's actions were in breach of the court's ruling to maintain *status quo*. The court in the same month found that the Capital Markets Authority's appointment of three directors to serve in motor dealer CMC's board was lawful and within the regulator's mandate, contrary to the lead shareholders' position that the action was in breach of company law.

The High Court has broken new grounds in extending the regulator's powers over public companies. The CMA is the public watchdog in so far as the conduct of public listed companies is concerned and it is by law mandated and expected to take all necessary steps within the confines of its statutory mandate to protect the interests of those who have invested in securities. However, the ruling is bound to have major implications on the broader landscape of corporate governance and the national business environment, as foreign investors with big stakes in local firms fear that it sets a precedent that could be used to lock them out of companies in the event of boardroom storm.

#### ***4.2 Tax Evasion***

The Webber Wentzel Report<sup>21</sup> found evidence of off-shore trust accounts in Jersey operated by directors of CMC from documents left behind by Mr. Forster, who was the then Chief Executive Officer.<sup>22</sup> The very existence of such accounts would lead to legal sanctions. The accounts were apparently supposed to fund a group of select employees, mostly senior managers and a few board members, who were given salary top-ups twice a year, in March and September of every year.

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<sup>21</sup> Ibid.

<sup>22</sup> As reported in The Star Newspaper on 15<sup>th</sup> September 2011.

Section 3(1) of the Income Tax Act<sup>23</sup> states that income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya. Section 5(2)(a) of the same Act has included wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services to include income. Employers are required to collect income tax on their employees' salaries every month and, if they fail, the Kenya Revenue Authority<sup>24</sup> can impose penalties. The relevant section states that the Commissioner may by order impose a penalty equal to twenty five percent of the amount of tax involved or ten thousand shillings, whichever is greater, and the provisions of the Act relating to the collection and recovery of the tax shall apply to the collection and recovery of any tax payable and such penalty as if it were tax due by the employer.

The Ringera Report<sup>25</sup> made a finding that Martin Henry Forster<sup>26</sup> and Jeremiah Gitau Kiereini,<sup>27</sup> as directors of CMC, were aware of the existence of offshore accounts and indeed operated those accounts and benefited from the same to the detriment of the shareholders.

### ***4.3 Breach of Corporate Governance Guidelines***

Article 2.5.1 of the Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya<sup>28</sup> states that there shall be public disclosure in respect of any management or business agreements entered into between the Company and its related companies, which may result in a conflict of interest. The fact that a director of CMC, Mr. Muthoka, was the director and chief executive of a firm that engaged in trading with CMC was clearly a breach of these Guidelines.

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<sup>23</sup> Chapter 470, The Income Tax Act (Revised Edition 2010), Laws of Kenya.

<sup>24</sup> Chapter 470, The Income Tax Act, Section 37 (Revised Edition 2010), Laws of Kenya.

<sup>25</sup> Ibid.

<sup>26</sup> Former CMC Chief Executive Officer.

<sup>27</sup> Former CMC Chairman.

<sup>28</sup> Gazette Notice No. 3362 dated 14<sup>th</sup> May 2002, issued under sections 11(3) (v) and 12 of the Capital Markets Act



Also according to the same guidelines, chairmanship of a public listed company should be held by an independent and non-executive director, but this has not been the case with CMC. The same Guidelines have also provided for a Company Secretary but CMC only appointed one after the boardroom wrangles. Article 2.5.3 of the Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya states that the Company Secretary of every public listed company shall be a member of the Institute of Certified Public Secretaries of Kenya established under the Certified Public Secretaries of Kenya Act. The Company Secretary of CMC had not been formally appointed though he acted like one and was not qualified to act as such. The Ringera Report resolved that CMC must appoint an in-house Company Secretary by the end of August 2012.

### **5.0 Penalties and Sanctions under the Capital Markets Authority Act**

The CMA is empowered under the Capital Markets Authority Act<sup>29</sup> to levy sanctions and penalties for breach of the provisions of the Act and its regulations. Section 25A of the Act has been put into effect by the Board of CMA through the Ringera Report. The Board disqualified seven former and current directors from appointment as directors of any listed company. The Board also issued reprimands to several of the directors and ordered institution of recovery of amounts that the said directors had benefited from their capacity as trustees.

### **6.0 Business and Ethical Challenges**

At CMC, the major shareholder, Peter Muthoka who was also Chief Executive of Andy Forwarders, took advantage as director of CMC and exploited opportunities by virtue of his knowledge and position. He therefore did not act in the best interests of the company. The decision to remove him as Chairman of the Board was apparent after it became evident there was an obvious and significant conflict of interest with his role as chairman of CMC and his position as chairman and chief executive officer of Andy Freight Forwarders Services, which was the sole freight and clearing agent for CMC and questions were raised about inflated costs.

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<sup>29</sup> Chapter 485A The Capital Markets Act.

The pursuit of fraudulent transactions in parastatals is fuelled by conflict of interests; when directors act in their own interests rather than in that of the parastatals, thus undermining the economic resources of the organization. Directors occupy a position of trust in the company and as such, they are expected to act as best to promote the interests of the corporation and to avoid conflict of interest.<sup>30</sup>

### **7.0 Breach of the Code of Ethics**

After the corporate collapse of Enron, Swissair, Daewoo Group, WorldCom etc., talk about ethics in business matters has become nearly as clamorous as making profit. One acts 'ethically' when one acts morally, correctly and honourably. The term 'moral'<sup>31</sup> expresses what is 'based on people's sense of what is right or just, not on legal rights and obligations'. Following the above company scandals, shareholders, investors and the State required that companies should be guided more trustfully and reliably from top to bottom. As a consequence, new regulations demand the implementation of such ethics in the daily business of a company's life in the form of principles of good corporate governance.

Most codes emphasize that directors should act as good citizens and respect the law. Furthermore, directors must ensure compliance structures are implemented and effected, so that wrongdoings are discovered, reported and dealt with. This has not been the case in any of the three corporations discussed in this article. Codes of ethics demand that directors treat other and make decisions on the basis of fairness. Fairness includes equal treatment of interests of majority and minority shareholders. There is no dispute that decisions have been taken at the board level that has not been for the interests on the minority shareholders.

In CMC, the competence of the finance director and auditors were put to question by a forensic report over non-compliance with international finance

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<sup>30</sup> Stephen D Girrn, Sania Frisby & Alastar Hudson: *Charlesworth's Company Law* (18<sup>th</sup> Ed, Sweet & Maxwell 2010) p. 319.

<sup>31</sup> The Oxford Paperback Dictionary (3<sup>rd</sup> Edition)

reporting standards. Alleged failure by the external auditor, Deloitte, to flag the inadequacies to the shareholders has also been raised.

After release of the report by Webber Wentzel of South Africa, which was commissioned to conduct investigations into the operations of CMC last year by the CMA, the regulator says failure to adhere to the standards of international financial reporting means the directors have been misinforming its shareholders.

### **8.0 Adoption of a Risky Business Model**

Business Risk<sup>32</sup> is defined as the probability of loss inherent in an organisation's operations and environment such as competition and adverse economic conditions, which may impair its ability to provide returns on investment. Business risk plus the financial risk arising from use of debt (borrowed capital and/or trade credit) equal total corporate risk. Though the external auditors had brought to the attention of the Board the risky nature of the business, no remedial action was taken to reverse the situation.

The Ringera Report was of the view that some of the directors of CMC engaged in risky business practices whilst sitting as directors. The operations of the company were linked to benefits derived from offshore accounts that exposed the company to higher credit, liquidity and interest rates risk. It was reported that the board never took action over the management's failure to implement policies that had been passed by the board. This was a failure of the board's duties to its shareholders.

### **9.0 Insider Dealing**

Insider dealing takes place when a connected person who has relevant information in relation to the listed corporation with which he is connected, deals in the listed securities of that corporation or their derivatives. Directors of a corporation may be identified as insider dealers if the corporation of which they are a director (in this case Andy Forwarders) is an insider dealer

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<sup>32</sup> <http://www.businessdictionary.com>

and that corporation carried out insider dealing with their consent or connivance. Allegations against Mr. Muthoka, a director of CMC, were that as the Chairman and Chief Executive of Andy Forwarders Services Limited (AFS) he made undisclosed profit from CMC by the use of unfavorable market related exchange rates, contrary to fiduciary duty of a director under Article 3.1.1 of Guidelines on Corporate Governance Practices by Public Listed Companies. He also breached the Capital Markets (Take-over and Mergers) Regulations, 2002 by holding more than 25% of the shares of a listed Company without making an offer contrary to regulation 3 and 4 of the aforesaid Regulations.

### **10.0 Breach of Fiduciary Duty and Conflict of Interest**

Fiduciary duties require that the fiduciary acts solely in the best interest of the employer/principal, free of any self-dealing, conflicts of interest, or other abuse of the principal for personal advantage. Thus, corporate directors are barred from using corporate property or assets for their personal pursuits, or taking corporate opportunities for themselves. More traditional fraudulent conduct, such as thefts, acceptance of secret commissions, and conflicts of interest also violate the duty of loyalty, and may be prosecuted.

The CMC Ad hoc Committee established that Martin Forster<sup>33</sup> breached his fiduciary duties in that during his reign at CMC, there were grave weaknesses in the internal controls of the company. There was no disclosure on the extent of compliance with Guidelines on Corporate Governance Practices by Public Listed Companies<sup>34</sup> and neither were the annual accounts prepared in accordance with the International Financial Reporting Standards.<sup>35</sup> The Guidelines Article 2.4.1<sup>36</sup> specifically state that the board should present an objective and understandable assessment of the

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> A set of international accounting standards stating how particular types of transactions and other events should be reported in financial statements. IFRS are issued by the International Accounting Standards Board <http://www.ifrs.org>

<sup>36</sup> Ibid.

Company's operating position and prospects. The board should ensure that accounts are presented in line with International Accounting Standards. It was also noted that the Chairman of CMC was at one time a member of the Board Audit Committee which was in contravention of the Guidelines.

### **11.0 The National Hospital Insurance Fund**

The Ministry in charge of Public Service proposed to issue an insurance cover to civil servants and the police, which was to be implemented by the private sector insurance companies. A tender was floated but the private sector firms believed the amount of money offered was too low. The government had to turn to NHIF to provide the scheme. However there were allegations of corruption in the procurement process, mismanagement and possibilities of fraud.<sup>37</sup> As a result, the NHIF Board Chairman moved to dismiss the then Managing Director, with the Vice Chairman openly dismissing the chairman's actions.<sup>38</sup> This culminated in a game of musical chairs. The then Minister for Medical Services, infuriated by the board chairman's actions suspended him, and the Permanent Secretary in the Ministry announced that *status quo* be maintained at the helm of the NHIF.

Ultimately, the President through the Head of Public Service, suspended the entire board including the Managing Director. The Minister for Health went ahead to reinstate the board and the Prime Minister stepped in to quell the decision and suspended the board.

The matter was referred to the Parliamentary Health Committee which was mandated to probe the irregularities on the medical scheme. The report was however rejected in parliament. The issues arising from the NHIF saga include:-

- a) Public procurement at NHIF;
- b) Investigation of the Board of the NHIF on alleged irregularities in the scheme;

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<sup>37</sup> [www.africanewsonline.com](http://www.africanewsonline.com) accessed on 7<sup>th</sup> February 2017.

<sup>38</sup> <http://www.standardmedia.co.ke>, That was only the first chapter of NHIF saga

- c) Whether the suspension of the Chairman and the Board were done in accordance with the law; and
- d) Duty of the Board.

### ***11.1 Appointment and Suspension of the Chairman of the NHIF Board and CEO***

Section 4 of the NHIF Act establishes a board to be known as the National Hospital Insurance Fund Management Board.<sup>39</sup> The Act is clear that the appointment of the Chairman is by the President. The dramatic sacking by the Chairman of the entire board, the sacking of the Chairman by the Minister for Medical Services, sacking of the entire board of NHIF by the acting Permanent Secretary and head of Civil service and the eventual disbandment by the Prime Minister, who established a caretaker committee, explains the lack of independence by the directors and the undue influence in their operations from the Executive.<sup>40</sup>

The Chairman of the Board, being a presidential appointee, can thus be suspended only by the President. Paragraph 2 (b) of the Second Schedule of the Act empowers the Minister to remove any member of the board from office except the Chairman or ex-officio. In the circumstances, Professor Anyang Nyong'o absolutely overstepped his mandate in suspending the Chairman of the Board.

Further, Section 10(1) of the NHIF Act provides that the CEO to the board shall be appointed by the Minister. In the circumstances, the Chairman had

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<sup>39</sup> Board consists of the Chairman, permanent Secretary in the Ministry responsible for matters relating to health, permanent secretary to the treasury, permanent secretary/director of personnel management, one nominated person by federation of Kenya Employees, one person nominated by the central organization of Trade unions, one person nominated by the Kenya National Union of Teachers, one person nominated by the Kenta National Farmers Union, two members appointed by the Minister from Association of Kenya Insurers and from the Kenya medical Association and One member from NGO involved in provision of health care.

<sup>40</sup> The Nation Team, *'Now Nyong'o lifts sacking of NHIF Bosses'* ( The Daily Nation, 7<sup>th</sup> May 2012; Nairobi, Kenya pg 1 and 4)

no authority to suspend the CEO without an express resolution from the board.

After the suspension of the board at NHIF, the President appointed a caretaker board. However, Justice Korir in his ruling on the appointment of the caretaker board, held that Section 4(1) of NHIF Act outlines how the Board should be appointed, and the president in appointing the caretaker board overlooked the provision of Section 4(1) of the Act.<sup>41</sup> The question is, what next? Should the suspended CEO return to office? Debate has been ongoing with the Minister for Health recalling the CEO.

### ***11.2 Conflict of Interest***

Prof. Muga, the Suspended chairman of the NHIF Board is associated with the Star Children Hospital which is accredited to NHIF.<sup>42</sup> It is not, however clear if he had declared when the civil service scheme was rolled out. If this were to be true, it clearly shows a serious conflict of interest.

### ***11.3 Accreditation of Health Facilities***

Some of the health facilities that had been accredited by NHIF were nonexistence with a list of the NHIF list of accreditation not having any presence on the ground or even if were present, they were not operational since the branches were under construction or under refurbishment and no services were being offered.

One of the failures of NHIF was in not conducting a quality assurance audits of the various clinics that Kenya Medical Practitioners and Dentist Board had accredited.<sup>43</sup> The Board, which is mandated with approval of all accredited facilities, was kept in the dark by the management.<sup>44</sup> Some of the healthcare providers were not suitable to offer services or they were ill-equipped to do so. The two major beneficiaries of the scheme, Clinix and Meridian Medical

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<sup>41</sup> <http://www.citizennews.co.ke> Accessed on 7<sup>th</sup> February 2017

<sup>42</sup> See FN 5 pg 39

<sup>43</sup> The Nairobi Law Monthly , July 2012, pg 44

<sup>44</sup> Siringi Samuel, Saturday Nation, 20th July 2012 “ Fresh Scandals unearthed in health scheme” pg 3

Centre, had expanded exponentially in three months, Clinix in February had 24 branches but by May, it had 71 branches. The question that lingers is whether NHIF conducted quality assurance audits on the various clinics as required.

#### **11.4 Corruption**

At NHIF, allegations of suspicion and corruption marred the whole process of the procurement of medical scheme. Diana Patel says that whether or not there was corruption involved in the awarding of the contracts to various providers was inevitable for two reasons: firstly, the infrastructure was not in place for services NHIF promised and secondly, NHIF was not straightforward about what they could and could not accomplish within their unrealistic budget. In the circumstances, NHIF board of Directors failed to act in good faith and in the interest of the Company by rushing to roll out the scheme.

#### **12.0 Shareholding of some Private Service Providers**

Clinix Health Care, which was one of the beneficiaries in the scheme shareholding was not clear. One of the majority shareholders Pharma Investment Holdings, which was holding 99% of the shares was untraceable and the company was said to be registered in the British Virgin Islands. It was however not possible to ascertain the ownership of Pharma Investment Holdings. Clinix Health care Ltd had not submitted documents for registration as a foreign Company as required under Section 365 (1) of the Companies Act.<sup>45</sup>

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<sup>45</sup> Diana Patel, Economist and the Executive Director of Avenue Healthcare:  
*"(1) Sections 366 to 375 shall apply to all foreign companies, that is to say, companies incorporated outside Kenya which, after the appointed day, establish a place of business within Kenya and companies incorporated outside Kenya which have, before the appointed day established a place of business within Kenya and continue to have a place of business within Kenya on and after the appointed day: (2) A foreign company shall not be deemed to have a place of business in Kenya solely on account of its doing business through an agent in Kenya at the place of business of the agent"*



### **13.0 East African Portland Cement Company**

The boardroom wrangles at EAPCC were kicked off by Acting Industrialization Minister's move to suspend the eight members of the board to pave way for a forensic audit by the Efficiency Monitoring Unit (EMU) into allegations of malpractices<sup>46</sup> and misappropriation, which resulted in huge losses and poor performance of the company.<sup>47</sup>

In an ironic twist of events, the EMU 2012 Report placed the blame squarely on the Industrialization Ministry for failing to act on recommendations contained in its earlier report- the EMU 2007 Report.<sup>48</sup>

### **13.1 Control and Ownership of the Company**

At the centre of the court room battle and suspension of the board of directors at EAPCC was the question of control and ownership of the company. It was the board's position that EAPCC is not a State Corporation but a limited liability company incorporated under the Companies Act and therefore, the minister and his Permanent Secretary did not have powers to suspend the board. The minister's position was that the combined shareholding of the government in the company and NSSF exceeds the threshold of 50% and therefore that EAPCC is a State Corporation.<sup>49</sup>

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<sup>46</sup> The report by the Efficiency Monitoring Unit (EMU 2012 report) revealed loss of millions of shillings through irregular price variations, contravention of public procurement procedures, unjustified allowances and expenditure by board members. The report also revealed how the firm was mismanaged for years as government representatives watched. The report indicted a section of the firm's board of directors who diverted millions of shillings from the firm for personal gain.

<sup>47</sup> High Court of Kenya at Nairobi, Judicial Review Division Misc. APPLICATION No. 337 Of 2011, Mark Ole Karbolo & 4 others v Acting Minister Ministry of Industrialization & another East African Portland Cement Company (Interested Party) & 4 others.

<sup>48</sup> The 2007 report is said to have raised issues similar to those that forced the ministry to intervene in December 2011. Some of the key recommendations in the 2007 report were that; Peter Korir be investigated and surcharged for irregular single sourcing among other breaches; lawyer Harmish Keith to leave the board for abrogating the role of the tender committee and that disciplinary action be taken against him in his capacity as the then chairman of the board tender and procurement committee; the board of directors to terminate the services of Daly & Figgis Advocates the law firm where Mr Keith is the managing partner for conflict of interest, or Mr. Keith to drop his directorship. None of the recommendations were implemented and the status quo upheld to date.

<sup>49</sup> *Ibid* n. 2

The two issues were resolved by Justice Mohammed Warsame in his forty-two page ruling delivered on 20<sup>th</sup> April 2012 by finding that NSSF, by virtue of being established by Chapter 285 of the Laws of Kenya is a state corporation under the State's Corporation Act and consequently, the two sets of shares by Government and NSSF are shares held by two State Corporations<sup>50</sup> bringing EAPCC under the ambit of The State's Corporations Act.

### ***13.2 Contravention of the Provisions of the Public Procurement and Disposal Act, 2005***

The Board of Directors, contrary to the provisions of the Public Procurement and Disposal Act, 2005 varied the contract price of clinker by imposing a 10 per cent increment against the advice of the tender committee. The tender committee rejected the increment, which was not based on changes in consumer price index variation as per the regulations.<sup>51</sup> According to the Public Procurement and Disposal Act an amendment to a contract is only effective if the amendment has been approved in writing by the tender committee of the procuring entity.<sup>52</sup>

According to the EMU 2012 Report, the board of EAPCC on July 8<sup>th</sup> 2010 established a team known as the Board Tender and Procurement Oversight Committee, whose role was to adjudicate procurements valued at over Kshs. 50 million, analyze tenders awarded and those to be awarded and the bids to be rejected. The subcommittee was illegal as it was not provided for in the Public Procurement and Disposal Act. The motive behind the creation of such a committee is questionable and one of the reasons could have been to influence the awarding of tenders by the Board contrary to the procurement rules.

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<sup>50</sup> P. 19

<sup>51</sup> Regulation 31 of the Public Procurement and Disposal Regulations 2006.

<sup>52</sup> Section 47 (a); as a consequence a price increase of approximately Kshs. 74 million was effected by the board.

The board of EAPCC contravened provisions of the Public Procurement and Disposal Act<sup>53</sup> by awarding a kiln upgrade contract to Posco Plantec, a South Korean firm against the Technical Evaluation Committee's advice.<sup>54</sup> The Korean company had an inferior technical capacity and in awarding the contract to Posco Plantec, the board acted against provisions of the Act, which provides that a person is qualified to be awarded a contract for procurement if that person has the necessary qualifications, resources, equipment and facilities to provide what is being procured. The Act further bars members of the board and directors from participating in the procurement process<sup>55</sup>. The meeting between the chairman, his two directors and senior executives of Posco Plantec may be construed as having exerted undue pressure on the technical officers' decisions and further compromised their role as directors.

### ***13.3 Collusion to Unprocedurally Privatise the Company***

The Board of Directors in contravention of the Privatization Act Cap 485, while the process of divesture was underway, proceeded to request the shareholders for approval to change the status of the company from a State Corporation to a private company<sup>56</sup>. Section 22 (1) of the Privatization Act prohibits the transfer of a public entity's interest in a State Corporation if that privatization is not included in the Privatization Programme. The intended transfer of NSSF shares was being done before the government had given its response to the privatization proposal. A proposal to privatize must also be approved by the cabinet after which the privatization commission should publish a notice for the proposed privatization<sup>57</sup>.

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<sup>53</sup> Section 31 (a)

<sup>54</sup> EMU 2012 Report.

<sup>55</sup> In a meeting held on August 17, 2011 the Technical Evaluation Committee resolved to send a technical team to Posco Plantec to conduct due diligence; the team was however joined by the chairman of the board and two other directors. The chairman and the directors according to the audit report also met with the senior executives of Posco Plantec on September 27, 2011 after which the tender was awarded to the Korean firm.

<sup>56</sup> NSSF through its managing director- the nominee to the EAPCC board -had agreed to reduce NSSF's stake in the company by 4 per cent by transferring funds to its staff pension scheme. NSSF purported to dispose of its assets without concurrence and consent of the Minister of Labour and Finance consecutively being a public body.

<sup>57</sup> Section 30 (1), Privatization Act

### ***13.4 Appointment and Termination of Directors***

There is often confusion as to who the appointing and 'sacking' authority is in State Corporations. This is because the State Corporations Act provides for appointment of the Chairman by the President and the Board of Directors by the Ministry<sup>58</sup>. This was one of the issues for determination in the suit brought against the Minister for Industrialization and the PS by the board of EAPCC, who questioned whether the Minister and PS had authority to dismiss the board. In his ruling Justice Warsame, stated that the Minister and PS could not validly and legitimately remove, suspend all or any person as a board member of the Company because they were not the appointing authority of any of the Board members, and could not therefore purport to suspend any member of the Board from running the affairs and the management of the company<sup>59</sup>."

### ***13.5 Political Interference***

This was witnessed in EAPCC when the Minister dismissed the entire board and the President's appointment of a Managing Director, which was done without any color of right because the Managing Director is appointed by the Board. The appointment was later declared null and void by Justice Warsame who held that the President had no authority or power in making the appointment<sup>60</sup>.

The Judge noted that "...often times executive powers are exercised for political gains, expediency and to achieve ulterior or extraneous considerations. He was in no doubt that "... *the original intent or desire behind the suspension of the entire board was to subvert and substantially alter and redesign the direction, control, operation and management of the company. The Minister*

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<sup>58</sup> This, besides complicating the management of parastatals, has greatly contributed to politicization of the process to a point where the law has been contravened so as to advance political interests.

<sup>59</sup> Ibid note 22, p 30. Only the shareholders have the authority to remove the directors and not the ministry of Industrialization which is actually not a shareholder. There is also the element of political interference in the appointment a point which will be discussed below under business challenges.

<sup>60</sup> Ibid, note 22 p 41.

*therefore subverted the machinery of the Company through undesirable political interference which had no basis in law and in fact”<sup>61</sup>.*

### **13.6 Conflict of Interest**

Directors at common law must subscribe to the duty of loyalty and the duty of good faith amongst others. A director is therefore not expected to do business with the company where he is either a CEO or where he holds majority shares. Bamburi Cement, being a significant shareholder sits on the EAPCC board. The audit revealed that Bamburi Cement supplies products to EAPCC raising an issue of conflict of interest<sup>62</sup>. Mr Keith, who sits on the board of EAPCC as a nominee of Larfage, is the Managing Partner at Daly & Figgis, the law firm that represents the company in legal matters. A recommendation had been made earlier to terminate the services of Daly & Figgis or to have the Mr Keith relinquish his seat at the board.

### **13.7 Embezzlement and Pillage of Public Funds**

EAPCC lost millions of shillings in allowances paid to the chairman and directors contrary to the Office of the President regulations.<sup>63</sup> The auditors came across payment vouchers of millions of shillings made to the directors regardless of the business transacted<sup>64</sup>. The overpayments and unscheduled meetings outside work led to an increase in board expenses as a result of which the company lost Kshs 849,000/-.

The EMU 2012 Report also revealed that the Chairman was assigned a company car on full time basis contrary to the office of the president guidelines, as a result of which the firm incurred an unnecessary expense of Kshs. 6 Million on operation and maintenance costs.

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<sup>61</sup> Ibid note 22, p 34.

<sup>62</sup> Decisions to award major tenders are mainly sanctioned by the board and much as the said board member may be qualified to do business with the respective company it is hard to convince the other stakeholders that the member won the tender fairly and without any undue influence.

<sup>63</sup> Circular OP.CAB.9/21/2 of November 25, 2004 provided for which provided for taxable allowance of up to Kshs 20,000 per sitting.

<sup>64</sup> An activity like attending a football match (Sofapaka) or walking around the plant or meeting the Permanent Secretary earned a director Kshs 45,000.

Flawed procurement procedures, alternative procurement procedures, price variations and board interference were confirmed to have caused losses in billions of shillings leading to a decline in operational profits for the last two years despite an increase in volume of sales<sup>65</sup>. The pursuit of fraudulent transactions in parastatals is fuelled by conflict of interests. When directors act in their own interests rather than that of parastatals, they undermine the economic resources of the organization.

#### **14.0 Integrating Alternative Dispute Resolution in Corporate Governance**

ADR is a framework of voluntary and amicable procedures for resolving corporate governance disputes more quickly and at less cost than by using traditional court litigation. It may take several years for complaints to be resolved through litigation, and courts may lack expertise in corporate governance or be overwhelmed with their caseloads.

Adversarial litigation can be highly damaging to the company's performance, reputation, and value. By contrast, ADR allows for private and even amicable proceedings. Disputants assume greater ownership of the way the dispute is considered and settled, since they actively drive the process. In the US, approximately eight hundred companies including Time Warner, UPS, General Electric, the Prudential, and Coca-Cola have since pledged to explore ADR before litigation whenever a dispute arises with a company that has made a similar pledge.<sup>66</sup> The companies that are particularly in favor of ADR tend to be larger entities like Fortune 1000 companies; these corporations experienced major downsizing and restructuring during the 1980s and thus needed to lower expenses wherever possible.<sup>67</sup> As such, their corporate boards and executives began disliking costly litigation and started seeking other means of tackling disputes.

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<sup>65</sup> This was a challenge to the business because misuse of funds meant that the funds were not being put into proper use and neither were they paid out to shareholders in form of dividends. The increase in sales did not benefit the company, its shareholders and stakeholders but the profit was lining the pockets of directors.

<sup>66</sup> Available at: <http://www.gcgf.org>

<sup>67</sup> Mediation of Corporate Governance Disputes, *Angela Lu*

Mediation is another common ADR process. Mediation is generally defined as a disputes resolution process where parties in dispute voluntarily invite a neutral third party called a mediator to assist them in resolving their dispute. Mediation became a popular tool for resolving conflicts, and its usefulness led corporations to view mediation as something more than just an alternative to litigation and arbitration. In fact, corporations have utilized the principles and theories behind various mediation methodologies to formulate systems for managing conflicts.<sup>68</sup>

Furthermore, it is the failure to resolve corporate governance disputes that has created fertile ground for corruption, breach of public procurement laws and other criminal activities.

Mediation is recognized as an excellent means to resolve corporate governance disputes. Mediation is a confidential process. It is an effective, inexpensive, informal way to resolve a dispute quickly. The mediator helps people generate options for a mutually satisfactory solution. All decisions are made by the people involved, not by the mediator. It is about mending fences and finding a constructive approach to conflict resolution that brings to the surface issues of mutual concern; reviews the various angles of the issue at stake; and allows the conflict to be used as a learning tool and as a basis for improved relations among the parties.

Mediation skills and techniques can improve governance and board effectiveness by fostering discussions and collaboration on decisions, while surfacing and working through disagreements and personality issues. By so doing, the directors build stronger and more constructive working relationships.<sup>69</sup>

It may be a surprise to learn that hidden litigation costs are often far greater than legal costs. Mediation helps to avoid the following costs of litigation:

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<sup>68</sup> F. Peter Phillips, *ADR as a Tool for Management and for Corporate Governance*

<sup>69</sup> Jon J. Masters and Alan A. Rudnick, *Improving Board Effectiveness: Bringing the Best of ADR into the Boardroom - A Practical Guide for Mediators*. Washington, D.C.: American Bar Association, 2005

e.g. reputational damage, loss of brand value, loss of profitable business relationships, loss of opportunity costs, loss of customers and damage to company morale.

### **15.0 Conclusion**

Full-blown disputes are always bad news for a company. They can lead to poor performance, scare investors, divert resources and, in some cases, paralyze a company. From the onset I would recommend that the three corporations should adopt ADR policies in dealing with disputes and other ethical challenges which would mean that the directors before making any decision would have to put aside their self-interests and weigh carefully the benefits and costs their decision or business action is likely to have on shareholders and stakeholders affected and to therefore pursue ADR where benefits outweigh the costs.

An analysis of the cause of the three companies' boardroom wrangles shows that it can be attributed to failure by the Boards of these companies to stem the disputes within their corporate governance structures. Corporations should entrench policies that ensure corporate governance disputes are resolved amicably so as to protect the interests of the shareholders and other stakeholders. It is important that directors and senior management to note that ADR can play a critical role in maintaining good corporate governance principles and by extension avoid enhancing disputes and enhance corporate performance.



## **Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework**

*By: Kariuki Muigua\**

### ***Abstract***

*This paper critically discusses how the current legal and policy framework on access to justice can be enhanced through putting in place appropriate policy, statutory and administrative measures that will ensure that the Alternative Dispute Resolution (ADR) mechanisms, Traditional Dispute Resolution (TDR) mechanisms and other informal justice systems, find their rightful place in the conventional judicial system and that the same are meaningfully and actively utilized in facilitating access to justice especially for the poor Kenyans. The author traces the existing provisions that provide for ADR and TDR mechanisms and examines the viability of such provisions in promoting the use of these mechanisms in access to justice in Kenya.*

*The paper argues that despite the formal recognition under the Constitution, TDR and other ADR mechanisms are yet to be institutionalized by way of putting in place adequate supporting legal and policy measures that would ensure effective utilisation of the same in facilitating access to justice. This presents a challenge on implementation of the constitutional provisions on ADR and TDR. It is for this reason that the author offers recommendations on how best to institutionalise these mechanisms since they can go a long way in facilitating access to justice, especially at the community level and the creation of a just and peaceful society for all.*

### **1.0 Introduction**

The Constitution guarantees the right of every person to access justice and calls for the State to take appropriate policy, statutory and administrative interventions to ensure the efficacy of justice systems.<sup>1</sup> In order to guarantee

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access to justice for Kenyans, the Constitution broadens the available mechanisms in the justice system by encouraging the utilisation of formal and informal justice systems.<sup>2</sup> In this regard, Article 159 recognizes the use of Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms in addition to the court process. Article 159 (2) envisages the underlying principles for the exercise of judicial authority in Kenya which include promotion of ADR and TDR mechanisms.<sup>3</sup>

Despite the formal recognition coupled with a constitutional mandate for their promotion in appropriate dispute resolution strategies, TDR mechanisms and other community justice systems are yet to be institutionalized by way of putting in place adequate supporting legal and policy measures that would ensure effective utilisation of the same in access to justice. There exists no substantive policy or legislative framework to guide the promotion and use of these mechanisms despite their constitutional recognition and limitations set out under Article 159(2) and (3).<sup>4</sup>

It is against this background that this paper examines the current legal and policy framework on access to justice and the challenges that arise therefrom. It also makes recommendations on the need for appropriate policy, statutory and administrative measures that will ensure that the TDR strategies and other informal justice systems find their rightful place in the conventional judicial system and that the same are meaningfully and actively utilised in facilitating access to justice especially for the poor Kenyans.

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<sup>1</sup> Articles 21, 47, 48 & 50, the Constitution of Kenya 2010.

<sup>2</sup> Article 159(2) (d).

<sup>3</sup> It stipulates that in exercising judicial authority, the courts and tribunals are to be guided by the following principles: (a) justice is to be done to all, irrespective of status, (b) justice shall not be delayed and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause 3. Clause 3 thereof provides that TDR mechanisms shall not be used in a way that (a) contravenes the Bill of Rights, (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, or (c) is inconsistent with the Constitution or any written law.

<sup>4</sup> It is noteworthy that the current Constitution of Kenya calls for promotion of alternative forms of dispute resolution as a guiding principle in the exercise of judicial authority by courts and tribunals but not necessarily as a requirement under any written law.

## **2.0 Access to Justice through TDR and ADR Mechanisms in Kenya**

Access to justice is one of the most critical human rights. This is because it also acts as the basis for the enjoyment of other rights, and it thus requires an enabling framework for its realisation.<sup>5</sup> The Constitution provides for the right of access to justice and obligates the state to ensure access to justice for all persons.<sup>6</sup> Access to justice by majority of citizenry has been hampered by many unfavourable factors which include *inter alia*, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow.<sup>7</sup> This makes access to justice through litigation a preserve of a select few. Through providing for the use of ADR and TDR mechanisms to enhance access to justice, the Constitution of Kenya was responding to the foregoing challenge in order to make the right of access to justice accessible by all.<sup>8</sup> This was in recognition of the fact that TDR and other ADR mechanisms are vital in promoting access to justice among many communities in Kenya. Indeed, a great percentage of disputes in Kenya are resolved at the community level through the use of community elders and other persons mandated to keep peace and order.<sup>9</sup>

Notably, the Constitution provides that one of the principles of land policy in Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.<sup>10</sup> This is reaffirmed under Article 67(2) (f) which provides that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

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<sup>5</sup> See D.L., Rhode, "Access to Justice," *Fordham Law Review*, Vol. 69, 2001. pp. 1785-1819; See generally M. Sepúlveda Carmona and K. Donald, 'Access to justice for persons living in poverty: a human rights approach,' Ministry for Foreign Affairs, Finland. pp.8-9. Available at [https://www.academia.edu/6907000/Access\\_to\\_justice\\_for\\_persons\\_living\\_in\\_poverty\\_a\\_human\\_rights\\_approach](https://www.academia.edu/6907000/Access_to_justice_for_persons_living_in_poverty_a_human_rights_approach) [Accessed on 2/07/2015].

<sup>6</sup> Article 48.

<sup>7</sup> J.B. Ojwang, 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development,' 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29 at p. 29.

<sup>8</sup> Article 159(2); Article 48.

<sup>9</sup> K. Muigua, *Resolving Conflicts through Mediation in Kenya*, (Glenwood Publishers, 2012). pp. 21-22; See generally J. Kenyatta, *Facing Mount Kenya, The Tribal Life of the Kikuyu*, Vintage Books Edition, October 1965.

<sup>10</sup> Article 60(1) (g).

The recognition of ADR and TDR mechanisms under Article 159 of the Constitution is a restatement of the customary jurisprudence of Kenya.<sup>11</sup> This is because TDR mechanisms existed from time immemorial and are therefore derived from the customs and traditions of the communities in which they operate. In most African communities, TDR mechanisms existed even before the formal dispute settlement mechanisms were introduced.<sup>12</sup> The formal courts, being adversarial in nature, greatly eroded the traditional conflict resolution mechanisms.<sup>13</sup> The use of TDR in accessing justice and conflict management in Africa is still relevant especially due to the fact that they are closer to the people, flexible, expeditious, foster relationships, voluntary-based and cost-effective. For this reason, most communities in Africa still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.<sup>14</sup>

The use of TDR mechanisms fosters societal harmony over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa.<sup>15</sup> Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts. Unlike the court process which delivers

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<sup>11</sup> K. Muigua, "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010," p. 2. Available at <http://www.chuitech.com/kmco/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf>; See also I.K.E., Oraegbunam, *The Principles and Practice of Justice in Traditional Igbo Jurisprudence*, *African Journal Online*, p.53.

Available at <http://www.ajol.info/index.php/og/article/download/52335/40960> [Accessed on 30/06/2015].

<sup>12</sup> See generally L.J. Myers and D.H. Shinn, 'Appreciating Traditional Forms of Healing Conflict in Africa and the World, 2010, available at [scholarworks.iu.edu/journals/index.php/bdr/article/download/.../1220](http://scholarworks.iu.edu/journals/index.php/bdr/article/download/.../1220) [Accessed on 29/06/2015].

<sup>13</sup> J. Kenyatta, *op.cit.* pp. 259-269.

<sup>14</sup> K. Muigua, *Resolving Conflicts through Mediation in Kenya*, *op cit* at pp.21-22; See also N.N. Ntuli, 'Policy and Government's Role in Constructive ADR Developments in Africa.' Presented at a conference "ADR and Arbitration in Africa; Cape Town 28th and 29th November 2013. pp. 2-3. Available at <http://capechamber.co.za/wp-content/uploads/2013/11/POLICY-IN-AFRICA-AND-GOVERNMENT.pdf> [Accessed on 30/06/2015].

<sup>15</sup> *Ibid*, p.23.

retributive justice, TDR mechanisms encourage resolution of disputes through restorative justice remedies. TDR mechanisms derive their validity from customs and traditions of the community in which they operate. The diversities notwithstanding, the overall objective of all TDR mechanisms is to foster peace, cohesion and resolve disputes in the community.<sup>16</sup> The other advantages of TDR mechanisms and other community based justice systems are that: traditional values are part of the heritage of the people hence people subscribe to its principles; promotes social cohesion, peace and harmony; proximity to the people/accessibility and use of language that the people understand; the mechanisms are affordable; TDR are resolution mechanisms; are cost effective since parties can easily represent themselves in such forums; proceedings undertaken are confidential; TDR and ADR mechanisms are flexible since they do not adhere to strict rules of procedure or evidence and they yield durable solutions.<sup>17</sup>

TDR mechanisms are also preferable because: they decongest the courts and prisons, respect the traditional cultures and traditions, decisions emanating from such mechanisms are easily acceptable to communities, they promote peace, harmony, co-existence among communities and security, they are expeditious and most cases are resolved by elders who have background knowledge and understanding of cases and the people hence allow for handling matters discreetly for quick resolution, they are less costly and easy accessible to the poor, resolve disputes at grassroots' level and enhance access to justice, they also provide local solutions which are more acceptable to people and they are agents of change and promote economic development, foster love, cohesion, integrity and promote respect for each other.<sup>18</sup> In

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<sup>16</sup> Articles 60(2) (g) & 67(1) (f) of the Constitution of Kenya; AT Ajayi and LO Buhari, "Methods of Conflict Resolution in African Traditional Society," *An International Multidisciplinary Journal*, Ethiopia, Vol. 8 (2), Serial No. 33, April, 2014, pp. 138-157 at p. 154.

<sup>17</sup> K. Muigua, *Resolving Conflicts through Mediation in Kenya*, *op cit* pp. 23-26; see also A.A. Theresa, 'Methods of Conflict Resolution in African Traditional Society,' *Indexed African Journal Online*, vol. 8(2), Serial No. 33, April, 2014: pp. 138-157 at pp. 151-152.

<sup>18</sup> K. O. Hwedie and M. J. Rankopo, Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, p. 33, *University of Botswana*. Available at <http://ir.lib.hiroshima->

recognition of this, the Constitution obligates the State to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.<sup>19</sup> According to the Food and Agricultural Organisation of the United Nations, indigenous knowledge has been conceptualised as a repertoire of ideas and actions from which community members faced with specific problems can draw, depending on their level of knowledge, their preferences, and their ability and motivation to act. In this regard, it would involve improvisation and flexibility in response to ongoing conditions. Dispute processing is similarly characterized as a repertoire of processes which communities and their members respond to dynamically and differentially.<sup>20</sup> It has been argued that chances for peaceful resolution of Africa's conflicts can be enhanced considerably if the region's indigenous principles, skills, and methods of conflict resolution are understood and harmonized with those of the modern nation-state.<sup>21</sup>

It is for this reason that the constitutional provisions on the protection and enhancement of intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the Kenyan communities should be actualized through ensuring that there is put in place supportive policy and legal framework. This is because despite the constitutional spirit of promoting ADR and TDR mechanisms, most of which rely on indigenous knowledge of the respective communities, what is not clear is how this should be carried out because as it is now, there is no defined procedure on how they should determine the matters to go for TDR and those for courts or even who should carry out the TDR. While it is true that the use of ADR and

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u.ac.jp/files/public/33654/20141016194149348069/ipshu\_en\_29\_33.pdf [Accessed on 3/07/2015]

<sup>19</sup> Article 69(1) (c).

<sup>20</sup> Food and Agricultural Organisation of the United Nations, 'Indigenous Knowledge And Conflict Management: Exploring Local Perspectives And Mechanisms For Dealing With Community Forestry Disputes,' *Paper Prepared for the United Nations Food and Agriculture Organization, Community Forestry Unit, for the Global Electronic Conference on "Addressing Natural Resource Conflicts Through Community Forestry," January-April 1996.* Available at <http://www.fao.org/docrep/005/AC696E/AC696E09.htm> [Accessed 4/07/2015]

<sup>21</sup> F.B., Mensah, 'Indigenous Approaches to Conflict Resolution in Africa,' in the World Bank, *Indigenous Knowledge: Local Pathways to Global Development*, 2004. pp. 39-44 at p. 39. Available at <http://www.worldbank.org/afr/ik/ikcomplete.pdf> [Accessed 4/07/2015].

TDR mechanisms can go a long way in resolving some of the long standing conflicts over natural resources in Kenya, this well intentioned constitutional provision may be defeated owing to lack of a proper legal framework or guidelines on how they should be implemented. Arguably, a strong legal system based on a fusion of formal and informal justice systems improves the capacity of citizens to access justice. This is because the two justice systems complement each other and citizens are at liberty to choose the most appropriate and affordable system for themselves.<sup>22</sup>

It is against the foregoing that the author herein sets out to explore how best these mechanisms can be entrenched in Kenya's legal system through legal and policy measures.

### **3.0 Overview of TDR and ADR Mechanisms**

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms a society utilises to resolve disputes without resort to costly adversarial litigation. Most of the African communities had their own unique dispute resolution mechanisms.<sup>23</sup> Similarly, each African community had a council of elders that oversaw the affairs of the community, including ensuring that there is social order and justice in the community. These were known by various names in different communities and their membership had specific characteristics/qualifications. The most commonly used ADR mechanisms by traditional Kenyan communities include mediation, arbitration, negotiation, reconciliation and adjudication amongst others.<sup>24</sup>

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<sup>22</sup> See K. Venerando, *et al*, United Nations Development Programme, "Access to Justice in Asia and the Pacific: A DGTTF Comparative Experience Note Covering Projects in Cambodia, India, Indonesia and Sri Lanka," *The DGTTF Lessons Learned Series*, 2009. Available at [http://www.undp.org/content/dam/aplaws/publication/en/publications/democrati-c-governance/dgttf-/access-to-justice-in-asia-and-the-pacific/UNDP\\_CE%20Paper\\_Asia\\_web.pdf](http://www.undp.org/content/dam/aplaws/publication/en/publications/democrati-c-governance/dgttf-/access-to-justice-in-asia-and-the-pacific/UNDP_CE%20Paper_Asia_web.pdf) [Accessed on 29/06/2015] p. 11.

<sup>23</sup> B. Laurence, "A History of Alternative Dispute Resolution," *ADR Bulletin*: Vol. 7: No. 7, Article 3, 2005. p. 1. Available at: <http://epublications.bond.edu.au/adr/vol7/iss7/3> [Accessed on 26/06/2015].

<sup>24</sup> Ibid.

Negotiation aims at harmonising the interests of the parties concerned amicably. This mechanism involves the parties themselves exploring options for resolution of the conflict without involving a third party. In this process, there is a lot of back and forth communication between the parties, in which offers for settlement are made by either party.<sup>25</sup> Conflict resolution among the traditional African societies was anchored on the ability of the people to negotiate.<sup>26</sup>

If negotiation fails, parties resort to mediation where they attempt to resolve the conflict with the help of a third party. In mediation, a third party called the mediator sits down with the two disputing sides and facilitates a discussion between them in order to reach a solution. Often, the mediators are the respected elders of the communities of the disputants. Elders are trustworthy mediators owing to their accumulated experience and wisdom. The role of elders in a TDR hearing include, urging parties to consider available options for resolution of the dispute, making recommendations, making assessments, conveying suggestions on behalf of the parties, emphasizing relevant norms and rules and assisting the parties to reach an agreement.<sup>27</sup>

In adjudication, the elders, Kings or Councils of Elders summon the disputing parties to appear before them and orders are made for settlement of the dispute.<sup>28</sup> The end product of adjudication is reconciliation, where after the disputants have been persuaded to end the dispute, peace is restored.<sup>29</sup>

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<sup>25</sup> See M. Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management* (Centre for Conflict Research, Nairobi, 2006). p.115.

<sup>26</sup> See United Nations, 'Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities.' *Study by the Expert Mechanism on the Rights of Indigenous Peoples*. August 2014. A/HRC/27/65.

<sup>27</sup> K. Muigua, *Resolving Conflicts through Mediation in Kenya*, *op cit* pp. 27-28.

<sup>28</sup> AT Ajayi and LO Buhari, "Methods of Conflict Resolution in African Traditional Society," *op cit* at p. 150.

<sup>29</sup> *Ibid*, p. 150.



Under reconciliation, once a dispute is heard before the Council of Elders, the parties are bound to undertake certain obligations towards settlement. These are mainly through payment of fines by the party found to be on the wrong. Once this obligation is discharged, there is reconciliation, which results in restoration of harmony and mending relationships of the parties.<sup>30</sup>

The main aspects of TDR and other ADR mechanisms which make them unique and community oriented is that they focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by formal common law and statutory regimes.<sup>31</sup> The main objective of TDR in African societies is to resolve emerging disputes and foster harmony and cohesion among the people.<sup>32</sup>

Unlike litigation which results in dispute settlement, TDR and majority of ADR mechanisms (perhaps except arbitration) focus on conflict resolution. Conflict resolution mechanisms are those that address disputes with finality and produce mutually satisfying solutions. Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. Conflict resolution entails the mutual satisfaction of needs and does not rely on the power relationships between the parties.<sup>33</sup> The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes. On the other hand, dispute settlement mechanisms only address the issues raised by disputants and aim at resolving the issues without venturing into the root causes of the

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<sup>30</sup> J. Kenyatta, *op.cit.*

<sup>31</sup> K. Muigua, 'Effective Justice for Kenyans: Is ADR Really Alternative?' pp. 12-13.  
Available at

<http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf>

<sup>32</sup> K. O. Hwedie and M. J. Rankopo, Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, *op cit* p. 33.

<sup>33</sup> M. Mwagiru, *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, July 2008), pp. 36-38.

dispute.<sup>34</sup> Examples of dispute settlement mechanisms are arbitration and litigation.

TDR utilizes resolution mechanisms such as negotiation, mediation and conciliation to ensure that the root causes of the dispute are addressed and assist the parties to explore mutually satisfying and durable solutions.<sup>35</sup> These mechanisms can be effective in managing conflicts and have their outcome recognized by the formal institutions especially under the current Constitutional dispensation.<sup>36</sup>

However, TDR mechanisms do also have some disadvantages such as: disregard for basic human rights; application of abstract rules and procedure/lack of a legal framework; lack of documentation/record-keeping; evolution of communities and mixing up of different cultures thereby eroding traditions; negative attitudes towards the systems and bias at times; the jurisdiction is vague/undefined and wide; and lack of consistency in the decisions made.

Other challenges include lack of recognition and empowerment of elders both legally and by the government, inadequate security and protection and negative attitudes towards elders by the community, illiteracy and lack of modern technology, gender imbalance in the composition of the committees and lack of awareness by the public on the TDR and general rights, among others. However, these disadvantages can effectively be addressed through putting in place an efficacious policy and legal framework in order to foster the use of these mechanisms since the advantages thereof outweigh the demerits.

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<sup>34</sup> See K. Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, Available at <http://www.beyondintractability.org/bi-essay/culture-of-mediation> [Accessed on 29/06/2015]

<sup>35</sup> Ibid.

<sup>36</sup> Article 159(2); See also S. 20, Environment and Land Court Act, 2011.

The Constitution recognizes application of TDR and ADR mechanisms in dispute resolution for efficient dispensation of justice since their merits outweigh the disadvantages thereof.<sup>37</sup> It supports access to justice through informal systems such as TDR and ADR mechanisms in addition to the court process. A high percentage of disputes in Kenya are resolved outside courts or even before they reach courts by use of TDR or ADR mechanisms. TDR and other community justice mechanisms are widely used by communities to resolve conflicts owing to their legitimacy and accessibility. The main disputes that may be resolved by way of TDR mechanisms in the communities include land disputes, marriage, gender violence, family cases including inheritance, clan disputes, cattle rustling, debt recovery, overall community conflicts and resolution of political disputes in the community, and welfare issues such as nuisance, child welfare and neglect of elderly in a community amongst others.<sup>38</sup>

Generally, many cases are resolvable through TDR except for serious criminal offences that may require the intervention of the courts. Where attempts have been made to subject the matters that were previously believed to fall within the exclusive ambit of criminal law, it has led to heated deliberations as to whether the same should be allowed.<sup>39</sup> This therefore calls for an effective policy and legal framework on ADR and TDR mechanisms

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<sup>37</sup> See Article 159 (2) (c) of the Constitution of Kenya 2010.

<sup>38</sup> J. Kenyatta, *op.cit.*

<sup>39</sup> See the case of *Republic V Mohamed Abdow Mohamed* [2013] eKLR, High Court at Nairobi (Nairobi Law Courts) Criminal Case 86 of 2011, where the learned Judge of the High Court upheld a community's decision to settle a murder case through ADR. It is also important to point out that the *National Cohesion and Integration Act*, No. 12 of 2008 [2012] under S. 25(2) thereof states that the National Cohesion and Integration Commission is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof. To achieve this, the Commission should *inter alia* promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace. What remains to be seen is how the Commission will handle any cases which, just like the *Mohamed case*, the involved communities or families feel that they can be handled locally but the Commission feels that the same should go to courts owing to their magnitude.

although the debate on what may or may not be subjected to these mechanisms may go on for a while.

#### **4.0 Legal and Policy Framework on ADR in Kenya**

Currently, there is no stand-alone statute on traditional dispute resolution in Kenya. In communities where traditional dispute resolution process is utilised in conflict management, the rules and procedure used are derived from customs and traditions of the community. The preservation of TDR mainly relies on the fact that customs and traditions are handed down from one generation to the next and there is no form of documentation for TDR in most Kenyan communities. Consequently, there is a danger of distortion or neutralization of customs and traditions in the context of modern notions of Western civilization. Some of the Kenyan laws make reference to ADR and TDR mechanisms and advocate for their use in conflicts management in the country.

#### **4.1 *The Constitution of Kenya, 2010***

The Constitution seeks to promote the cultural practices and traditional knowledge of the Kenyan communities including the use of ADR and TDR mechanisms in conflict management. In this regard, Article 159 (1) provides that judicial authority is derived from the people and vests in and it is to be exercised by courts and tribunals established by or under the Constitution with regard to the principles *inter alia* promoting the use of ADR mechanisms in conflicts management.<sup>40</sup>

The rationale of the Constitutional recognition of TDR is to validate alternative forums and processes that provide justice to Kenyans. However, Article 159 (3) provides that traditional dispute resolution mechanisms are not to be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law. The policy behind subjection of customary law to the repugnancy test was founded on the contention that there are certain aspects of customary laws

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<sup>40</sup> Article 159 (2) (c) and (3).

that do not augur well with human rights standards. This has resulted in continued subjection of customary laws to the repugnancy clause by courts hence undermining the efficacy of traditional justice systems.<sup>41</sup> Besides, the repugnancy clause suffers from a grievous misconception of 'justice and morality' because it imposes the Western moral codes on African societies, who have their own conceptions of justice and morality. Redefining the repugnancy clause would call for a change of attitude by the courts and reforms on the formal legal systems to elevate the position of customary laws.

#### **4.2 Civil Procedure Act and Rules**

The Civil Procedure Act and Rules, Cap 21 embody the procedural law and practice in civil courts in Kenya. These include the High Court and Subordinate Courts. The Act and Rules envisage enabling provisions within which ADR mechanisms are to be supported.<sup>42</sup>

Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives. TDR mechanisms are arguably part of such options.

Section 1B provides that the aims of ensuring a just, expeditious, proportionate and affordable resolution of civil disputes include the just determination of proceedings, efficient disposal of Court business, efficient use of judicial and administrative resources, timely disposal of proceedings, affordable costs and use of appropriate technology. In most civil matters emanating from customary law such as family disputes (marriage, divorce and matrimonial property), succession and inheritance often turn to customs and traditions of the communities of the parties. Thus, use of traditional processes in such cases facilitates achievement of the overriding objective. Pursuant to the inherent powers of the court under *Section 3A* which empowers courts to make orders that may be necessary for the ends of justice, the court can promote the use of TDR.

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<sup>41</sup> Section 3(2), Judicature Act, Cap.8.

<sup>42</sup> Section 1A (1)of the Civil Procedure Act encapsulates the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

Mediation is one of the key dispute resolution mechanisms in traditional justice systems. *Section 59A* establishes the Mediation Accreditation Committee. The Committee's role is to determine the criteria for certification of mediators and propose rules for the certification of mediators.

Further, the use of TDR in resolution of civil disputes is promoted under Order 46 rule 20<sup>43</sup> of the Civil Procedure Rules. Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR and TDR or any other appropriate mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. There is a need therefore to introduce court-annexed TDR and ADR as it will go a long way in tackling the problem relating to backlog of cases, enhance access to justice, encourage expeditious resolution of disputes and lower costs of accessing justice.

Under Order 46 Rule 20 (2), a court may adopt any ADR mechanism for the settlement of the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be thoroughly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism that will lead to the attainment of the overriding objectives under Sections 1A and 1B of the Act. Nonetheless, Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases.

The application of TDR in dispute resolution is promoted under the Evidence Act, Cap 80 which introduces amendments to relax the rules of evidence in informal hearings such as rules relating to character evidence, statements by persons who cannot be called as witnesses, competency of witnesses and rules as to examination of witnesses.

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<sup>43</sup> "Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act."

To promote TDR in dispute resolution, Parliament should amend the Limitation of Actions Act, Cap 22 such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.

#### **4.3 Land Act, 2012**

The Land Act is the substantive regime for matters pertaining to land in Kenya. It was enacted with a view to harmonize land regimes which were scattered in different pieces of legislation. The Act lays down the guiding values and principles of land management and administration which include *inter alia*: elimination of gender discrimination in law, customs and practices related to land and property in land; encouragement of communities to settle land disputes through recognized local community initiatives; participation, accountability and democratic decision making within communities, the public and the Government; and alternative dispute resolution mechanisms in land dispute handling and management.<sup>44</sup>

This Act promotes the application of ADR mechanisms which in this case include traditional dispute resolution mechanisms. Thus, TDR can effectively be utilized within the framework of providing access to justice. In particular, disputes involving communal land can be better resolved through application of TDR. It is also important to point out that the use of ADR and TDR mechanisms can also facilitate the implementation of the Constitutional principles of public participation, inclusiveness, protection of the marginalised, non-discrimination, equity and social justice amongst others.

Lack of a policy and legal framework on the operation of ADR and TDR mechanisms however gives a wide discretion to the National Land Commission<sup>45</sup> on how to go about ensuring the use of ADR and TDR in land matters and may even create confusion as to how and when the same should be used.

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<sup>44</sup> Section 4.

<sup>45</sup> Established by the Constitution of Kenya under Article 67 and the National Land Commission Act, 2012, No. 5 of 2012.

#### **4.4 Commission on Administrative Justice Act, 2011**

Section 3 establishes the Commission and confers it with the mandate under section 8 to perform various functions.<sup>46</sup> Under Section 8 (f), the Commission is mandated to work with various public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration. In this regard, the utilization of ADR and TDR mechanisms enables the Commission to explore the root causes of the disputes and the most appropriate options for resolution.<sup>47</sup> The Commission has been instrumental in promoting the use of ADR mechanisms especially in handling disputes between various State and Constitutional organs with a high success rate.<sup>48</sup>

#### **4.5 The National Land Commission Act, 2012**

Under Section 3, the object of the Act is to provide for the management and administration of land in accordance with the principles of national land policy and the Constitution of Kenya.

Under Section 5 (f) of the Act, the Commission is obligated to encourage the application of traditional dispute resolution mechanisms in land conflicts. Further, under Sub-section 2(f), the Commission is mandated to develop and encourage alternative dispute resolution mechanisms in land dispute handling and management. Section 6 provides for the powers of the Commission and Subsection 3 thereof provides, *inter alia*, that in the exercise of its powers and the discharge of its functions, the Commission is not bound by strict rules of evidence.

There is need to amend Section 17 on consultations to the effect that the Commission can consult or seek assistance from community leaders on matters pertaining to land. Having a legal framework on the use of TDR and ADR is arguably the only way that community elders can have a say in

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<sup>46</sup> See also Article 59(4), Constitution of Kenya, 2010.

<sup>47</sup> O, Amollo, "Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya," in *Chartered Institute of Arbitrators (Kenya) Alternative Dispute Resolution Journal*, Vol. 2, No. 1, 2014, pp. 96-111 at pp. 109-111.

<sup>48</sup> *Ibid.*



deliberations on the use, access and management of natural resources affecting their livelihoods, especially land, without being side lined by the Commission. Currently, there have been no sign of actual and meaningful engagement of communities in land matters especially in the ongoing supremacy battle between the National Land Commission and the Ministry of Land, Housing & Urban Development on who should spearhead the control of use, access and management of land in the country.<sup>49</sup> There is need to put in place provisions in the Act that obligate the Commission to engage the community experts in handling land disputes and ensuring that the same enable such communities to challenge the Commission's actions where they feel that they were side lined.

#### ***4.6 Environment and Land Court Act, 2011***

Under section 3, the objective of the Act is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act and that the parties and their representatives shall assist the court in furthering the overriding objectives.

Section 20 provides for the application of ADR and empowers the court to adopt and implement on its own motion with the agreement of or request of the parties, any appropriate mechanism such as mediation, conciliation and TDR mechanisms in accordance with Article 159(2) (c) of the Constitution. Further, the Act provides that in cases where ADR is a condition precedent to any proceeding before the Court, the court must stay proceedings until such condition is fulfilled. What is ambiguous is what or who determines a matter where the use of ADR and TDR mechanisms is a condition precedent to any proceeding before the Court. The court's discretion and lack of clarity

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<sup>49</sup> Standard Digital, F. Ayieko, "Ngilu- National Land Commission wars hit lenders," Thursday, October 23rd 2014. Available at <http://www.standardmedia.co.ke/lifestyle/article/2000139137/ngilu-national-land-commission-wars-hit-lenders>. [Accessed on 06/7/2015]; Daily Nation, "Ministry, judges on the spot over 5,000 land cases," Monday, June 9, 2014. Available at <http://www.nation.co.ke/news/Ministry-judges-on-the-spot-over-5-000-land-cases/-/1056/2342658/-/qjbgvh/-/index.html> [Accessed on 06/7/2015]

on these provisions may defeat the spirit of Article 159 and the same should therefore be clarified.

#### **4.7 Community Land Act, 2016**

The Community Land Act 2016<sup>50</sup> acknowledges the importance of these mechanisms in management of community land related disputes. It provides that a registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.<sup>51</sup> It also provides that any dispute arising between members of a registered community and another registered community should, at first instance, be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws.<sup>52</sup> Furthermore, where a dispute or conflict relating to community land arises, the registered community should give priority to alternative methods of dispute resolution.<sup>53</sup> This is a positive move in ensuring that communities exploit mechanisms that are most familiar to them before they can resort to the formal justice system, if at all.

It is also noteworthy that subject to the provisions of the Constitution and of this Act, a court or any other dispute resolution body should apply the customary law prevailing in the area of jurisdiction of the parties to a dispute or binding on the parties to a dispute in settlement of community land disputes so far as it is not repugnant to justice and morality and inconsistent with the Constitution.<sup>54</sup> This obligation can go a long way in ensuring that courts actively facilitate the uptake of ADR mechanisms in the management of the community land disputes.

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<sup>50</sup> Community Land Act, No. 27 of 2016, Laws of Kenya.

<sup>51</sup> Ibid, sec. 39(1).

<sup>52</sup> Ibid, sec. 39(2).

<sup>53</sup> Ibid, sec. 39(3).

<sup>54</sup> Ibid, sec. 39(4).

Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to mediation.<sup>55</sup> The mediation should take place in private or in informal setting where the parties participate in the negotiation and design the format of the settlement agreement.<sup>56</sup> If an agreement is reached during the mediation process, the agreement should be reduced into writing and signed by the parties at the conclusion of the mediation.<sup>57</sup> While the mediation outcome must be in writing, it is commendable that the process should be conducted in an informal setting since this creates a conducive environment which can enable the participants to actively and meaningfully participate and appreciate the mutually agreed outcome.

Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration.<sup>58</sup> However, where the parties to an arbitration agreement fail to agree on the appointment of an arbitrator or arbitrators, the provisions of the Arbitration Act relating to the appointment of arbitrators should apply.<sup>59</sup> While the use of arbitration in matters falling under the Community Land Act 2016 may be necessary in some instances, it may give rise to other challenges which may affect the outcome and the long run solution to the prevailing problems. One such challenge would be the determination of who is to pay arbitrator's fees which may become exorbitant depending on the time taken. The conduct of the arbitration process may also need some modifications to suit the potentially sensitive land issues.

Where all efforts of resolving a dispute under this Act fail, a party to the dispute may refer the matter to court.<sup>60</sup> The Court may- confirm, set aside, amend or review the decision which is the subject of the appeal; or make any order in connection therewith as it may deem fit.<sup>61</sup> This is important to ensure

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<sup>55</sup> Community Land Act, No. 27 of 2016, sec. 40(1).

<sup>56</sup> Ibid, sec. 40(2).

<sup>57</sup> Ibid, sec. 40(4).

<sup>58</sup> Ibid, sec. 41(1).

<sup>59</sup> Ibid, sec. 41(2).

<sup>60</sup> Ibid, sec. 42(1).

<sup>61</sup> Ibid, sec. 42(2).

that if parties fail to agree, then the dispute is handled through the formal system.

The enactment of this statute is a positive step towards legitimizing the community based dispute management mechanisms although its success depends on the goodwill of the parties and the courts.

## **5.0 Towards a Policy and Legal Framework**

### ***5.1 A Policy Framework on ADR in Kenya***

It is noteworthy that currently there is no policy on TDR and other community based justice systems in Kenya. Thus, dispute resolution through TDR and other community justice systems is community based. The rules governing the TDR processes differ from one community to another depending on the customs and traditions of the communities. In this regard, there is a gap owing to the absence of a comprehensive policy to guide dispute resolution through TDR Mechanisms. There ought to be put in place a TDR policy framework in order to recognize and affirm the importance of TDR mechanisms in the administration of justice and establish a clear interface between TDR and the formal processes. The policy should be targeted at promoting access to justice while preserving customs and traditions of the people of Kenya. The policy framework should be designed in a way that harmonizes traditional systems with the core principles of the Constitution and international law.

The traditional justice systems policy framework should promote and preserve the African values of justice, which are based on reconciliation and restorative justice. The role of traditional justice systems in access to justice goes beyond dispute resolution. For instance, TDR mechanisms promote social cohesion, coexistence, peace and harmony besides the reactive role of dispute resolution.<sup>62</sup>

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<sup>62</sup> See *National Cohesion and Integration Act*, No. 12 of 2008 [2012]. S. 25(1) thereof states that the object and purpose for which the National Cohesion and Integration Commission is established is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities

The essence of the traditional justice system lies in the participation of communities in resolving their disputes. The absence of a clear legal framework on coordination in matters arising between the State and local communities leaves room for potential conflicts between the State organs and such communities. National policy on ADR and TDR mechanisms should affirm the traditional institutions or forums sitting as traditional courts at which councils of elders or community leaders exercise their role and functions relating to the administration of justice. The policy should be designed in a way that promotes coordination between courts and traditional dispute resolution institutions.

The Policy should provide the minimum qualifications for the recognised TDR practitioners. Mechanisms should also be put in place to ensure that TDR practitioners exercise their role and functions in line with culture and traditions of the community. These safeguards should be designed to prevent deviation from the applicable rules of the community. There should be mechanisms to ensure adherence to due process by the community and observance of the principles of natural justice.

The Policy should also promote continuous training of TDR practitioners. In order to link TDR mechanisms to formal justice systems, there is a need to train TDR practitioners on the minimum requirements of formal law such as Constitutional requirements as to the Bill of Rights and best practices regarding TDR. Further, an enactment on TDR is necessary to provide for training programmes designed to promote efficient functioning of TDR mechanisms.

In most Kenyan communities, traditional dispute resolution systems have a wide and undefined jurisdiction comprising of both civil and criminal

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of Kenya, and to advise the Government on all aspects thereof. S. 25(2)(g) goes further to state that Without prejudice to the generality of subsection (1), the Commission should *inter alia* promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace.

matters. There is no clear line as to which matters should be subjected to the TDR process and which matters should be taken to court. An enactment with clear guidelines would help clear the ambiguity that may arise.

The sanctions imposed in TDR processes should not contravene the Bill of Rights. As such, TDR and ADR practitioners would greatly benefit from clarification on what amounts to violation of the Bill of rights as spelt out in the Constitution.<sup>63</sup>

The policy framework should also outline minimum procedural requirements in TDR proceedings in order to entrench due process and rules of natural justice. These include requirements as to submitting a dispute, service of processes and whether or not there needs to be representation in the hearing, among others.

Further, the policy framework should clearly provide for recourse of any party who is aggrieved with a decision delivered in TDR processes. This is in line with the Constitution and due process for a fair hearing and access to justice.<sup>64</sup> These mechanisms include review or appeal. The formal courts should be expressly conferred with jurisdiction to review decisions made in TDR proceedings.

There should also be a clear interface between TDR processes and formal courts and tribunals. To this end, there is a need to formulate a clear referral system indicating how disputes from TDR proceedings can be referred to court and vice versa. The framework should be clear on the stage of the dispute process at which a referral may or may not be done.

In order to overcome the challenge of poor record keeping especially for purposes of appeal, review or referral, there is need to adopt information technology in TDR processes.

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<sup>63</sup> Chapter Four (Articles 19-58), Constitution of Kenya 2010.

<sup>64</sup> Articles 48, 50.

## **5.2 Legal and Administrative/Institutional Framework**

Article 159 (2) (c) of the Constitutions obligates courts and tribunals in the exercise of judicial authority to promote the application of TDR and ADR mechanisms. In addition, the Civil Procedure Act under Section 1A provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives. Courts and tribunals, in consultation with knowledgeable community leaders, can therefore go a long way in encouraging and promoting the use of TDR and ADR mechanisms in conflict management.

In most Kenyan Communities, the institution of Council of Elders remains a strong regulatory institution. Most disputes are submitted to the elders for resolution before parties consider the court process. The Councils of Elders exercise jurisdiction over both interpersonal disputes relating to land, marriage and inheritance and minor crimes.

The foregoing institutions can join hands in a mutual relationship to promote the active uptake of TDR and ADR mechanisms in conflict management in Kenya. An effective working relationship between the formal justice system and TDR mechanisms, would call for an effective court-annexed TDR and ADR framework where the outcomes of such processes would enjoy the approval of the Judiciary for purposes of recognition, enforcement and appeal. It would also call for simplified procedures to ensure that courts and tribunals focus on substantive rather than procedural justice. This would tackle the problem of backlog of cases, enhance access to justice, and encourage expeditious disposal of disputes and lower costs of accessing justice.

Kenya can learn a lot from the case of Rwanda's mandatory mediation framework where carrying the agenda of local ownership of conflict resolution, the Rwandan government passed *Organic Law No. 31/2006* which recognises the role of *abunzi* or local mediators in conflict resolution of

disputes and crimes.<sup>65</sup> The Constitution of Rwanda provides for the establishment in each Sector of a "Mediation Committee" responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with the court of first instance.<sup>66</sup> The Mediation Committee comprises of twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills.<sup>67</sup> Such a framework may be useful in dealing with the challenges that are likely to arise in the actualization of Articles 60(1)(g) and 67(2)(f) together with all the relevant land laws which require the use of ADR and TDR mechanisms in managing natural resource based and especially land conflicts. There should be set in place a legal framework within which such an arrangement may operate.

Order 46 Rule 20 of Civil Procedure Act and Rules,<sup>68</sup> does not expressly mention TDR mechanisms. This needs to be amended so as to put it in line with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases. These provisions have the potential to promote the active use of ADR and TDR through an all-inclusive policy, which takes into account the particular context, cultural distinctions and value systems of particular communities.

The Evidence Act, Cap 80 should also be reviewed so as to simplify the evidential rules to cover situations where informal systems of dispute resolution are being used. Simplified procedures should be introduced to ensure that courts and tribunals focus on substantive rather than procedural justice as contemplated under Article 159(2) (d). This is in appreciation of the

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<sup>65</sup> M. Mutisi, "Local conflict resolution in Rwanda: The case of abunzi mediators", in M. Mutisi and K. Sansculotte-Greenidge (eds), *Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa*, pp. 41-74 at p.41, African Centre for the Constructive Resolution of Disputes (ACCORD), Africa Dialogue Monograph Series No. 2/2012 Available at <http://accord.org.za/images/downloads/monograph/ACCORD-monograph-2012-2.pdf> [Accessed on 28/03/2015]

<sup>66</sup> Article 159, Constitution of Rwanda, 2003.

<sup>67</sup> *Ibid.*

<sup>68</sup> Cap 21, Laws of Kenya.



fact that most of the practitioners of TDR are usually non-lawyers and mostly persons with no formal education. If these persons are to take part in the justice system, then there should be created an environment that allows them to participate meaningfully such as one that allows them to utilize their expertise and knowledge based on their cultural backgrounds.

It is also important that the Judicature Act, 1967 be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under the Constitution and should inform the use of ADR and TDR mechanisms in conflict management and access to justice.

There should also be put in place proper procedures and channels through which application of TDR in the appellate process where the matter in dispute involves customary law can take place.

Land Act, 2012, should also be reviewed to ensure clear and substantive provisions that ensure that a requirement encouraging communities to settle land disputes through recognized local community initiatives and participation is phrased in a mandatory manner so as to ensure that there is equal and equitable opportunities to members of all ethnic groups; non-discrimination and protection of the marginalized; democracy, inclusiveness and participation of the people; and the active utilisation of alternative dispute resolution mechanisms, especially TDR, in land dispute handling and management. As it is now, the provisions appear to be too general and ambiguous rendering their implementation more discretionary than mandatory. In addition to the foregoing, Section 17 of the National Land Commission Act should be amended so as to ensure that the Commission consults or seeks assistance from community leaders on matters pertaining to land on a mandatory basis rather than a discretionary one. Section 18, which provides for the establishment of County Land Management Boards, needs to be amended in terms of the composition of the Boards so as to include community leaders/elders who would advise such boards on matters of ADR and TDR.

Such elders should also be accorded an opportunity through a legal platform to assist or advise the court in matters pertaining to customary law. There is therefore a need to formulate an enabling policy and legal framework for ADR and TDR mechanisms. As such, one of the ways that this would be actualized is enactment of a statute to be known as the Alternative Dispute Resolution and Traditional Dispute Resolution Mechanisms Act, which would provide for the effective implementation of Article 159 of the Constitution on the use of ADR and TDR and to provide for the regulatory and institutional framework to govern the practice of ADR and TDR. This would go a long way in ensuring that: such mechanisms are used in a way that is consistent with the Bill of Rights; there exists a clear referral mechanism; there is formal recognition and enforcement of ADR and TDR outcomes and that there is clearly defined jurisdiction of ADR and TDR practitioners. All this should be done while ensuring that the informality of these mechanisms is preserved.

## **6.0 Conclusion**

Although the Constitution guarantees the right of access to justice and goes further to recognize ADR and TDR, there is no elaborate legal or policy framework for their effective application. Currently, the legal framework does not provide comprehensive guidelines on linkage of TDR with the formal court process. This has further frustrated the utilization of TDR in Kenya.

While acknowledging that the adoption and application of Africa's traditional dispute resolution mechanisms, including indigenous principles and methods on conflict management do not apply to all situations, there are relevant aspects of these principles and practices that can be integrated and harmonized with the formal legal and institutional framework to offer an all-round approach on access to justice which caters for all persons despite any social differences. They can be weighed against the Constitutional safeguards so as to get rid of the negative aspects therein. Traditional dispute resolution mechanisms can go a long way in facilitating access to justice at the community level, especially for those who feel alienated from the formal

processes in terms of the cost for justice and technical procedures.<sup>69</sup> There is therefore a need for enactment of a sound legal and policy framework for effective utilization of TDR and ADR to ensure full access to justice for Kenyans. It is only through putting such legal and policy measures in place that we can fully legitimize the ADR and TDR mechanisms and tap into their advantages. This will facilitate effective justice for Kenyans and ultimately promote the creation of a just and peaceful society for all.

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<sup>69</sup> Article 60(1) (g) of the Constitution of Kenya provides that one of the principles of land policy in Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution. This is also reflected under Article 67(2) (f) which provides that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

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## **Arbitration and Expert Determination: A Comparative Overview of the Differences between the Two Mechanisms**

*By: Hazron Maira\**

### **1.0 Introduction**

The paper provides a comparative overview of the differences between arbitration and expert determination that make the two mechanisms distinct. The comparison deals with both the substantive and procedural differences. The author finds in conclusion, that by using arbitration as an alternative dispute resolution (ADR) mechanism, certainty in terms of costs and time is better than in expert determination.

Unless otherwise stated, references to the term “the Act” shall be deemed to mean The Kenyan Arbitration Act, Cap 49 [Rev. 2012]. The type of expert determination referred to in this paper is not the process that is widely known for valuations, for example of company shares, properties etc, but the expert determination used as a mechanism for settlement of some or all disputes.<sup>1</sup>

In commercial relationships, arbitration and expert determination are the two most widely used ADR mechanisms. Both are founded on dispute resolution clauses in an agreement that provides for appointment of an independent third party to determine the parties’ rights and obligations. The similarities do not go further than that because once the dispute resolution clauses are invoked, different regimes apply that make both mechanisms distinct.

Parties who agree to refer all disputes to arbitration, agree without qualification on a form of dispute resolution alternative to that provided by the Courts.<sup>2</sup> The principal characteristics of the term arbitration are that it is a mechanism for the settlement of disputes; it is consensual and is a private

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<sup>1</sup> Both types of expert determinations are governed by the same legal principles

<sup>2</sup> *Halki Shipping Corporation v Sopex Oils Ltd* [1997] EWCA Civ 3062.



procedure that leads to a final and binding determination of the rights and obligations of the parties.<sup>3</sup>

Expert determination, as an ADR mechanism, can be preferable to arbitration for certain types of disputes<sup>4</sup> for example, disputes that are of a specific technical character that require a specialised expert. Other reasons that make parties provide for expert determination are informality and speed, privacy and a desire to resolve disputes in a way which may be seen as reasonably consistent with the maintenance of ongoing business relationships.<sup>5</sup> It is not unusual for parties to agree on expert determination and to provide that the expert's decision shall be "final and binding" or "conclusive", thus giving the clause the binding effect and thereby hold parties to their bargains, provided that the matters referred to the expert are ones which the agreement contemplates.<sup>6</sup>

Appreciation of the differences that distinguish arbitration and expert determination, and the consequential effects when the settlement of disputes clauses are invoked is relevant, especially for parties who draft dispute resolution agreements. Despite the distinct nature of the two mechanisms and the intention of the parties at the time of concluding an agreement that they contemplated having their differences be resolved through one of the mechanisms, there are reported cases of disputes as to whether the clause in the agreement is a provision for arbitration or expert determination. Thus, in

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<sup>3</sup> United Nations Conference on Trade and Development (2005) *Dispute Settlement International Commercial Arbitration* 5.1 *International Commercial Arbitration* [online]. Available at: [http://unctad.org/en/Docs/edmmisc232add38\\_en.pdf](http://unctad.org/en/Docs/edmmisc232add38_en.pdf) [Accessed 24 November 2016].

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<sup>5</sup> *Straits Exploration (Australia) Pty Ltd & Anor -v- Murchison United NL & Anor* [2005] WASCA 241 at para 14.

<sup>6</sup> *Fletcher Construction Australia Limited v MPN Group Pty Limited* NSWSC, 14 July 1997 (unreported) (Source: *The Heart Research Institute Ltd and Anor v Psiron Ltd* [2002] NSWSC 646 at para 19).

*Wilky Property Holdings Plc v London & Surrey Investments Ltd.*,<sup>7</sup> the Defendant, London & Surrey Investments Limited ("LSI") applied for a stay, pursuant to the England and Wales Arbitration Act 1996 or the inherent jurisdiction of the Court, of a Part 8 Claim<sup>8</sup> issued by the Claimant, Wilky Property Holdings plc ("Wilky"). LSI claimed that it had invoked a dispute resolution provision in an agreement between the parties, which was an arbitration clause, and which permitted the appointed arbitrator to determine all issues arising. Wilky contended that the clause in the agreement was a provision for expert determination of a limited number of issues and that it was entitled to issue its Part 8 Claim to have the Court rule upon a variety of questions concerning the meaning and effect of the agreement and the proper scope of the expert determination.

At the hearing, the parties were agreed that the first question to be determined was whether or not the Clause which was at the centre of the dispute was an arbitration agreement within the meaning of the Arbitration Act 1996.

In certain circumstances, a different outcome with fundamental consequences could result if one mechanism is used instead of the other. In the *Wilky v LSI* case, the Judge said that his decision had fundamental consequences for the approach of the Court to the future conduct of the Part 8 Claim and the reference to the Expert who had already been appointed. As an example, the Judge said that if the clause in dispute was an arbitration agreement, a stay of the Part 8 Claim would be mandatory under section 9(4) of the Arbitration Act 1996, whereas if it is an expert determination clause, the Court had discretion whether to grant a stay.

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<sup>7</sup> [2011] EWHC 2226.

<sup>8</sup> The part of England and Wales Civil Procedure Rules that sets out the procedure to be used where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact: See details in <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part08>.

The discussion that follows is a comparison of the main differences between arbitration and expert determination that make the two distinct mechanisms.

## **2.0 The Approach to Jurisdiction**

Parties to an alternative dispute resolution agreement should be held to what they have agreed. As Lord Mustill said in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*,<sup>9</sup>

*'.....those who make agreements for the resolution of disputes must show good reasons for departing from them ... that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point.'*

In *Fiona Trust and Holding Corp v Privalov*<sup>10</sup>, it was established that an approach to the construction of an arbitration clause by drawing a distinction between clauses which referred to disputes "arising under" or "in relation to" reflect no credit upon commercial law and should no longer apply. Lord Hoffmann, who read the lead judgment in the case said that the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. An arbitration clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

In comparison to arbitration, expert determination clauses should be construed with the presumption that the parties intended certain types of dispute to be resolved by expert determination and other types by the court (or if there is an arbitration clause by arbitrators). When interpreting such clauses, the question is whether the dispute which has arisen between the

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<sup>9</sup> [1993] AC 334 at p.353.

<sup>10</sup> [2007] UKHL 40.

parties is within the jurisdiction of the expert conferred by the expert determination clause or is not within it and is therefore within the jurisdiction of the court, and it is a question of construction with no presumption either way.<sup>11</sup>

## **2.1 Determination of Jurisdiction**

In a plain arbitration case, an arbitral tribunal may determine its own jurisdiction. A tribunal's determination on any objections with respect to the existence or validity of the arbitration agreement includes competence to rule on both separability and severability of the arbitration agreement.<sup>12</sup>

By agreement, parties may also refer or go straight to court for a determination of the question of jurisdiction, or they may get arbitrator's permission for the issue to be determined by the court.<sup>13</sup>

Determination of the jurisdiction of an expert was considered in *Barclays Bank Plc v Nyl on Capital LLP*<sup>14</sup>. In that case, the issue was whether the court should stay proceedings brought for a declaration as to the interpretation of an agreement on the grounds that the issue falls within the expert determination clause of the agreement. The relevant clause provided in part that an accountant was to act as an expert and not as arbitrator, and was to determine all matters in dispute including, "*any dispute concerning the interpretation of any provision of this Agreement or his jurisdiction to determine the dispute*". His decision was to be final and binding.

It was held that an expert determination is a very different alternative form of dispute resolution to which no statutory codes apply unlike arbitration. In any case where a dispute arises as to the jurisdiction of an expert, the court is the final decision maker as to whether the expert has jurisdiction, even if a

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<sup>11</sup> *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826 per Thomas LJ at para 28.

<sup>12</sup> See Section 17(1) of the Act.

<sup>13</sup> *AES Ust-Kamenogorsk Hydropower Plant Llp v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647 at para 82.

<sup>14</sup> *Ibid* (note 11) at para 21.

clause purports to confer that jurisdiction on the expert in a manner that is final and binding.<sup>15</sup>

### **3.0 Procedure**

Arbitral procedures are governed by procedural or curial law. This is the national law which the parties expressly or by implication select to govern the relationship between themselves and the arbitrator in the conduct of the arbitration.<sup>16</sup>

In contradistinction to arbitration, expert determination has no procedural law and unless the parties have expressly provided for a particular procedure for the expert's conduct in the dispute resolution process, it is up to the expert to decide what the procedure should be.<sup>17</sup>

Two procedures in both mechanisms stand out as significantly different.

#### ***3.1 Procedure for Appointing an Arbitrator and an Expert***

Parties to a contract with an arbitration clause ordinarily agree on the procedure for the appointment of an arbitrator. However, non-compliance with the agreed procedure does occur and the result is a failure of the appointment procedure. This may come about due to: (i) failure or refusal of a party to make or concur in the appointment when requested to do so, or (ii) failure or refusal by a third party to make an appointment in accordance with the provisions of the arbitration agreement.<sup>18</sup>

In the event of total failure to agree on the appointment of an arbitrator, arbitral legislation provides for default procedures on how to proceed, including getting courts' interventions.<sup>19</sup> In a small number of cases, a court's intervention in appointing an arbitrator is called if it can be seen that

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<sup>15</sup> *Ibid* at para 23.

<sup>16</sup> *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (note 9) at p. 357.

<sup>17</sup> *Ambra Borgognoni Vimercati v BV Trustco Ltd & Ors* [2012] EWHC 1410 (Ch) at para 20.

<sup>18</sup> *Holloway & Anor v Chancery Mead Ltd* [2007] EWHC 2495 (TCC) at para 36.

<sup>19</sup> See Section 12 of the Act.

the arbitral process cannot result in a fair resolution of the dispute.<sup>20</sup> In making the appointment, the court may require parties' input on the qualifications of arbitrator they expect to be appointed.<sup>21</sup>

The default time limits for appointment of an arbitrator provided in national arbitral legislation if the parties fail to agree on appointment are short, and the decisions of the courts, if the position gets to that, are not appealable. According to the Model Law explanatory notes by the UNCITRAL Secretariat, this is because of the urgency of matters relating to the composition of the arbitral tribunal or its ability to function, and in order to reduce the risk and effect of any dilatory tactics.<sup>22</sup>

Expert determination has no default legislative provisions that parties can turn to in the event of a failure to appoint an expert. Lack of cooperation by one party can lead to a failure in appointment, and the parties are free to seek courts' intervention, not to assist in appointment, but to offer guidance in interpreting the written contract. Thus, in the two cases of *Cream Holdings Ltd v Davenport*,<sup>23</sup> the parties had agreed that the term "Fair Value of shares" shall mean the price per Share as agreed by the Company Board and the Transferor or failing such agreement as determined by the Third Party Accountant (TPA). Article 2.1 of the Articles of Association defined "Third Party Accountant" as "... an independent firm of accountants chosen by the Transferor and the Board or failing agreement on such appointment within 7 days as chosen by the President from time to time of the Institute of Chartered Accountants." The TPA were to act as experts and not as arbitrators and, in the absence of manifest error, their decision was to be final and binding.

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<sup>20</sup> *Atlanska Plovidba & Anor v Consignaciones Asturianas SA* [2004] EWHC 1273 (Comm) at para 24.

<sup>21</sup> *Henry Muriithi Mvungu v Bruno Rosiello* [2006] eKLR.

<sup>22</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Part Two. Explanatory Note by the UNCITRAL Secretariat: Available at: [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf): [Accessed on 04 December 2016].

<sup>23</sup> [2008] EWCA Civ 1363 and [2011] EWCA Civ 1287.

The issue in the first proceedings of 2008 was whether the TPA had been chosen by the parties as required by the definition provisions contained in Article 2.1. There was no doubt that TPA had been selected by both parties as an appropriate TPA but only one of them had signed the letter of engagement. Was the signature of this letter by both parties a pre-requisite to a valid appointment under the Articles? Both the first instance Judge and the Court of Appeal answered in the affirmative and held that there had to be a tripartite agreement on the terms of engagement before the appointment could take effect.

In the second case of 2011, the parties had accepted the nominated TPA by the President of the Institute of Chartered Accountants but disagreed on the terms of the TPA's engagement. The issue in court was whether the parties should be required to agree to the TPA's appointment on the terms upon which he was prepared to act. It was held that if those terms are reasonable and are consistent with the rights and obligations of the parties under the Articles, the implication of a term requiring the parties to co-operate in the valuation process by accepting the appointment on those terms is an obvious and necessary means of giving effect to the contract.

The two court decisions firmed up two legal principles that should assist parties in resolving future similar disagreements. Two observations from the litigation process are notable: (i) the period between notification of intention to proceed with the appointment of a TPA in accordance with the parties' agreement and the date of the second case judgment was about six and half years. For reasons already discussed, such a delay cannot occur in arbitration, and (ii) although it has been said that the whole point of instructing a third party to act as an expert and not as an arbitrator (as parties had agreed in this case) is to achieve certainty by a quick and reasonably inexpensive process,<sup>24</sup> the two cases demonstrate that these benefits can be negated by lack of cooperation by one party.

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<sup>24</sup> See *Morgan Sindall plc v Sawston Farms (Cambs) Limited* [1999] 1 EGLR 90 at p. 92M.

### **3.2 Procedural Fairness or Rules of Natural Justice**

Judges, arbitrators and those in equivalent positions are formally required to comply with rules of natural justice.<sup>25</sup>

In *Amec Capital Projects Ltd v Whitefriars City Estates Ltd*,<sup>26</sup> Lord Justice Dyson said that the common law rules of natural justice or procedural fairness are two-fold. First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made.<sup>27</sup> Secondly, the person affected has the right to an unbiased tribunal. The Judge went on and said these two requirements are conceptually distinct because it is quite possible to have a decision from an unbiased tribunal which is unfair because the losing party was denied an effective opportunity of making representations, and conversely, it is possible for a tribunal to allow the losing party an effective opportunity to make representations, but be biased. In either event, the decision of the tribunal will be in breach of natural justice, and be liable to be quashed if susceptible to judicial review, or (in the world of private law) to be held to be invalid and unenforceable.

An expert is not obliged to comply with all rules of natural justice, but has an implied obligation to act fairly. As Megarry J pointed out in *Hounslow LBC v Twickenham Garden Developments Ltd*:<sup>28</sup>

‘He must throughout retain his independence in exercising that judgment; but provided he does this, I do not think that, unless the contract so provides, he need go further and observe the rules of natural justice; giving due notice of all complaints and affording both parties a hearing.’

The case of *Worrall & Anor v Topp*<sup>29</sup> was about fairness and concerned a dispute on the position of the boundary between two neighbours. The parties

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<sup>25</sup> *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291 at para 46.

<sup>26</sup> [2004] EWCA Civ 1418 at para 14.

<sup>27</sup> Codified by Section 19 of the Act.

<sup>28</sup> [1971] Ch. 233 at p. 259.

<sup>29</sup> [2007] EWHC 1809 (Ch).



agreed that the dispute was to be determined by an independent expert surveyor, who was to determine the position of the boundary having considered the evidence, the documents placed before him and the position on the ground. It was contended the expert surveyor did not act fairly by receiving an email with attached plans sent by one party and not availing to the other. The Judge said at para 21;

‘I am satisfied there was an implied obligation upon Mr. Caruth (the expert) to act fairly. Clearly it is highly desirable that any communications between one party and an expert in the position of Mr. Caruth are copied to all other parties. Fairness must generally demand that each party should have an opportunity to respond to contentions made by any other party. If this course is not followed then a court may hold that any decision reached by the expert cannot stand. Whether it does so or not must depend upon all the circumstances and, in particular, the nature of the communication, the extent to which it concerned matters of which the other party or parties were already aware and the effect it had on the expert in reaching his decision.’

### *3.2.1 Bias or Partiality*

Impartiality is a mandatory requirement of all tribunals, including arbitrators<sup>30</sup> and the effect on the award of a biased tribunal has already been noted.

Bias can either be “actual” or “apparent”. It has been said that the phrase “actual bias” has not been used with great precision and has been applied to the situation: (1) where a Judge has been influenced by partiality or prejudice in reaching his decision and (2) where it has been demonstrated that a Judge is actually prejudiced in favour of or against a party. As for “apparent bias”, it describes the situation where circumstances exist which give rise to a reasonable apprehension that the Judge may have been, or may be, biased.<sup>31</sup>

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<sup>30</sup> *Amec Civil Engineering v Secretary of State for Transport* (footnote 15) at para 73.

<sup>31</sup> *Director General of Fair Trading v Proprietary Association Of Great Britain* [2000] EWCA Civ 350 per The Master of the Rolls at para 38.

In *Macro v. Thompson (No 3)*<sup>32</sup>, the Judge referred to the authorities in the context of determining the partiality of an expert and concluded that when the court is considering a decision reached by an expert valuer who is not an arbitrator performing a quasi-judicial function,

‘It is actual partiality, rather than the appearance of partiality, that is the crucial test. Otherwise auditors (like architects and actuaries) who have a long-standing professional relationship with one party (or persons associated with one party) to a contract might be unduly inhibited, in continuing to discharge their professional duty to their client, by too high an insistence on avoiding even an impression of partiality.’

It is therefore generally accepted that an expert who is guilty of actual bias could have his determination set aside and apparent or unconscious bias would not have this effect.<sup>33</sup>

#### **4.0 Process**

In late 19<sup>th</sup> century, Lord Esher MR in two separate cases considered the processes of both arbitration and expert valuation and distinguished the differences between the two with formulations that have withstood the test of the times. The case of *Re Carus-Wilson v Green*<sup>34</sup> concerned an application to have an expert’s valuation set aside on the basis that it was an arbitration award and thus, according to the legislation then in force, could be set aside on certain grounds. The application failed at the Court of Appeal with His Lordship saying at p. 9:

‘The question here is whether the umpire was merely a valuer ...or arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of

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<sup>32</sup> [1997] 2 BCLC 36 at p. 64/5.

<sup>33</sup> *Bernhard Schulte v Nile Holdings* (supra) at paras 96 & 101.

<sup>34</sup> (1886) 18 QBD 7.

an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner.’

In the earlier case of *Re Dawdy and Hartcup*<sup>35</sup>, His Lordship, with reference to expert valuation had said at p. 430;

‘It has been held that if a man is, on account of his skill in such matters, appointed to make a valuation, in such manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skill, he is not acting judicially: he is using the skill of a valuer, not of a judge. In the same way, if two persons are appointed for a similar purpose, they are not arbitrators but only valuers. They have to determine the matter by using solely their own eyes and knowledge and skill.’

Almost a century after Lord Esher’s pronouncements, Lord Wheatley in the House of Lords case of *Arenson v. Arenson* <sup>36</sup> formulated *indicia* for an arbitration process and said at p. 428;

The *indicia* are as follows: (a) there is a dispute or a difference between the parties which has been formulated in some way or another; (b) the dispute or difference has been remitted by the parties to the person to resolve in such a manner that he is called upon to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision.

The modern day summary of the difference between arbitration and expert determination processes was recently summarised by Mr Justice Cooke in *Bernhard Schulte GmbH & Co Kg & Ors v Nile Holdings Ltd* <sup>37</sup> as follows;

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<sup>35</sup> (1885) 15 QBD 426.

<sup>36</sup> [1977] A.C. 405.

<sup>37</sup> [2004] EWHC 977 (Comm) at para 95.

‘A person sitting in a judicial capacity decides matters on the basis of submissions and evidence put before him, whereas the expert, subject to the express provisions of his remit, is entitled to carry out his own investigations, form his own opinion and come to his own conclusion regardless of any submissions or evidence adduced by the parties themselves.

The *dicta* are consistent and clear. By arbitration process, a third party holds a judicial inquiry and determines a dispute on the basis of evidence submitted by the parties. In contradistinction, by expert determination, a third party determines the dispute on the basis of investigations and makes a conclusion based on his skills and expertise.

### **5.0 Immunity of the Decision Maker**

It has long been established that judges are immune from actions for negligence in the performance of their duty, and the reason is that public policy requires that they should not be liable to harassment for actions by disappointed litigants. Immunity against actions for negligence is enjoyed by arbitrators<sup>38</sup> for much the same reason and if arbitrators were liable to be sued, that would effectually discourage persons of worth from accepting to be arbitrators.<sup>39</sup>

In comparison to arbitrators, experts do not enjoy the benefits of immunity whilst carrying out their mandate. Following two House of Lords decisions in *Sutcliffe v Thackrah*<sup>40</sup> and *Arenson v Arenson*<sup>41</sup>, it is well established that experts are liable to an action in negligence. The principle is universally

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<sup>38</sup> Codified by Section 16B of the Arbitration Act.

<sup>39</sup> *Arenson v. Arenson* (note 36) per Lord Fraser at p.440.

<sup>40</sup> [1974] A.C. 727; It was held in that case that when issuing interim certificates as to the amount due, an architect was not acting as an arbitrator, and owed a duty to his client to record the total value of work properly executed and was liable to an action in negligence in over-certifying.

<sup>41</sup> *Ibid* (note 36): The case concerned a suit against an accountant/auditor who made a valuation of shares negligently, and the court applied the principle in *Sutcliffe v Thackrah* and held that there was no reason of public policy that made it necessary to treat a “mutual” valuer as an exception to the general rule of liability for negligence applicable to judges and arbitrators.

accepted and to mitigate liabilities, many experts insist on having a cap on liability in their engagement contracts.<sup>42</sup>

## **6.0 Challenging the Decision**

Arbitral legislations limit the grounds and time for challenging the awards, with time limits designed to promote the finality of the awards.<sup>43</sup> Two processes must be exhausted before commencement of a challenge by recourse to the court under its statutory powers to set aside the award:<sup>44</sup> (i) “arbitral process of appeal or review”,<sup>45</sup> if the parties have agreed or the Arbitration legislation provides for it, and (ii) correction and interpretation of arbitral award and making of an additional award following correction or error, mistake or ambiguity as provided in the arbitral statute.<sup>46</sup> Differentiating the two processes, the former process is one by which an award is subject to an appeal or review by another arbitral tribunal (as in GAFTA arbitrations) whilst the latter recourse for correction is to the same arbitral tribunal which issued the award.<sup>47</sup>

The essential policy of appeal or review is not to exclude the court process altogether, but to deal with the risk of concurrent proceedings in the court and the arbitral process.<sup>48</sup> Grounds for challenging an award are limited to whether the tribunal had jurisdiction to make the award, the process and procedure of making that award, the principles of law upon which the award is based<sup>49</sup> or as expressly provided by the parties.<sup>50</sup>

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<sup>42</sup> See for example the 2011 case of *Cream Holdings Ltd v Davenport* (note 23).

<sup>43</sup> *K v S* [2015] EWHC 1945 (Comm) at para 24.

<sup>44</sup> Application for setting aside an award is the sole recourse against an arbitral award in the UNCITRAL Model Law (note 22) to the exclusion of any other recourse regulated in any procedural law of a State. Countries that did not adopt the Model Law could have other regime for recourse against arbitral awards, for example, England and Wales Arbitration Act 1996 sections 67 & 68 permits challenging the award on grounds of substantive jurisdiction and serious irregularity respectively, and each section has specific regime for recourse against arbitral awards.

<sup>45</sup> See Section 70 of England & Wales Arbitration Act 1996.

<sup>46</sup> See Section 34 of the Act.

<sup>47</sup> *K v S* (note 43) at paras 16 -18.

<sup>48</sup> *A Ltd v B Ltd* [2014] EWHC 1870 (Comm) at para 19.

<sup>49</sup> See Sections 35(2)(a) and 39 of the Act.

<sup>50</sup> *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR.

According to the Model Law, grounds that a court may consider of its own initiative for setting aside an award are non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).<sup>51</sup>

In expert determination, a different approach compared to that of arbitration applies. A decision of an expert cannot be challenged if it has been made honestly and in good faith simply because it has a mistake. As Lord Denning MR said in *Campbell v. Edwards*:<sup>52</sup>

‘If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it.’

Notwithstanding the above, in the absence of factors such as fraud, collusion and bias, an expert determination declared by contract to be final and binding is open to challenge only to the extent that it does not lie within the scope of the expert’s authority.<sup>53</sup> As Dillon LJ put it in *Jones v. Sherwood Computer Services Plc*:<sup>54</sup>

‘On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning M.R. said in *Campbell v. Edwards* [1976] 1 W.L.R. 403, 407G, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect. .... either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do.’

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<sup>51</sup> *Ibid* (note 22) and Section 35(2) (b) of the Act.

<sup>52</sup> [1976] 1 WLR 403 at p. 407.

<sup>53</sup> *Savcor v State of NSW* [2001] NSWSC 596 at para 35.

<sup>54</sup> [1992] 1 WLR 277 at p.287.

The question in *Veba Oil Supply & Trading GmbH v Petrotrade Inc*<sup>55</sup> was what, for an expert's determination not to be binding, is a material respect? Simon Brown LJ, with whom Tuckey LJ agreed formulated a test of materiality and cited a statement by Lloyd J's judgment in *Shell UK v Enterprise Oil* [1999] 2 All ER (Comm) 87 at 98 and said;

'Once a material departure from instructions is established, the court is not concerned with its effect on the result. ...the determination in those circumstances is simply not binding on the parties. Given that a material departure vitiates the determination whether or not it affects the result, it could hardly be the effect on the result which determines the materiality of the departure in the first place. Rather I would hold any departure to be material unless it can truly be characterised as trivial or *de minimis* in the sense of it being obvious that it could make no possible difference to either party.'

In *Ackerman v Ackerman*,<sup>56</sup> the Judge reviewed the authorities on materiality and concluded that "a departure from substantive instructions will be material and automatically invalidate a decision unless it is trivial or *de minimis*, but that a departure from express or implied procedural instructions or an unfairness will not always do so."

## 7.0 Questions of law

Arbitral legislation gives prescribed rights to the parties to refer questions of law that arise during the proceedings or out of the award to the court.<sup>57</sup> It is the questions of law that arise out of the award and from the determination that are common and considered in this paper.

In *Vinava Shipping Co Ltd v. Finelvoet AG (The "Chrysalis")*<sup>58</sup>, Mustill J discussed the question of law in arbitral award and said the process of an arbitrator's

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<sup>55</sup> [2001] EWCA Civ 1832.

<sup>56</sup> [2011] EWHC 3428 (Ch) at para 274.

<sup>57</sup> See Section 39 of the Act.

<sup>58</sup> [1983] 1 QB 503 at 507.

reasoning is divided into three stages: (i) the arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute; (ii) the arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached; (iii) in the light of the facts and the law so ascertained, the arbitrator reaches his decision.

The Judge went on and said that it is the second stage of the process that is the proper subject matter of an appeal on the question of law. In some cases, an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another: this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct - for the Court is then driven to assume that he did not properly understand the principles which he had stated.

Following determination of the question of law, the court confirms, varies or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.<sup>59</sup>

Expert determination does not have the benefits of statutory provisions on question of law and determination of the issues referred to an expert must be made in accordance with the mandate conferred upon him by the agreement; the scope of that mandate (including the principles as derived from the contract upon which that determination must be made) is a question of law.<sup>60</sup>

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<sup>59</sup> See Section 39(2) of the Act.

<sup>60</sup> *Ibid* (note 11) at para 34.



Until recently, the often cited *dictum* on questions of law in expert determination was as stated by Knox J in *Nikko Hotels (UK) Ltd v MEPC plc*:<sup>61</sup>

‘The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him. If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.

The conclusion of Knox J was approved by the Court of Appeal in *RE Brown & Ors v GIO Insurance Ltd*<sup>62</sup> but the principle in the passage recently came under pressure in *Barclays Bank v Nylon Capital* case. Lord Neuberger MR in comments that were *obiter* questioned the accuracy of the approach of Knox J's in *Nikko Hotels v MEPC* and said he did not consider that the observation can safely be relied on and that it necessarily represented the general rule. According to him, it seemed that where a contract requires an expert to effect a valuation which is to be binding as between the parties, and there is an issue of law which divides the parties and needs to be resolved by the expert, it by no means follows that his resolution of the issue is incapable of being challenged in court by the party whose argument on the issue is rejected. It must be questionable whether the parties would have intended an accountant, surveyor or other professional with no legal qualification, to determine a point of law, without any recourse to the courts, even if it has a very substantial effect on their rights and obligations. Thomas LJ who read the lead judgment speech in the case and with whom Etherton LJ agreed said he saw the force in the observations of The Master of the Rolls “*but the issue needs detailed examination when it arises*”.

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<sup>61</sup> [1991] 2 EGLR 103 at 108.

<sup>62</sup> [1998] EWCA Civ. 177.

In a later case of *Premier Telecom Communications Group Ltd & Anor v Webb*<sup>63</sup>, Moore-Bick LJ who read the sole judgement in the case, and with whom the other two Judges agreed, referred to comments by Lord Neuberger M.R. and said it is possible that the parties might by their agreement define the terms of the expert's mandate in such a way that any error of law on his part rendered his decision invalid, but in many cases, to do so would risk undermining the whole purpose of the reference. The Judge then said, ultimately, however, as Lord Denning observed in *Campbell v Edwards* [1976] 1 W.L.R. 403, 407 (and as Lord Neuberger himself was at pains to emphasise in *Barclays Bank v Nylon Capital*), it all comes down to the construction of the contract under which the expert was appointed to act. Only by construing the contract can one identify the matters that were referred for his decision, the meaning and effect of any special instructions and the extent to which his decisions on questions of law or mixed fact and law were intended to bind the parties.

In the more recent case of *Jones v Murrell*<sup>64</sup> which concerned a boundary award made by the independent expert, the appellant claimed it was not made in accordance with the law. The Judge referred to the following provisions in *Kendall on Expert Determination, 5th Ed, Chapter 14*:

‘(i) .... If the court considers that the expert has reached a wrong decision on a question of law, it might decide that the particular expert determination clause implicitly required the expert to reach a correct decision in accordance with relevant legal principles, and that a decision based on incorrect legal principles involved failure to carry out the task which the expert was required to carry out and was, as a result, based on a material departure from instructions ..., and (ii) ....Where, as is usually the case, the contract is interpreted as requiring the expert to reach a decision which is in accordance with the national law, a clear failure to apply the national law at all is likely

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<sup>63</sup> [2014] EWCA Civ. 994 at para 9.

<sup>64</sup> [2016] EWHC 3036 (QB)

to be considered to be a departure from the expert's instructions, so that the expert's decision will be held to be of no effect.'

Following the comments in *Premier Telecom v Webb* and the decision in *Jones v Murrell*, the conclusion of Knox J in *Nikko Hotels v MEPC plc* case may have received its *quietus* and the question may be whether the principle in *Jones v Murrell* will be universally accepted or not. Time will tell, but whichever way and for the purpose of this paper, the observations above have established the approach that when dealing with questions of law in expert determination, it is a matter of contract and it is distinct from the approach of the same questions if the matter were submitted to arbitration.

## **8.0 Enforcement of Arbitral Award and Expert Determination**

Enforcement of an arbitral award is governed by legislation.<sup>65</sup> By comparison, enforcement of an expert determination is dependent on the terms of the contract between the parties.

### **8.1 Enforcement of Arbitral Awards**

Arbitration legislations recognize arbitral awards as binding and provide for enforcement through the courts if such awards are not honoured.<sup>66</sup> Enforcement can be by action on the award, or with the court's permission and where provided by legislation, by entering judgement in the terms of the award. The latter is a summary process.<sup>67</sup>

Enforcement of foreign awards is governed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as implemented by the respective national arbitration legislation.

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<sup>65</sup> See Part VII of the Act.

<sup>66</sup> See Section 36 of the Act.

<sup>67</sup> Summary enforcement of arbitral awards is not provided for in the UNCITRAL Model Law and countries that adopted it have no such provisions in their arbitration legislations. Discussion of the principle in this paper is based on Section 66 of England and Wales Arbitration Act 1996 that provides; "An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. Where leave is so given, judgment may be entered in terms of the award."

## **8.2 Enforcement by Action on the Award**

An action to enforce an arbitral award is based on an implied term in the arbitration agreement that an award would be honoured when it is made and that if it's not honoured, there is then a breach of that implied term.<sup>68</sup>

Applications to court seeking to enforce an arbitral award is done in accordance with the respective nation's judicial procedural rules and is based on two propositions: (i) that an action based on an award is an action for the enforcement of the contract which contains the submission to arbitration<sup>69</sup>, and (ii) that the plaintiff must plead and prove both the arbitration agreement and the award.<sup>70</sup>

Once the leave of the court is granted for a party to enforce an arbitral award, the award is recognized and adopted as the order of the court.<sup>71</sup>

## **8.3 Summary Enforcement of an Award**

When parties to a dispute submit to having it decided by an arbitrator, one of consequence that flows from the making of his award, is that the award constitutes a final judgment upon all matters referred to the arbitrator, and unless it is challenged or where there were matters which required a further investigation which could only appropriately be undertaken by proceedings, summary enforcement would be permitted.<sup>72</sup> Enforcement of part of an award is permissible provided the part to be enforced can be ascertained from the face of the award and judgment can be given in the same terms as those in the award.<sup>73</sup>

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<sup>68</sup> *Agromet Motoimport v. Maulden Engineering Co. (Beds) Ltd.* [1985] 1 W.L.R. 762 at p.772

<sup>69</sup> *The "Saint Anna"* [1983] 1 Lloyd's Rep. 637 at p.640.

<sup>70</sup> *Ibid* at para 641.

<sup>71</sup> *National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited* [2014] eKLR at para 50.

<sup>72</sup> *Middlemiss & Gould (A Firm) v. Hartlepool Corporation* [1972] 1 W.L.R. 1643 at p.1647/8 and *Deutsche Schachtbau-und Tiefbohrgesellschaft M.B.H. v. Ras Al Khaimah National Oil Co.* [1987] 2 Lloyd's Rep. 246 at p.254.

<sup>73</sup> *Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd* [2008] EWCA Civ 1157 at para 14.

An award may either be enforced "in the same manner as a judgment" or "judgment may be entered in terms of the award". The leave of the court to enforce "in the same manner as a judgment" is a prerequisite of the power to enter judgment in terms of the award, but the two are separate. The essential difference is that the obligation to honour an award arises by virtue of the agreement of the parties, whereas in the case of a judgment, it follows from the power of the court.<sup>74</sup>

If summary enforcement is refused, the claimant can seek to enforce the award by action on the award.

#### ***8.4 Enforcement of Expert Determinations***

Compared to arbitration, expert determination does not have statutory provisions or international conventions providing for enforcements. The course that parties take after the expert has served his determination depends on the agreed terms. Depending on the case, the determination could either be an order for performance of a contractual obligation or payment of damages.

##### *8.4.1 Order for Performance of a Contractual Obligation*

If a party fails to perform as per the terms of the determination, a failure in performance of a contractual obligation does not entail a loss of the bargained-for contractual rights. Those rights remain so as to enable performance of the contract to be enforced, as by an order for specific performance.<sup>75</sup>

Specific performance as an equitable remedy is available only as a matter of discretion to do justice where damages would be an inadequate remedy. The established principle for not granting an order for specific performance

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<sup>74</sup> *Gater Assets Ltd v NAK Naftogaz Ukrainiy* [2008] EWHC 1108 (Comm) at para 23.

<sup>75</sup> *Alfred McAlpine Construction Limited v. Panatown Limited* [2000] UKHL 43, per Lord Clyde.

where damages would be an adequate remedy is that the court will not order specific performance of an obligation to carry on a business.<sup>76</sup>

#### 8.4.2 Payment of Damages

The purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. A remedy which enables the claimant to secure, in money terms, more than the performance is unjust,<sup>77</sup> but the long established general principle applicable to the measure of damages for breach of contract as stated by Parke B in *Robinson v Harman*<sup>78</sup> provides:

‘The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.’

It thus follows that a court will enforce an expert’s determination by ordering payment of damages if such a payment would be an adequate remedy rather than an order for specific performance or the determination explicitly provides for making such a payment.

## 9.0 Conclusion

Arbitration is a formal ADR mechanism that is governed by national legislation and is an alternative to the court for the resolution of all disputes between parties. Rules of natural justice apply to arbitration as much as are

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<sup>76</sup> *Dowty Boulton Paul Ltd v. Wolverhampton Corporation* [1971] 1 W.L.R. 204 per Pennycuik V.C. at p. 211 when refusing to order the corporation to maintain an airfield as a going concern: In *Co-operative Insurance Society Ltd v. Argyll Stores* [1997] UKHL 17, Lord Hoffmann set out four reasons given in the cases for declining to order someone to carry on a business as; the requirement for constant supervision, the cost of enforcement to the parties and the resources of the judicial system, the need for precision and compliances, and the unjust enrichment of the claimant at the defendant's expense.

<sup>77</sup> *Co-operative Insurance Society Ltd v. Argyll Stores* [1997] UKHL 17.

<sup>78</sup> (1848) 1 Exch 850 at 855.

applicable to courts processes. An arbitral award with errors or mistakes can be corrected at the instigation of parties or the tribunal and if necessary, the tribunal can prepare an additional award to incorporate the corrections. Provisions in arbitration legislation for parties to seek court intervention during the proceedings, in enforcing the awards and in limiting of periods for doing so, facilitates the reduction of risk and effect of dilatory tactics, thus making the process fast and economical.

In contradistinction to arbitration, expert determination is an informal ADR mechanism that is governed by contract. Unless expressly provided for by the parties, expert determination is intended for resolution of certain types of dispute while others are to be resolved by the court or arbitration (if parties have agreed for arbitration). A mistake made honestly does not vitiate a final and binding expert determination and parties are nevertheless bound by such a decision. An expert is not bound to observe procedural fairness but an implication of a term to do so may apply, and there is no requirement, unless expressly provided, for him to observe other formalities applicable to arbitration or courts process. This makes it possible for the expert to carry out his mandate fast, confidentially and in an economical manner. However, the informality of the process has the potential to delay the determination of parties' rights and obligations, and increase costs if one party decides not to cooperate and courts' interventions are sought to take the process back on track.

## **Is the Doctrine of Sovereign Immunity a Threat to Investment Arbitration?**

*By: Nyaira Kinyua\**

### **1.0 Introduction**

Establishing investor status is a substantive jurisdictional issue in international arbitration of investment disputes. The pertinent question during investment arbitration often revolves around the meaning and interpretation of the terms “investor” and “investment.”<sup>1</sup> This paper advances the argument that the construction of the term “investment” in order to establish “investor status” is important as it determines an investor's ability to get protection in two distinct kinds of arbitration, namely International Commercial Arbitration (ICA), and arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention).<sup>2</sup> The former sets a lower threshold for the construction of the term “investment” in order to include a wide range of activities undertaken by [an] investor(s) in [an] other state(s). The latter, ICSID arbitration, sets a higher standard for the determination of what amounts to “investment and thus a narrower construction of the term.”<sup>3</sup>

Nonetheless, this paper concludes by observing that the distinction between “investment” under ICA and ICSID is often blurred. It is a question of facts and due regard must be given to the circumstances of the relevant case.

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\* LLM (UON, December 2017); LLB (Hons, UoN); (PG. Dip. Law KSL, December 2017).

<sup>1</sup> Anna Turinov, “Investment” and “Investor” in Energy Charter Treaty Arbitration: Uncertain Jurisdiction [2009] 26 (1), *Journal of International Arbitration*, (Kluwer Law International) p. 1.

<sup>2</sup> Also known as the Washington Convention 17 UST 1270, TIAS 6090, 575 UNTS 159, (entered into force 14 October 1966). The term ICSID Convention is birthed from the acronym derived from ‘International Center for Settlement of Investment Disputes’ (ICSID).

<sup>3</sup> *Supra* (note 1) at p. 2.



## 2.0 Establishing “Investor Status” or “Investment” under ICA and ICSID

### 2.1 Investment under ICA

International commercial arbitration (ICA) was tailored for the resolution and settlement of international contractual disputes between private parties. Under ICA, the jurisdiction of a tribunal is subjective because the parties must consent to be subject to arbitration when disputes arise. The *consensus ad idem* is signified through an agreement in writing to the effect that the parties have agreed to arbitrate when dispute(s) erupt(s). The requirement of a written agreement is grounded on two major international treaties, namely the UNCITRAL Model Law,<sup>4</sup> and the New York Convention.<sup>5</sup> The 1995 Kenyan Arbitration Act is substantially based on the UNCITRAL Model Law.<sup>6</sup> The arbitration agreement can be provided in the primary contract, in the form of an arbitration clause, or as a separate agreement, to constitute a secondary contract.

Where parties to an international commercial dispute relating to investment are an investor and a state, the consent of the parties to resort to arbitration of a potential dispute will be found in the relevant Bilateral Investment Treaty (BIT).<sup>7</sup> A BIT agreement is an example of an International Investment Agreement (IIA), entered into by a state on the behalf of an investor,<sup>8</sup> and is not *per se* a contract between the investor and the host state.<sup>9</sup> The contracting party undertakes to fulfil its obligations to investors regarding their respective investments, and to submit disputes arising from the investment

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<sup>4</sup> United Nations Convention on International Trade Law ‘UNCITRAL Model Law’ 24 ILM 1302 (1985).

<sup>5</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ‘New York Convention’ 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1958).

<sup>6</sup> Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (Glenwood Publishers Nairobi, 2011).

<sup>7</sup> Anna Turinova, “Investment” and “Investor” in Energy Charter Treaty Arbitration: Uncertain Jurisdiction, *supra.*, (note 1), at p. 5

<sup>8</sup> For example the World Trade Organisation Agreement (WTO), and Organisation for Economic Cooperation and development (OECD) agreement.

<sup>9</sup> *Ibid.*

to international commercial fora for example the *ad hoc* UNCITRAL tribunal or the institutional arbitration in Stockholm.<sup>10</sup>

Unlike arbitration under ICSID, ICA arbitration is usually regulated by the national laws of the seat of arbitration.<sup>11</sup> The seat of arbitration is critical because the conduct and procedure of arbitration is subject to the national courts of such seat. National courts have the power to set aside an arbitral award when they determine lack of the element of “investor status” or “investment” in the commercial activity undertaken by the contracting party. ICSID awards, are on the contrary, final and grounds of setting aside the award are limited.

## **2.2 Investment under ICSID**

The ICSID Convention, also known as the Washington Convention was created in a bid to facilitate and foster international investment through provision of amicable means of settling disputes, which are unavoidable in the course of human interactions. Availability of a favourable legal framework for the resolution and settlement of disputes in international commerce and investment is an important tool for attracting foreign investors, whether public or private.<sup>12</sup> The preamble, in particular, recognises the role of private international investment in stimulation of economic growth.<sup>13</sup> However, despite such clarity in the ends set to be on the commencement and during the subsistence of this Convention, the Act is ambiguous in the description of the type of investment disputes that may invoke the jurisdiction of ICSID. In particular, Article 25(1) provides:

‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the

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<sup>10</sup> Ibid.

<sup>11</sup> Also known as *lex arbitri*.

<sup>12</sup> Christoph Schreuer, *The ICSID Convention: A Commentary* (2<sup>nd</sup> edn, Cambridge University Press 2009).

<sup>13</sup> *Supra.*, (note 2), 1<sup>st</sup> preambular paragraph.

Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre'<sup>14</sup>

A full reading of the whole Convention reveals that the drafters of the Convention intentionally opted to fail to provide an express definition of the term "investment".<sup>15</sup> In place of an explicit definition, a procedure has been provided which the signatories may adopt to decide when to submit in writing their disputes to ICSID for arbitration.<sup>16</sup> The omission of a definition of the term has presented problems determining what amounts to an investment in the international platform.<sup>17</sup> Countries have been given leeway to formulate a working definition through avenues such as Bilateral Investment Treaties (BITs) and through ICSID procedures.<sup>18</sup>

Wise arbitrators have fortunately been keen to realise the inadequacies that could be presented by consent, which when solely relied upon could provide a subjective and hence unsatisfactory interpretation of the out the term "investment". Attempts have been made in various tribunals to generate objective tests of determining what amounts or does not amount to an "investment" for purposes of investment arbitration. Some have been considered below.

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<sup>14</sup> Article 25(1) on Jurisdiction of ICSID.

<sup>15</sup> See the case of *Ceskoslovenska Obchodni Banka, AS (Czech Republic) v The Slovak Republic* ICSID, Decision on Objections to Jurisdiction, 24 May 1999, ARB/97/4, IIC 49 (1999). (See paragraph 64).

<sup>16</sup> Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Doc. ICSID/2, 1 ICSID Reports, 1993, 23, 1 27.

<sup>17</sup> Alex Grabowski, *The Definition of Investment under the ICSID Convention: A Defense of Salini*, [2014] 15(1), *Chicago Journal of International Law*, at p. 289 <<http://chicagounbound.uchicago.edu/cjil/vol15/iss1/13>> accessed 16 March 2016.

<sup>18</sup> *Supra.*, (note 7).

## **2.3 Resolution and Settlement of Investment Disputes *vidé* Arbitration**

### *2.3.1 The Formulation of an Objective Test: 'The Salini test'*

The objective test originally emanated from the decisions in *Alcoa Minerals of Jam. v Jam*,<sup>19</sup> and *Kaiser Bauxite Co. v Jam*,<sup>20</sup> and applied in the case of *Fedax N.V. v The Republic of Venezuela*,<sup>21</sup> where a three-pronged approach was crafted and used in the case of *Salini et al v. Morocco*,<sup>22</sup> where the test finally crystallised and came to be known by the epithet 'The Salini Test'. A fourth consideration was added in *Salini (supra)* and the case is presently the leading authority on the topic. The criteria laid down in the *Fedax* and *Salini (supra)* are that an investment under ICSID is properly so called when:

- i. It involves a contribution of money or assets;
- ii. It is for a definite duration;
- iii. It involves an element of risk; and
- iv. A contribution is made to the economic development of the host state. (Added in *Salini*).

In *Salini (supra)*, the underlying facts of the dispute were that two Italian construction Companies, *Salini Costruttori* and *Italstrade*, entered a two-year contract with the government of Morocco for the construction of a 50km highway. Through a joint submission of the bidding documents, the two companies won the tender and began the work, which, was completed 6 months after the period agreed upon in the contract. On this basis, the government of Morocco was unwilling to fulfil its part of the agreement. After exhausting local channels of dispute resolution, the companies resorted to arbitration under ICSID to claim compensation for the work done. *Salini* relied on the four-pronged criteria developed in *Fedax* to invoke the jurisdiction of ICSID for purposes of settlement of the dispute. In holding that

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<sup>19</sup> ICSID Case No. ARB/74/2, Decision on Jurisdiction, 2/4 (Jul. 6, 1975).

<sup>20</sup> ICSID Case No. ARB/74/3, 296, 297, Decision on Jurisdiction (Jul. 6, 1975).

<sup>21</sup> ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to jurisdiction, 1381 16 (Jul. 11, 1997), 37 I.L.M. 1380 (1998).

<sup>22</sup> ICSID Case No. ARB/00/4, Decision on Jurisdiction, 152 (Jul. 23, 2001), 42 I.L.M. 609 (2003).

the companies were private international investors and hence entitled to compensation, the arbitrators were of the view that the work by the companies would significantly contribute to the economic development of the host state (Morocco).<sup>23</sup>

In the case of *Joy Mining Machinery v. The Arab Republic of Egypt*,<sup>24</sup> the arbitrators accepted and applied without reservation the Salini test, which was invoked by Joy Mining Machinery against Egypt, concerning a contract for the replacement by the former of mining equipment for a project undertaken by the latter on phosphate mining. The dispute involved problems on the new equipment which had been installed. Both parties blamed each other for the fault of the equipment. On its part, Egypt contended that the dispute was outside the scope of the ICSID panel arguing that it was simply a contract for sale. Joy Mining Machinery on its end argued that the dispute was rightly within ICSID's jurisdiction, and further that it met the four criteria of the Salini test. The arbitration panel was in agreement with Joy Mining Machinery and adopted the test.

Application of the fourth criterion has proved to be problematic because it is said that it is not 'practically possible to determine what amounts to 'contribution to the economic development to the host state'.<sup>25</sup> For instance, in the case of *LESI S.p.A. et Astaldi S.p.A. v. People's Democratic Republic of Algeria*,<sup>26</sup> the dispute was between a two Italian investors and an Algerian construction company in Algeria. The case concerned the financing of the building of a dam whose construction was made difficult by the government of Algeria. The investors put forth the *Salini* test for the arbitrators to consider

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<sup>23</sup> Alex Grabowski, *The Definition of Investment under the ICSID Convention: A Defense of Salini*, *Supra*, (note 8), at p. 12.

<sup>24</sup> *Joy Mining Machinery Ltd. v Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 153 (Jul. 23, 2001) 19 ICSID Rev 486 (Aug. 6, 2004).

<sup>25</sup> Alex Grabowski, *The Definition of Investment under the ICSID Convention: A Defense of Salini*, *supra.*, at p. 13.

<sup>26</sup> *LESI S.p.A. et Astaldi S.p.A. v People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 1-72 (Jul. 12, 2006). The case is available in French and a summary of the facts in English was obtained from Alex Grabowski, *The Definition of Investment under the ICSID Convention: A Defense of Salini*, at p. 14.

in determining whether their investment fell within the meaning of ICSID Convention. The court rejected the fourth criterion, arguing that it was of a character that is "difficult to establish" and that in any case, the criterion was sufficiently covered by the *Fedax and/or Salini three*.

The rationale underpinning the rejection of 'contribution to economic development to the host state' as an element of determining investment status has been well-explained in several international investment arbitral proceedings. In the cases of *Quiborax v Bolivia*,<sup>27</sup> and *Victor Pey Casado and President Allende Foundation v The Republic of Chile*,<sup>28</sup> the arbitral panels reached the conclusion that the first preambular paragraph of the ICSID Convention listed 'contribution to the economic development of the host state' as a consequence of private foreign investment and not as a criterion for establishing investor status. In the latter, it was emphasised:

*'...the Preamble to the ICSID Convention mentions contribution to the economic development of the host State. However, this reference is presented as a consequence and not as a condition of the investment: by protecting investments, the Convention facilitates the development of the host State. This does not mean that the development of the host State becomes a constitutive element of the concept of investment.'*<sup>29</sup>

The argument above is somewhat myopic. If the outcome of the ICSID Convention was to steer economic development in the host states, then some standard must be used to determine whether the investment undertaken contributed to the economic welfare of the relevant host state. The criterion cannot be absolutely dismissed. This is desirable especially given the need to eliminate illegal international commercial activities in the name of foreign investment.

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<sup>27</sup> ICSID Case No. ARB/06/2, Decision on Jurisdiction, 1-220 (Sept. 27, 2012).

<sup>28</sup> ICSID Case No. ARB/98/2, Award, 232 (May 8, 2008).

<sup>29</sup> *Ibid.*, at p.222.

### **3.0. Effect of Sovereign Immunity on Investment Arbitration**

#### **3.1 The Concept of Sovereign Immunity**

The concept of sovereign immunity can be explained from the vantage of the concept of territorial sovereignty, which is exercised by a state in its well-defined territory. When territory is established, the government of such state has the right to exercise control over such area, and has the obligation to respect the territorial integrity of other states.<sup>30</sup> Generally, a state has the right to exercise sovereignty (control) over persons who come within its territory. This, however, is subject to limitations recognised under international law, such as sovereign immunity. This was observed by U.S Supreme Court Chief Justice Marshall in the case of *The Schooner Exchange v McFaddon*,<sup>31</sup> where he stated that although the jurisdiction of a state within its own territory was absolute and exclusive, it did not comprise foreign sovereigns. He noted thus:

*'perfect equality and absolute independence of sovereigns . . . have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.'*<sup>32</sup>

Sovereign immunity arises at two different levels:

- a) Immunity of a foreign state from jurisdiction of municipal courts of another state to adjudicate a claim arising from e.g. a contract or tort; and
- b) The exemption of a foreign state from enforcement measures against its property especially in cases relating to the execution of a municipal court decision.

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<sup>30</sup> Malcolm N. Shaw, *International Law* (6<sup>th</sup> edn, Cambridge University Press, Cambridge, 2008), at P. 865.

<sup>31</sup> 11 U.S. 7 Cranch 116 (1812).

<sup>32</sup> *Ibid.*, at p. 137.

In addition to the above, sovereign immunity may be absolute or restrictive. In the former, a sovereign or state [was]<sup>33</sup> completely immune from foreign jurisdiction in all cases whatever the circumstances. This gave government entities undue advantage over private entities or companies, and is therefore not recognised. It has actually been dismissed a doctrine which is 'no longer a rule in international law'.<sup>34</sup> States have therefore, adhered to the latter, i.e. restrictive immunity which makes note of increased state activity in international commerce and trade. The concept of restrictive immunity provides that it is possible for states to be sued and be made liable in foreign jurisdictions.<sup>35</sup>

### **3.2. Determination of Sovereign Activities: Jure imperii v Jure gestionis**

It has been established that the restrictive theory of sovereign immunity is the apt approach in determining whether a foreign state is liable or not under international law. It is also right to state that in determining liability, the critical question is to determine the nature of the acts or activities complained of. Acts by the Government of a state with reference to which immunity may be granted are known as acts *jure imperii*, while actions done in a private capacity or trade activities are known as acts *jure gestionis*.<sup>36</sup>

In addition to the aforesaid, an objective or legal understanding of what constitutes a state is critical. The United Nations Convention on Jurisdictional Immunities of States and Their Property 2004,<sup>37</sup> describes a state to mean the following:<sup>38</sup>

- a) The state and its various organs of government;

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<sup>33</sup> Note the use of past tense, because the doctrine of absolute immunity is not recognised anymore.

<sup>34</sup> Originally stated in the case of *Dralle v. Republic of Czechoslovakia* 17 ILR 155 (1950), at p. 155, which was approved in the case of *The Empire of Iran* 45 ILR, 57 (1963), at p. 57, by the West German Supreme Constitutional Court

<sup>35</sup> Malcolm N. Shaw, at p. 874.

<sup>36</sup> *Ibid.*, at p. 869.

<sup>37</sup> The United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, UN Doc A/59/508. (Adopted on 2 December 2004).

<sup>38</sup> *Ibid.*, Article 2(1)(b).



- b) Constituent units of a federal state or political subdivisions of the state, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;
- c) Agencies or instrumentalities of the state or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the state; and
- d) Representatives of the state acting in that capacity.

After determination of an entity as a state in light of Article 2(1)b above, the Convention provides that such an entity will, where need arises, enjoy “immunity in respect of itself and its property, from the jurisdiction of the courts of another state subject to the provisions of the...Convention.”<sup>39</sup> Another key provision is Article 2(2) which provides on commercial activities. The provision reads:

*‘In determining whether a contract or transaction is a ‘commercial transaction’... reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the state of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.’<sup>40</sup>*

In examining whether immunity should be granted, considerations are made based on the entire context on which a dispute arises. The question to be answered, as was explained by His Lordship, Justice Wilberforce in the case of *Iº Congreso del Partido*,<sup>41</sup> is whether the relevant act was an act *jure imperii* or an act *jure gestionis*. What amounts to either of the two acts is a question of fact. The International Law Commission has attempted a few examples on what amounts to *jure imperii*, and activities such as contracts for the procurement of medicine to fight an epidemic, or the procurement of food

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<sup>39</sup> Ibid., Article 5. (with emphasis).

<sup>40</sup> Ibid., Article 2(2).

<sup>41</sup> [1983] AC 244, 267; 64 ILR, pp. 307, 318.

supplies for its drought-stricken citizens are government acts and hence non-commercial.<sup>42</sup> In such instances, sovereign immunity can be invoked.

Lord Diplock in the case of *Alcom v Republic of Colombia*,<sup>43</sup> noted that the distinction between what a state did in the exercise of sovereign authority and what it did in the course of commercial activities was that the former class of activities enjoyed immunity, but the latter did not. The work of a court or arbitral panel would thus be to determine what amounts to sovereign acts or non-sovereign acts. What amounts to a commercial transaction for purposes of the 2004 UN Convention (*supra*) must come within the ambit of Article 2(1) (c) which describes a commercial transaction to mean:

- a) Any commercial contract or transaction for the sale of goods or the supply of services;
- b) Any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; and
- c) Any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

It is important to establish whether the contract in dispute was entered into in pursuance of a government activity or a commercial activity, because the 2004 UN Convention (*supra*) stipulates that no immunity lies where a state engages in a 'commercial transaction' with a foreign natural or artificial person (except a state) where a dispute comes for adjudication in the courts of another state,<sup>44</sup> unless the parties to the commercial transaction expressly agree otherwise.<sup>45</sup>

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<sup>42</sup> Malcolm N. Shaw, at p. 878.

<sup>43</sup> [1984] 2 All ER 6, 9; 74 ILR, at pp. 180-181.

<sup>44</sup> This could be interpreted to include arbitration before a panel in another state.

<sup>45</sup> The United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, Article 10.

## **4.0 Implications of the Defence of Sovereign Immunity on Investment Arbitrations**

Sovereign immunity is a defence in international law that serves to exempt a state from jurisdiction, in this instance, of an arbitral panel and exemption from enforcement of the arbitral award.<sup>46</sup> On jurisdiction, the state concerned will seek to refuse to submit to arbitration proceedings. As had been earlier observed, the concern of the arbitral tribunal will be to establish the nature of the activity. If the activity is of the nature of *jure imperii*, the defence of sovereign immunity lies. If the nature of the activity is of a commercial character, *jure gestionis*, then no immunity lies. This was unequivocally restated in the case of *Trendtex Trading Corporation v Central Bank of Nigeria*,<sup>47</sup> where the court clearly held that sovereign immunity does not apply to commercial transactions.

### ***4.1 Limitations to the Doctrine of Sovereign Immunity***

Immunity from execution of an arbitral award under ICSID Convention is provided under Article 55 of the Convention. The limitation to execution of an arbitral award is with reference to the need to protect state property.<sup>48</sup> Sovereign immunity may be waived under certain multilateral treaties, for instance the European Convention on International Commercial Arbitration,<sup>49</sup> which provides that the doctrine cannot be invoked in instances where a contracting party has obliged to submit to the courts of another contracting state through any of the following ways, through:<sup>50</sup>

- a) An international agreement;
- b) An express term provided in writing; or
- c) Express consent given after a dispute between the parties arises.

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<sup>46</sup> Iyabo Adebisi, 'Is the Doctrine of Sovereign Immunity a Threat to Investment Arbitration?' Center for Energy, Petroleum and Mineral Law Policy <[www.dundee.ac.ke](http://www.dundee.ac.ke)> (accessed 16 March 2016).

<sup>47</sup> *Trendtex Trading Corporation v Central Bank of Nigeria*, (1977) Q.B 529.

<sup>48</sup> *Supra.*, (note 46), at p. 16.

<sup>49</sup> European Convention on International Commercial Arbitration, 484 UNTS 364 (1964).

<sup>50</sup> See Article 2.

The goal of the ICSID Convention and other laws concerning investments is to provide cushion for investors from market uncertainties such as litigation, arbitration and other related eventualities. If states were allowed unfettered power to invoke the defence of sovereign immunity when disputes arise, no meaningful economic development would occur nationally, regionally and internationally. Limitations of the doctrine of state immunity to certain types of property from execution in the enforcement of arbitral awards poses problems for investors because before resorting to investment arbitration (ICSID arbitration), it is implied that they must first conduct due diligence to determine if the property in question, if any, is state property, which in such eventuality, is not amenable to execution. Further, proper inquiry must be done to determine whether the act giving rise to the dispute is an act of the government, or an act that is commercial in nature. This question is premised on facts of each case.

## **5.0 Conclusion and Recommendations**

The doctrine of sovereign immunity as arising in investment arbitration appears, in all respects, to be a case of 'cart before the horse'. The private party in investment arbitration stimulates in the mind an image of a man crossing his fingers in fear of the worst. The inequality of bargaining power is clear, despite the presence of a legal framework to protect private foreign investors in their quest to steer economic development in their host state of choice.

Almost always, states will attempt to find ways of eschewing arbitration awards, even when the activity in question was set to benefit them. It is desirable that in keeping with the principle of *pacta sunt servanda* (that agreements are binding),<sup>51</sup> parties to an investment agreement endeavour to honour their obligations, in order to facilitate the goal of investment activities, namely, to foster the economic development of all nations, regions, and the world at large.

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<sup>51</sup> Malcolm N. Shaw, at p. 10.

*Towards a Transnational Legal Order: The Role of Culture in Commercial Arbitration in Africa - Florence Karimi Shako*  
**Towards a Transnational Legal Order: The Role of Culture in Commercial Arbitration in Africa<sup>1</sup>**

By: Florence Karimi Shako<sup>2</sup>

**Abstract**

**Key words:** International arbitration; Dispute resolution; Commercial Disputes; Culture; Africa

*International arbitration is gaining traction in Africa as an ideal method of dispute resolution for commercial disputes between parties from different jurisdictions. As cross-border commerce, trade and investment increases in the African continent, so does the potential for international arbitration. Although this is welcome economically, the convergence of culture creates unprecedented complexities when disputes arise. Although sometimes overlooked, culture plays a critical role in international arbitration as cases often involve parties from different countries. The author contextualises commercial arbitration in a transnational legal order, as arbitration is increasingly viewed as a transnational system of justice. This paper further explores the meaning of culture and analyzes the manner in which culture undergirds international arbitrations in Africa, given this transnational context. The author argues that cultural considerations must be taken into account in order for international arbitration to survive in the long run in Africa. This paper analyzes cultural issues such as political and religious considerations, cultural biases and stereotypes, communication and language issues, inter alia. Within this analysis, the author highlights measures that should be put in place to ensure that these cultural issues are considered in African-related arbitrations in order to contribute to the greater success of the arbitral process.*

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<sup>1</sup> First published in Transnational Dispute Management Journal (2016) Volume 13, Issue 4; [www.transnational-dispute-management.com/article.asp?key=2356](http://www.transnational-dispute-management.com/article.asp?key=2356).

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## **1.0 Introduction**

For many years, it was fashionable to say that international commercial arbitration had come of age. That is no longer an appropriate observation. By now it has entered a mature and sophisticated middle age. Both the crises and the illusions of youth are past, and in the eyes of businessmen, the creature has developed an identity and ability to solve problems that match the needs of the critical role it plays in world commerce today.<sup>3</sup> There is increased use of international arbitration as a method of dispute resolution for commercial disputes in Africa. In a continent where the perception of lack of commercial sensitivity by the courts is an issue, considerations such as costs, neutrality, expertise of arbitrators and finality have been pointed out as distinct advantages of commercial arbitration over the national court systems.<sup>4</sup>

International commercial arbitration involves parties from different countries, and this gives the arbitral process a transnational character. This means that there is a convergence of the cultures of parties from different jurisdictions in the arbitral proceedings. Law is understood as constituted in part by social norms, routines, customs and practices, and in part by hard legal regulation. There are intricate relations between legal regulation and concrete, local, intimate social spaces.<sup>5</sup>

Few will deny the pervasiveness of cultural diversity in the world. Human diversity is the product of both individual idiosyncrasies and a multitude of external variables. In order to understand cultural diversity, one should strive to make valid generalizations regarding cultural groups, while at the same time avoiding irrational stereotypes. Fundamentally, cultural differences are nothing more than a rational and natural expression of the

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<sup>3</sup> Richard J. Graving, 'The International Commercial Arbitration Institutions: How Good a Job Are They Doing' (2011) *American University International Law Review*, Volume 4:2, 319, 320.

<sup>4</sup> Catherine Amirfar and Julien Fouret, 'The Current State and Future of International Arbitration: Regional Perspectives' (2015) *International Bar Association Arb40 Subcommittee*, 20.

<sup>5</sup> Peer Zumbansen, 'Transnational Legal Pluralism' (2010) *Transnational Legal Theory*, Volume 1:2, 171, 172.

human experience. There is therefore no reason to suppose that one culture is more or less valid than any other.<sup>6</sup> The diverse cultures present in Africa are just as valid as the cultural practices found in other parts of the world. International arbitrators should regard the cultural differences present in Africa-related arbitrations as a natural expression of the human experience and not as 'backward' or 'inferior' to any other culture.

Arbitrators, as powerful decision makers, must understand this crucial role that reasonable cultural accommodation plays. Cultural variation is so vast, and normative values and taboos are so numerous, that an arbitrator would be ill-advised to attempt to master any foreign cultural system. Indeed, many people struggle to master even their own native culture. Perhaps then, the better course of action would be to try to develop a framework for understanding and evaluating individuals from foreign cultures without necessarily trying to adopt their ways.<sup>7</sup> Therefore, international arbitrators do not have to adopt African culture but should strive to understand and be sensitive to the nuances it contributes to the arbitral process.

Critics posit that cultural clashes are mirages invoked to mask the real fight: that between the claimant and the respondent. They argue that when efforts are made to delay the arbitration process through procedural motions, they are a function of tactics, not tradition; positions are taken to try to build fundamental error into the arbitration process. Clothing such tactics as cultural is said to be disingenuous and that unmasked, they are designed to delay or upset an award, a strategy familiar to arbitrants from any state.<sup>8</sup> Critics further argue that as long as arbitral institutions, arbitrators, and arbitrants remain committed to a process that is fair, fast, frugal, and foreseeable, and execute on that commitment, claims of a culture clash in international commercial arbitration should be taken with a pinch of salt.<sup>9</sup>

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<sup>6</sup> Timothy B. Cash, 'Cross-cultural Issues in International Commercial Arbitration' (1995) 3 *Williamette Bulletin of International Law and Policy*, Volume 3:117, 123, 127.

<sup>7</sup> *Ibid.*

<sup>8</sup> John Barkett, Jan Paulsson et al., 'The Myth of Culture Clash in International Commercial Arbitration' (2009) *Florida International University Law Review*, Volume 5:1, 3, 11.

<sup>9</sup> *Ibid.*

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This paper analyzes the nuances created by cultural issues in Africa-related arbitrations that may affect the arbitral process, even if the process is fair and fast and which arbitrators and parties should be cognizant of. The paper seeks to demonstrate that the cultural practices of the African people can and do influence international commercial arbitration and are not merely tactics or strategies to derail the arbitral process.

Part I of this paper contextualises commercial arbitration within a transnational legal order and analyzes international commercial arbitration as an evolving transnational system of justice. Part II examines the meaning of culture and the manner in which it undergirds African-related arbitrations. Culture in this context carries a dual meaning as it refers to both legal culture and societal culture. Part III argues that cultural considerations must be taken into account in order for international commercial arbitration to be successful and to survive in the long run in the African context. Cultural issues such as political and religious considerations, cultural biases and stereotypes, communication and language issues, inter alia, should be considered. The paper examines measures that should be put in place to ensure these cultural issues are considered in African-related arbitrations in order to contribute to their greater success.

## **Part I**

### **2.0 Transnational Legal Theory**

Today, many regulatory areas can only be understood as instantiations of global norm creation. Supply chains that tie regional and global markets together, food safety and food quality standardisation regimes, internet governance, environmental protection, crime and terrorism are key examples of fast expanding spaces of individual, organisational and regulatory activity that evolve with little regard for jurisdictional boundaries but, instead, appear to develop according to functional imperatives.<sup>10</sup> International commercial arbitration is no exception and it continues to grow beyond

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<sup>10</sup> Peer Zumbansen, 'Transnational Legal Pluralism' (2010) *Transnational Legal Theory*, Volume 1:2, 152.



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borders. Parties involved in this arbitral process are often from different jurisdictions, even if they choose a particular country as the seat of the arbitration. The cultures of the different parties underlie the arbitration and influence the manner in which parties engage. Further, the sensitivity of the arbitrator to the parties' culture or lack thereof also influences the process and perception of the outcome by the parties. Therefore, international commercial arbitration is increasingly recognized as a transnational system of justice.

Transnational law is a hybrid of international and domestic law; it is the law that governs the gaps between formal international law and domestic law. In our modern era, transnational law is law that moves back and forth from the international to the domestic and often back again, such as when one nation's legal solutions are 'copy-pasted' or 'downloaded or uploaded' to the law of another nation or to the international system.<sup>11</sup> Transnational legal process is also defined as a blend of domestic and international legal process, which internalizes norms from the interaction of international and domestic law making authority.<sup>12</sup>

Legal sociology and legal pluralism, in particular, have long been developing tools to scrutinize the tension between official and unofficial norm creation, between hard and soft law, and between what, at least in the West, has often been depicted as a juxtaposition of state law-making on the one hand, and private ordering or social norms on the other. This constellation prompted legal sociologists to investigate the correlations between law and other spheres of culture. There are hybrid legal spaces that cannot sufficiently be captured through references to local or national contexts. A distinctly transnational legal pluralist lens allows us to study such regimes, not as entirely detached from national political and legal orders, but as emerging

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<sup>11</sup> Carrie Menkel-Meadow, 'Why and How to Study Transnational Law' (2011) UC Irvine Law Review, Volume 1:1, 110,111.

<sup>12</sup> Ibid.

out of and reaching beyond them.<sup>13</sup> Dispute resolution through this transnational legal pluralist lens contains elements of the state law-making such as when cases are submitted to the national court system and private ordering in the form of alternative dispute resolution. However, in the case of international commercial arbitration, there exists an open hybrid space where dispute resolution can take place within the confines of the national borders but yet transcending this space. From this socio-legal perspective in a transnational context, international arbitration broadens existing perceptions, functions and roles of the arbitrator and the parties. The arbitrator must be cognizant of the interrelation of the function of the law that governs the arbitration and the influence of the cultures of the parties.

Transnational law reflects and responds to these links between the domestic and the foreign. Philip C. Jessup has described transnational law as including public international law, private international law and any law that regulates actions or events that transcend national frontiers.<sup>14</sup> This description is very wide, covering matters that may arise in domestic courts or before various international tribunals and issues that engage rules from a combination of sources that are neither solely domestic nor international. The area of inquiry includes public law and regulation, private law, relationships to religious and kinship law, non-state rules of practice and commercial standardization, and general attention to custom and pluralism.<sup>15</sup> The focus of this paper lies in the analysis of the influence of culture and pluralism and how it affects international commercial arbitration.

An emphasis on justice and accessibility supports this wide approach. Law is not solely about governments and institutions, but rather must serve society. The transnational perspective poses questions of accountability, inclusiveness, the definition of law and its function in the public interest in a

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<sup>13</sup> Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism' (2012-2013) *Transnational Law & Contemporary Problems*, Volume 21:305, 330.

<sup>14</sup> Philip C. Jessup, 'Transnational Law' (1956) New Haven: Yale University Press, 4.

<sup>15</sup> Maureen Irish, 'Transnational Law and Legal Education' (2013) *Windsor Yearbook of Access to Justice*, Volume 31:1, 215,217.

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world in which public policy does not end at national borders. Throughout, the inquiry involves issues of justice and participation, dealing with the interactions of domestic and international systems, and the actual legal experience of cross-border reality.<sup>16</sup> It would be a great injustice if the arbitrator chose to ignore the culture of the parties to the arbitral process and this exclusion leads to underlying tension or a communication breakdown between the parties. The reality is that cross-border commerce, trade and investment is increasing in Africa and dispute resolution of disputes arising from these interactions must take into account the fact that public policy will not end at national borders.

Transnational law is an institutional framework for cross-border interaction beyond the nation state. In distinction to territorially organized national and international law, it is structured as a plurality of functionally specialized transnational law regimes, which in a pragmatic approach combine different governance mechanisms of private (norms, alternative dispute resolution, social sanctions) and public (laws, courts, enforcement) origin, where the latter are disembedded from their domestic context.<sup>17</sup>

The practice of international arbitral tribunals assumes a central role in the contemporary theory of transnational law. Arbitral tribunals can be organized in various ways, from so-called ad-hoc arbitration, where the contract parties appoint the arbitrators as a dispute arises, to institutionalized courts of arbitration, which administer arbitration proceedings according to standing rules such as the International Court of Arbitration of the International Chamber of Commerce. Ad-hoc arbitration and institutional arbitration have in common that no state officials are directly involved in the private dispute resolution process. As opposed to state courts, an arbitral tribunal under the UNCITRAL Model Law on International Commercial Arbitration, on which the procedural law concerning arbitration is based in many states, may not only apply state contract law, but also rules of law such

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<sup>16</sup> Ibid.

<sup>17</sup> Graft-Peter Calliess, 'Law, Transnational' (2010) Comparative Research in Law & Political Economy, Research Paper No. 35, 3.

as the UNIDROIT Principles or the Lex Mercatoria. Indeed, many arbitral awards apply such a-national rules.<sup>18</sup>

International commercial arbitration is therefore a transnational system of justice and provides a framework for cross-border justice in the commercial context. The culture, both legal and societal, of both parties undergirds African-related arbitration and transcends the national frontiers. This calls into question the meaning of culture in this transnational context.

## **Part II**

### **3.0 Meaning of Culture**

On one hand, the notion of culture contemplates culture in a legal sense. Culture in this context consists of shared norms and expectations produced by legal actors. Actors engaged in repeated interaction over time produce culture. Lawyers form an epistemic community, that is, a community of professionals with common training and expertise. This common training and expertise, combined with interactive practices, produces a common set of expectations. These expectations, in turn, shape behavior, though they are also subject to change as new norms arise. This notion emphasizes the dynamism of culture. It is culture as a product of law rather than constraint on law, an effect rather than a cause.<sup>19</sup>

There is increasing discussion of a culture of arbitration; a transnational culture common to practitioners, arbitrators and parties involved in arbitral practice. The culture of arbitration typically refers to the gradual convergence in norms, procedures and expectations of participants in the arbitral process.<sup>20</sup> A legal culture is a combination of procedures and concepts that constitute a network that, because of the commonality of usage, reduces the costs of interactive behavior. Culture becomes a kind of template for social

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<sup>18</sup> Ibid.

<sup>19</sup> Tom Ginsburg, 'The Culture of Arbitration' (2003) *Vanderbilt Journal of Transnational Law*, Volume 36:1335, 1337, 1338.

<sup>20</sup> Ibid.

interaction, and members of the same legal culture find it easier to work with each other than with outsiders.<sup>21</sup>

Legal culture is a culture of generality, which is expressed by its commitment to equal and universal application of rights and duties. In the special case of the international legal culture, this means a commitment to the principles of normative universality and normative equality. They are still, to some degree, aspirational and do not yet guarantee equal, or even equitable, apportionment of goods among all states or all persons, nor do they vaporize longstanding, stubbornly retained discriminatory practices against some states and persons. But the professed aim of the international legal culture is to advance universal equality of entitlement, both between states and among persons.<sup>22</sup>

On the other hand, societal culture implies values and patterns that influence actions and attitudes. Culture influences many aspects of life including attitude, social organisation, thought patterns and body language.<sup>23</sup> Thought patterns have an immediate effect on the process of reasoning, particularly legal reasoning. Therefore, what can be considered as completely logical, obvious and reasonable for one culture may be offensive and unreasonable for another. Cultural background strongly influences the legal systems and understandings of a people and therefore influences how people approach arbitration.<sup>24</sup>

Societal culture is a culture of differentiation, which emphasizes the exceptional quality of each particular society, whether it be a state, nation, race, religion or society. This exceptionality asks to be respected and preserved for its own sake. This also emphasizes rights, not of persons, but of groups or of persons as members of groups, whose rights are founded on

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<sup>21</sup> Ibid.

<sup>22</sup> Thomas Franck, 'The Legal Culture and the Culture Culture' (1999) American Society of International Law Proceedings, Volume 93, 272.

<sup>23</sup> Nikola S. Georgiev, 'Cultural Differences or Cultural Clash? The Future of International Commercial Arbitration' (2012) 4, 5.

<sup>24</sup> Ibid.

group affiliation and not on individual personhood. Persons acquire rights as a consequence of their membership in such self-differentiating groups.<sup>25</sup>

As Hans Kelsen pointed out, any legal order that is based on a territory invariably consists of a combination of norms, some of which are valid for the entire territory known as the central norms, while others are valid for part of the territory only and known as local or partial norms. A wholly centralized legal order with no local norms is virtually impossible to set up. Conversely, a fully decentralized legal order with no central norm is simply inconceivable since a legal order must have at least one central norm to ensure the unity of the territory that acts as the basis of that order.<sup>26</sup> In the context of international arbitration, there is a convergence of cultures – both in the legal and the societal sense – which give rise to unprecedented complexities whenever disputes arise. To focus on legal culture alone is to ignore the impact of societal culture and vice versa. Regard must be had to culture in both senses and its impact on the arbitral process. In Africa, cultural considerations must be taken into account in international commercial arbitration without overstating legal or societal cultures as being at odds due to their emphasis on universality and differentiation respectively.

In understanding the role of culture in commercial arbitration, reference to culture means culture in the legal sense and culture in the societal sense. Culture is an important component in the success of international commercial arbitration in Africa and arbitrators must take into account the manner in which it influences the arbitral process.

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<sup>25</sup> Thomas Franck, 'The Legal Culture and the Culture Culture' (1999) American Society of International Law Proceedings, Volume 93, 272.

<sup>26</sup> Charles Leben, 'Hans Kelsen and the Advancement of International Law' (1998) European Journal of International Law Volume 9, 292,293.

### **Part III**

#### **4.0 Role of Culture in International Commercial Arbitration in Africa**

In analysing the role of culture in international commercial arbitration in Africa, various cultural issues must be taken into account. These include the influence of having arbitrators trained in different legal systems, whether common law, civil law or Shari'a traditions, political and religious considerations, cultural biases and stereotypes, consideration of the importance of communication and language in different jurisdictions and the influence of patriarchy in Africa.

#### **4.1 Legal Systems**

The practice of international commercial arbitration, as its name suggests, involves the resolution of disputes between parties located in different countries and, in many cases, who come from vastly different cultures. As one might expect, counsel to parties in international arbitrations and members of these arbitral tribunals alike are commonly from different countries. Invariably, such cases also bring together attorneys trained in the different legal traditions of the common law and civil law.<sup>27</sup>

International arbitration produces a relatively efficient and cost effective remedy for international commercial disputes by eliminating many of the jurisdictional conflicts associated with multinational litigation. However, the international arbitration process poses significant challenges. Since the attorneys representing the disputing parties come from different legal systems, and the arbitral panel itself may also have diverse legal backgrounds, these participants come to the arbitration table with expectations and biases concerning the methods they will be using to sort out complex factual issues. For example, the uncertainty of whether the parties

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<sup>27</sup> Javier Rubinstein, 'International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions Perspective' (2004) *Chicago Journal of International Law*, Volume 5, 303.

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will be allowed to discover and exchange evidence before the hearing can be disquieting.<sup>28</sup>

The cultural aspect of a working legal system refers to the values and attitudes that bind the system together, and that determine the place of the legal system in the culture of the society as a whole. It is the legal culture that determines when and why and where people turn to law or government, or turn away from it. Legal culture also refers to those values and attitudes in society that determine what structures are used and why; which rules work and which do not, and why.<sup>29</sup> Law is not self-contained; it is culturally specific. If a community wants to put through some program of drastic political and economic change, it must make drastic changes in its laws. If it wants to modernize, and especially if it wants to modernize fast, the legal system has to be radically altered, or even replaced.<sup>30</sup>

Because lawyers are ordinarily trained only in the laws of their own jurisdiction, they sometimes reflect a lack of awareness of what is going on in other countries and, in particular, in different legal systems. Yet if lawyers are to become engaged in international commercial arbitration, familiarity with other jurisdictions and different legal systems is clearly important. This is because such arbitrations will frequently involve participants and problems that come from the different legal cultures and traditions. Moreover, to understand the attractions, opportunities and advantages of commercial arbitration, it will often be important to be conscious of the alternative forms of dispute resolution available, principally in the courts of the jurisdiction where the parties are resident or where a dispute arises.<sup>31</sup>

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<sup>28</sup> John W. Hinchey and Elizabeth T. Baer, 'Discovery in International Arbitration' (2000) Center for International Legal Studies, Salzburg Conference, King and Spalding, 2.

<sup>29</sup> Lawrence M. Friedman, 'Legal Culture and Social Development' (1969) *Law and Society Review*, Volume 4:1, 34.

<sup>30</sup> *Ibid.*

<sup>31</sup> The Hon. Michael Kirby, 'International Commercial Arbitration and Domestic Legal Culture' (2009) Australian Center for International Commercial Arbitration Conference, Melbourne, 12.



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The legal systems in different countries across Africa vary, from civil law legal systems to common law legal systems to Shari'a law and hybrid jurisdictions. Due to the different origins of the legal systems, coupled with cultural differences ranging from Francophone, Anglophone and Lusophone backgrounds, arbitration takes diverse forms when the international laws and principles are imported into each individual country. Parties engaging in arbitration, in most cases seek to avoid the 'diversities' of the domestic legal system. Since all the parties involved in the arbitration, including the tribunal, may have a different background in their understanding of normative rules of arbitration, the divergence may give rise to legal uncertainty.<sup>32</sup>

Arbitrators must take cognizance of the legal system of the country in which the arbitration will take place. The predominant legal systems in Africa are the common law and civil law systems. Countries that have a common law legal system include Kenya, Uganda and other former British colonies, while civil law countries include Angola, Mozambique, Burkina Faso, Burundi, Democratic Republic of the Congo, Cote d'Ivoire, Gabon, Guinea, and Guinea-Bissau, inter alia. Some countries such as Botswana, Cameroon, Lesotho, Zimbabwe, Mauritius and South Africa have pluralistic systems that have both common law and civil law traditions.

Perhaps the most fundamental difference between the common law and civil law modes of dispute resolution lies in the manner in which evidence is presented to the finder of fact. In the common law tradition, testimony is presented to the finder of fact principally through oral testimony of witnesses, rather than in written form. The questioning of witnesses is also conducted by counsel for the parties, with each party having the right to have their counsel cross-examine witnesses directly in the presence of the finder of fact. In the civil law tradition, by contrast, evidence and testimony generally is presented to the finder of fact principally in written form. While

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<sup>32</sup> Collins Namachanja, 'The Challenges Facing Arbitral Institutions in Africa' (2015) Chartered Institute of Arbitrators Kenya Alternative Dispute Resolution Journal, Volume 3:2, Glenwood Publishers Limited, 147.

oral testimony may be taken, the questioning of witnesses is conducted not by counsel, but rather by the court, which retains the sole authority to determine which questions will be put to the witness.<sup>33</sup>

The current standard practice in international arbitral proceedings seeks to strike a balance between the common law and civil law traditions. Witness testimony is generally presented in the first instance through written witness statements, which reflects the distinct influence of the civil law tradition. However, it is also generally well-established in international arbitration that any witness presented by a party must be made available to testify before the arbitral tribunal, with the opportunity for the opposing party to cross examine the witness, which reflects the common law tradition. Disputes also occasionally arise as to whether counsel should be given the opportunity to present oral arguments to the arbitral tribunal, whether in the form of opening statements at the outset of an arbitral hearing, or through closing arguments after the evidence has been presented.<sup>34</sup>

It is unlikely that the common law and civil law approaches to advocacy and proof will ever fuse into a single set of procedures for international arbitration, nor is it desirable that they should. One of the great strengths of arbitration is its procedural flexibility, which permits the process to be tailored to the particular needs of each case. What is emerging is rather a consensus as to a range of procedural options available to the arbitrators and the advocates in each proceeding. While not every procedure in that range is suitable for every arbitration, there is increasingly widespread acceptance of this range, as defining a set of procedures that are unlikely to be challenged as unacceptable or unfair by parties from either side of the increasingly less divisive common law - civil law divide.<sup>35</sup>

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<sup>33</sup> Javier Rubinstein, 'International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions' (2004-2005) *Chicago Journal of International Law*, Volume 5:1, 309-310.

<sup>34</sup> *Ibid.*

<sup>35</sup> Siegfried Elsing and John Townsend, 'Bridging the Common Law Civil Law Divide in Arbitration' (2002) *Arbitration International*, Volume 18:1, 7.

Another distinction between common law and civil law systems is discovery, i.e., the disclosure and exchange of evidence. Although discovery is increasingly common in international arbitrations, it is often a new experience for parties domiciled in civil law countries where such discovery is not permitted (or at least is heavily restricted) under local law. For such parties, the discovery process carries obvious risk. Companies in countries with a common law tradition are often accustomed to the concept of discovery in the litigation process, and thus may take precautions in their everyday business affairs, such as being careful what they put in writing, even in purely internal communications. For parties that have never been required to produce documents to litigation adversaries, however, such precautions are entirely alien, which leads inevitably to the risk that written communications may be produced that the author never dreamed would possibly make it into the hands of a litigation adversary.<sup>36</sup>

In African countries where Shari'a law applies in full or applies in personal status issues such as Algeria, Djibouti, Egypt, Eritrea, Ethiopia, Ghana, Somalia and Sudan, arbitrators have to be conscious of the effect of a Shari'a legal system on the arbitral process and enforcement of awards. National courts of a number of Islamic nations have refused to recognize foreign arbitral awards on domestic public policy grounds, including precepts of Islamic law. Interest or *riba* is a contentious issue in Islamic jurisdictions as Shari'a law prohibits *riba*.<sup>37</sup> The United Nations Commission on International Trade Law (UNCITRAL) *ad hoc* arbitration rules and the ICC International Court of Arbitration arbitration rules are silent on the issue of interest. The London Court of International Arbitration arbitration rules state that 'The Arbitral Tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the Arbitral Tribunal determines to be appropriate, without being bound by legal rates of interest imposed by any state court, in respect of any period which the Arbitral

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<sup>36</sup> Javier Rubinstein, 'International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions Perspective' (2004) *Chicago Journal of International Law*, Volume 5, 306.

<sup>37</sup> Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration' (2006) *Loyola of Los Angeles International and Comparative Law Review*, Volume 28, 602-614.

Tribunal determines to be appropriate ending not later than the date upon which the award is complied with.’ The imposition of interest is not mandatory under any of these international arbitration rules. Instead, the rules are either silent on the issue or allow the tribunal to include interest at its discretion based upon the contract and applicable law. The net result for all of these procedural rules is the same. They neither encourage nor discourage the use of interest. As a result, the procedural rules of international arbitration institutions by themselves do not contravene Shari’a and will not invalidate an award’s enforceability. It is only when an arbitration award contains interest that the award’s enforceability is placed at risk.<sup>38</sup>

The classical rules under Shari’a law seriously restrict the ability to appoint arbitrators; candidates require the same qualifications as a judge, including being male and Muslim. The fact that these restrictions on gender are ostensibly derived from the Shari’a raise some serious issues regarding bringing uniformity between the Islamic law and international commercial arbitration. One of the advantages of international commercial arbitration is the freedom that parties have to negotiate their choice of law provisions. This choice does not exist when it comes to the Shari’a, according to Islamic jurisprudence. The very concept of a divinely inspired system of laws precludes the choice of any other law by the parties to a dispute. In fact, Qur’anic injunctions urge believers to have their disputes judged ‘by what God has revealed.’<sup>39</sup>

There is now greater clamour to address the global issue of underrepresentation of women in international arbitration. A new era in the history of Saudi women was marked on May 10, 2016, when the Saudi administrative Court of Appeal in Dammam approved the appointment (or more precisely, did not object to it) of the first Saudi female arbitrator in the field of commercial disputes. This ground breaking woman is Ms. Shaima

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<sup>38</sup> Saud Al-Ammari and A. Timothy Martin, ‘Arbitration in the Kingdom of Saudi Arabia’ (2014) *The Journal of the London Court of International Arbitration*, Volume 30, Number 2, 407.

<sup>39</sup> *Ibid.*

Aljubran.<sup>40</sup> This is a positive indication of greater acceptance of women as international arbitrators in countries which apply Shari'a law. There is potential for more female arbitrators on an equal opportunity basis and this gender diversity will increase the legitimacy of the dispute resolution systems found in these countries.

International arbitrators must take into account the legal system of the seat of the arbitration in Africa and the manner in which that legal system influences the arbitral process. The legal system undergirds the arbitration and the manner in which the arbitral process will be carried out and the enforcement of the arbitral award. It also underlies the parties' expectations of the arbitral process.

#### ***4.2 Political and Religious Considerations***

Culture is also political. The power dynamics and social hierarchies of a people are reflected in its distinctive way of life. Their web of ideas and belief systems, patterns of relationships, behavioural norms, and material products are, in fact, dynamics of power and divergent interests embedded in the institutionalised patterns of behaviour, relationship structures, productive processes, material products and symbolic meanings, which cut across a society's institutions and practices. From a cultural studies perspective, cultural politics is theorised as both the legitimisation of social relations of inequality and the struggle to transform them.<sup>41</sup>

Arbitrators should be cognizant of the government bureaucracy in Africa as a political concern especially in matters that involve government institutions as one of the parties. This may even be complicated if the proceedings are in a government supported arbitral institution that is funded by the same government. Naturally, there is fear or bias or excessive bureaucracy due to power differences and influence that may defeat the need for arbitration. For

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<sup>40</sup> Mulhim Hamad Almuhim, 'The First Female Arbitrator in Saudi Arabia' (2016) <http://kluwarbitrationblog.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/> last accessed on 29<sup>th</sup> September, 2016 at 6 p.m.

<sup>41</sup> M. Bahati Kuumba, 'African Women, Resistance Cultures and Cultural Resistances' (2006) *Agenda*, 20:68, 112.

instance, government proceedings may require special procedures for some aspects of the process and this may clash with the established international arbitration laws and procedures. The concern may be real or perceived but there is need to ensure that the same is dealt with.<sup>42</sup> For arbitration to be successful the arbitrator should be impartial and be aware of the power dynamic and politics involved where the government or a parastatal is a party to the arbitral proceedings.

Another political concern is the perception of corruption. 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 are at stake and, may put forward the argument of grounds of public policy.<sup>43</sup> The arbitrator should guard against this perception and ensure that the arbitral process is not interfered with and should be free from political interference.

Other than the political considerations, arbitrators should consider the influence of religion on the arbitral proceedings and be sensitive and respectful to the religious beliefs of the parties involved. In Africa, there are various religions such as Christianity, Islam, Hinduism and traditional African religion. In some countries, religion is the very foundation of the government and its legal, social, cultural, political and educational practices. In others, religion is less important politically, but could be important personally. The importance of religion and politics cannot be overstated since it can lead people to have negative perceptions of other religions. When a participant in arbitration has a negative view of the religion of another participant, whether due to political, historical or other factors, the dispute resolution process will be negatively affected. It is the duty of the arbitrator and the parties to accommodate individual religious beliefs and promote

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<sup>42</sup> Kariuki Muigua, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' (2015) Arbitration Institutions in Africa Conference, 22.

<sup>43</sup> Ibid.

long-term peace and understanding through effective dispute resolution methods.<sup>44</sup>

It is essential that arbitrators who seek to engage people of different cultures to recognise and be sensitive to the dictates of the various religions embraced by the parties and other participants. A good example of the issues that can be faced is the observation of prayer obligations. In Africa for example, parties may observe the Muslim religion in certain jurisdictions. One western woman arbitrator sat in an arbitration in which an Islamic woman appeared as counsel, she had the good sense to make sure she called a break, at her own volition, at each prayer time, so that the woman could go and pray without having to be embarrassed by asking for time to do so. This is an example international arbitrators should follow. They must be sensitive to the religious practices of the parties who appear before them, and facilitate the parties' ability to follow such practices as a matter of course, just as arbitrators of their own culture would do automatically. If not, it can lead to resentment, which can defeat the mission to find amicable resolution of disputes.<sup>45</sup>

Another example in the African context is the need to respect traditional African religion, which may seem foreign to an international arbitrator and the parties involved in the arbitral process. It is important to respect religions that one may not necessarily subscribe to in order to be able to engage the parties and for the parties to be able to communicate. The best approach is to be respectful as most African countries have freedom of worship, which has resulted in religious diversity.

### ***4.3 Cultural Biases and Stereotypes***

For a businessperson, legal practitioner, negotiator, mediator, expert witness or arbitrator, the degree of sensitivity required invariably will delve far

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<sup>44</sup> William K. Slate II, 'Paying Attention to International Commercial Arbitration' (2004) *Dispute Resolution Journal*, 100.

<sup>45</sup> Karen Mills, 'Cultural Differences & Ethnic Bias in International Dispute Resolution: An Arbitrator/Mediator's Perspective' (2006) *Chartered Institute of Arbitrator's, Malaysia Branch International Arbitration Conference*, page 7.

deeper than just surface attributes. Ethnic or cultural *faux pas* may be excusable for a tourist, but they can be extremely detrimental, even fatal, to one's purpose for those of us who are seeking to resolve a dispute in one form or another. In order to do this we must earn the respect of all parties involved, which invariably involves affording to them, their culture and their laws, the appropriate form of respect customary within their community.<sup>46</sup>

In the cultural sense, neutrality addresses the appearance of bias rather than its actual presence. While one might suppose that an arbitrator might be inclined toward the position of a party who shares with him the same language, culture, and general value system, this is not necessarily the case. Nevertheless, the appearance that bias might be present has given rise to the general practice of selecting a third arbitrator from a nation other than that of the parties to the proceeding. The term neutrality is also frequently used in the same sense as 'impartiality'. This is not a political or geographical test, but one of a state of mind. It is a test for the lack of impermissible bias in the mind of an arbitrator toward a party or toward the subject-matter in dispute. This is a subjective test, since it is difficult to directly measure. It is a test not for the appearance of bias, but for its actual presence. The presence of bias is inferred from the facts and circumstances surrounding the arbitrator's exercise of the arbitral function.<sup>47</sup> An arbitrator must be cognizant of the perception of impartiality of bias in the arbitration and show sensitivity to the cultures of both parties.

Africa has failed dismally to benefit from its ethnic diversity because of ethnic bias and favouritism. In many countries on the continent, these remain the main causes of conflict and under-development. The continent lacks dedicated leadership and strong democratic institutions, with the result being that the character of governments has remained more or less unchanged, lacking in all-inclusive reforms that favour all citizens,

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<sup>46</sup> Ibid.

<sup>47</sup> Scott Donahey, 'The Independence and Neutrality of Arbitrators' (1992) *Journal of International Arbitration*, Volume 9:4, 32.



irrespective of their ethnicity.<sup>48</sup> International arbitrators should also be cognizant of the ethnic diversity in Africa and ensure that they are not perceived as favouring one ethnic community over another, as this could sabotage the success of the process. Parties may have underlying tensions due to these ethnic differences and the role of the arbitrator is to bring in a measure of neutrality as the impartial third party to the process.

Closely linked to cultural bias is the stereotypes that are present in African culture. Stereotyping involves a form of categorization that organizes our experience and guides our behavior towards ethnic and national groups. Stereotypes never describe individual behavior, rather, they describe the (sometimes perceived) behavioral norm for members of a particular group. Stereotypes, like other forms of categories, can be helpful or harmful depending on how we use them. Effective stereotyping allows people to understand and act appropriately in new situations. A subconsciously held stereotype is difficult to modify or discard even after real information about a person is collected, because it is often thought to reflect reality. If a subconscious stereotype also inaccurately evaluates a person or situation, we are likely to maintain an inappropriate, ineffective, and frequently harmful guide to reality.<sup>49</sup>

With respect to Africa, an oft-held general stereotype of the continent is that it is a place of danger, darkness, violence, poverty and hopelessness. Some Westerners view Africa as primarily a jungle or desert landscape where the people speak unintelligible languages. Africans are thought to live in rural areas, practice strange customs, and fight pointless battles against each other. These somewhat vague but decidedly negative stereotypes of Africa are founded on several myths that support the tone and message of the stereotypes.<sup>50</sup> Such stereotypes can and are extremely offensive to the African

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<sup>48</sup> Richard Ilorah, 'Ethnic bias, favouritism and development in Africa' (2009) *Development Southern Africa*, Volume 26:5,705.

<sup>49</sup> Nancy J. Adler, 'Communicating across Cultural Barriers' (1991) *International Dimensions of Organizational Behavior*, 2<sup>nd</sup> ed.,5,6.

<sup>50</sup> Amy E. Harth, 'Representations of Africa in the Western News Media: Reinforcing Myths and Stereotypes'  
<http://pol.illinoisstate.edu/downloads/conferences/2012/1BHarth.pdf>, 9.

people and where an international arbitrator adopts them, this can have a detrimental effect on the arbitral process.

#### **4.4 Communication**

Successful international commercial relations depends heavily upon good communication. Parties that do not carefully observe cultural rules of communication risk insulting, angering or embarrassing the other side. Culture heavily influences both verbal and nonverbal communication.<sup>51</sup> Miscommunications and a lack of understanding are usually the causes of conflicts. They can also cause problems in the dispute resolution process. All cultures have verbal and non-verbal communication systems that reflect their values and customs. Thus, there is a need to design guidelines to improve cross-cultural communications in arbitration. The same is true with gestures, facial expressions and body language, which send different signals. Gestures that are innocuous in one culture can be considered highly insulting in another. There is a need to explore the use of nonverbal communication across cultures, and the impact that it may have in different situations during the arbitration processes.<sup>52</sup>

Cross-cultural communication occurs when a person from one culture sends a message to a person from another culture. Cross-cultural miscommunication occurs when the person from the second culture does not receive the sender's intended message. Communication does not necessarily result in understanding. Cross-cultural communication continually involves misunderstanding caused by misperception, misinterpretation, and misevaluation. When the sender of a message comes from one culture and the receiver from another, the chances of accurately transmitting a message are low. Foreigners see, interpret, and evaluate things differently, and consequently act upon them differently. In approaching cross-cultural situations, one should therefore assume difference until similarity is proven.

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<sup>51</sup> Andrew Sagartz, 'Resolution of International Commercial Disputes: Surmounting Barriers of Culture without Going to Court' (1998) *Ohio State Journal on Dispute Resolution*, Volume 13:2, 685.

<sup>52</sup> William K. Slate II, 'Paying Attention to International Commercial Arbitration' (2004) *Dispute Resolution Journal*, 99.

It is also important to recognize that all behavior makes sense through the eyes of the person behaving, and that logic and rationale are culturally relative. In cross-cultural situations, labelling behavior as bizarre usually reflects culturally based misperception, misinterpretation, and misevaluation; rarely does it reflect intentional malice or pathologically motivated behavior.<sup>53</sup>

Nonverbal communication plays a dominant role in the life of Africans. Much as the following nonverbal behaviours may be acceptable in some cultures, in traditional African communities, they are frowned upon: beckoning to someone, pointing at someone with one finger, looking someone straight in the eye, passing things, especially food, with the left hand, *inter alia*, are unacceptable. Most forms of nonverbal communication can be interpreted within the framework of the culture in which they occur.<sup>54</sup>

#### **4.5 Language**

Most languages spoken in Africa can be categorised into the language families of Afroasiatic, Nilo-Saharan, Niger-Congo, Khoe and Indo-European languages. There is a high linguistic diversity in Africa used for inter-ethnic communication. Language issues can pose a serious obstacle to settlement of the dispute. Important details in the arbitral process may be lost in translation and the deeper elements of the language such as colloquial expressions may be misinterpreted.

Further, from a practical perspective, where English-speaking parties are in a French-speaking country and the arbitral institution only operates in French, it is likely that they would prefer an institution elsewhere. For example, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) in Egypt only administers cases in English and Arabic: it neither handles cases nor avails its arbitral rules in French. Similarly, Cour

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<sup>53</sup> Nancy J. Adler, 'Communicating across Cultural Barriers' (1991) *International Dimensions of Organizational Behavior*, 2<sup>nd</sup> ed., 2, 3.

<sup>54</sup> Cynthia Danisile Ntuli, 'Intercultural Misunderstanding in South Africa: An Analysis of Nonverbal Communication Behaviour in Context' (2012) *Intercultural Communication Studies*, Volume 21:2, 22.

Commune de Justice et d'arbitrage (CCJA) in Cote d'Ivoire only accepts French as the language of the arbitration, thereby presenting a potential challenge to English-speaking parties.<sup>55</sup>

#### **4.6 Time**

Culture has a great impact on the definition of time, and misunderstandings due to different perceptions of time can easily occur in cross-cultural business relations. Americans tend to worship time as a commodity that they do not like to waste. They believe 'faster' is better than 'slower'. Americans are often known as the world's fastest dealers.<sup>56</sup> In Africa, things are often done at a slower pace.

Two different orientations to time exist across the world: monochromic and polychromic. Monochromic approaches to time are linear, sequential and involve focusing on one thing at a time. These approaches are most common in the European-influenced cultures of the United States, Germany, Switzerland and Scandinavia. Japanese people also tend toward this end of the time continuum. Polychromic orientations to time involve simultaneous occurrences of many things and the involvement of many people. The time it takes to complete an interaction is elastic, and more important than any schedule. This orientation is most common in Mediterranean and Latin cultures including France, Italy, Greece, and Mexico, as well as some Eastern and African cultures.<sup>57</sup>

Negotiators from polychromic cultures tend to start and end meetings at flexible times. Take breaks when it seems appropriate, be comfortable with a high flow of information, expect to read each other's thoughts and minds, sometimes overlap talk, view start times as flexible and not take lateness

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<sup>55</sup> Collins Namachanja, 'The Challenges facing Arbitral Institutions in Africa' (2015) CIArb Centenary Conference, 10.

<sup>56</sup> Andrew Sagartz, 'Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court' (1998) Ohio State Journal on Dispute Resolution, Volume 13:2, 689.

<sup>57</sup> Tingqin Zhang and Hui Zhou, 'The Significance of Cross-cultural Communication in International Business Negotiation' (2008) Vol 3:2, International Journal of Business and Management, 2.

personally. Negotiators from monochromic cultures tend to prefer prompt beginnings and endings, schedule breaks, deal with one agenda item at a time, rely on specific, detailed, and explicit communication, prefer to talk in sequence and view lateness as devaluing or evidence of lack of respect.<sup>58</sup> In Africa-related arbitrations, the polychromic nature of communication should be used to contribute to greater success of the process.

## **5.0 Conclusion**

It is a hackneyed cliché, but one well worth repeating, that economic systems and their characteristics are never static, but change in response to certain imperatives taking place in the world. An indication of such imperatives unfolding today is the increasingly global nature of trade and investment issues that are constantly thrust into focus, with the result being that attention is increasingly turned toward formulating uniform legal rules, forms and processes of general application that must be called into play within the emerging global community. In the sphere of international business contracts, the most notable feature of this phenomenon is the very rapid evolution of legal rules, practices and institutional arrangements for resolution of international business disputes by arbitration.<sup>59</sup>

As cross-border interactions increase, there is a need to pay attention to the convergence of cultures as disputes between parties from different jurisdictions arise. For Africa-related arbitration, the cultural issues analyzed above are of great importance and contribute to the success or failure of the arbitral process. International arbitrators ought to factor in both legal and societal culture to make international commercial arbitration in this transnational legal order effective in the long run in Africa.

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<sup>58</sup> Ibid.

<sup>59</sup> Samson Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' (1992), *International and Comparative Law Quarterly*, Volume 41, 388.

*Resolving the Challenges Facing International Commercial Arbitration in Africa -  
Ngata Kamau*

**Resolving the Challenges Facing International Commercial Arbitration in  
Africa**

By: Ngata Kamau\*

**Abstract**

*This paper focuses on the challenges facing international commercial Arbitration in Africa. The paper examines the reasons why international commercial arbitration is ideal in Africa and its importance to the continent. It further, goes ahead to explain how arbitration has developed over time in Africa to its current state, reasons for its development and its impact on the continent. The paper further, outlines the challenges facing international commercial arbitration in Africa. Finally, the paper proposes ways to mitigate those challenges.*

**1.0 Introduction**

Arbitration is a voluntary process in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision (the award) on the dispute. In opting for arbitration, the parties settle for a private dispute resolution mechanism instead of going to court.<sup>1</sup>

Arbitration, as a key arm of Alternative Dispute Resolution (ADR), is hailed as a solution to the problems associated with litigation. 73% of multinational enterprises prefer to use international arbitration over litigation to solve their disputes<sup>2</sup>. As per Lord Langdate, M.R. in *The Earl of Mexborough v. Bower*:

*“many cases occur, in which it is perfectly clear, that by means of a reference to arbitration, the real interests of the parties will be much better satisfied than they could be by any litigation in a court of justice”.*<sup>3</sup>

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\* Advocate of the High Court of Kenya.

<sup>1</sup> Sourced from <http://www.wipo.int/amc/en/arbitration/what-is-arb.html>, accessed on 12/03/2016.

<sup>2</sup> Gerry Lagerberg and Robert Kus, ‘Global Survey Sheds Light on Perceptions of International Arbitration’, (Price Waterhouse Coopers, 2007).

<sup>3</sup> (1848), 7 Beav. 132.

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International Commercial Arbitration has become the preferred method of settling commercial disputes. Its preference comes as a result of the numerous advantages that arbitration offers. Some of these advantages include: privacy and flexibility. Arbitration is a private process that enjoys a lot of confidentiality unlike litigation, which is a process that is open to the public. In arbitration, party autonomy is key and as such the parties have sovereignty over the arbitrator and the process and as a result, the outcome will be acceptable to the parties. Flexibility is the most admirable attribute of arbitration after confidentiality. Flexibility arises as a result of party autonomy. There are no stringent or invariable rules like those in courts. Parties are free to adopt flexible rules and procedures that suit everybody.<sup>4</sup> An arbitration award, unlike other alternative dispute resolution mechanisms outcomes, can be enforced by a court of law therefore making it binding.

The rise in demand for international commercial arbitration has also been influenced by the fact that other alternative dispute resolution mechanisms, like negotiation, do not yield desirable results and the outcome of negotiation is not binding despite it being a win- win method of settling disputes. All people, states and institutions are free to enter into contracts as a matter of right. However, just like legislation that governs us, contracts can never be perfect or comprehensive enough to prevent disputes. This then calls for resolution of those disputes, either through litigation in courts or amicably through alternative dispute resolution mechanisms like international commercial arbitration.

Unfortunately, International commercial arbitration has not achieved its full potential in Africa, as it has in other jurisdictions outside Africa. This is mainly because of the challenges international commercial arbitration is facing in Africa. Most Countries in Africa have already embraced international commercial arbitration whereas others are still warming up to

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<sup>4</sup> See generally on Merits of Mediation; the London Court of International Arbitration, LCIA website [www.lcia.com](http://www.lcia.com). Accessed on 12/03/2016 and Chartered Institute of Arbitrators UK [www.clarb.co.uk](http://www.clarb.co.uk) accessed on 12/03/2016.

the idea. This, therefore, means that different countries in Africa face different challenges when it comes to the issue of international commercial arbitration. Some countries have managed to mitigate some of those challenges with the help of other countries in jurisdictions outside Africa while others are yet to deal with those challenges.

## **2.0 Why International Commercial Arbitration is Ideal for Africa**

Commercial disputes are unavoidable. Because of this, efficient mechanisms for their management are essential. International trade disputes are also 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.<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup> Africa ADRs mandate is to foster the culture of alternative dispute resolution in Africa and will oil the wheels of international trade and commerce.<sup>8</sup>

The referral of African disputes to European arbitral authorities for settlement is prohibitively expensive and unsatisfactory. Such referral also

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<sup>5</sup> "Africa ADR - a new African Arbitration Institution", available at <http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution>, accessed on 12/03/2016.

<sup>6</sup> Ibid.

<sup>7</sup> <http://www.africaadr.com>, accessed on 1<sup>st</sup> November, 2013.

<sup>8</sup> Ibid.



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 arising disputes referred to arbitration in Africa. The business and investment community stands to benefit from international commercial arbitration in Africa as it 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.<sup>9</sup>

### **3.0 Where Does International Commercial Arbitration Stand in Africa at the Moment?**

Africa has encouragingly grown economically over the last decade and there have also been impressive accompanying developments. This has, as a result, led to an increase in the level of foreign investment in the continent and, inevitably, to an increase in international disputes. Combined with some multinational companies' desire to avoid local courts and a strong arbitration tradition in international trade, it is unsurprising that international arbitration in Africa or involving African companies is on the rise.

There have been some positive harmonization steps taken by the 17 African countries signatory to the OHADA Treaty.<sup>10</sup> The Uniform Act on Arbitration Law was adopted in 1999 and is based on the UNCITRAL model law, sharing many of its principles.<sup>11</sup> It applies to any ad hoc arbitration seated in an OHADA signatory country and supersedes any previously existing national law (although the UAA remains subject to any national law that does not conflict with its provisions).<sup>12</sup>

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<sup>9</sup> Africa ADR-a new African Arbitration Institution, Op. cit.

<sup>10</sup> Accessed from <http://kluwerarbitrationblog.com/2016/13/arbitration-in-africa-past-present-and-future/>.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

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Therefore, while Africa, like its European counterpart, does not have a harmonized arbitration law that applies to the continent as a whole, it is clear that Africa is rapidly improving in one of the most important factors affecting choice of seat.<sup>13</sup> This should give comfort to foreign investors that, in the event of a dispute, an arbitration seated in Africa will be governed by laws that are in accordance with internationally recognized principles.<sup>14</sup> However, it is unfortunate that despite that fact, majority of arbitrations involving an African party still take place outside the African continent.<sup>15</sup>

Arbitration, while in a developmental phase, is growing rapidly across sub-Saharan Africa, which might be broadly split into three groups: East Africa, West and Central Africa, and Southern Africa. (North Africa is considered in the report on MENA). While arbitration is well established in some parts of West and Central and Southern Africa such as Ghana, Nigeria and South Africa, various other countries in the continent have only recently been seen to support and embrace arbitration. In East Africa, arbitration is reported to be increasing in the jurisdictions of Kenya, Tanzania and Rwanda in particular. Users from these particular jurisdictions foresee a significant upturn in arbitration in the next five years.<sup>16</sup>

#### **4.0 Challenges Facing International Commercial Arbitration in Africa**

The challenges international commercial arbitration faces in the African continent are numerous. They can be categorized as social, institutional, political and so on. These include Political and social unrest; failure to endorse home grown talent; lack of a harmonized arbitral legislation; societal attitude; corruption; the cost of arbitration; delay by national courts; interference by courts; lack of professional interaction; delay of arbitral proceedings; uncertainty of drafting and varying cultures of the parties to the dispute.

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<sup>13</sup> Ibid.

<sup>14</sup> Accessed from <http://kluwarbitrationblog.com/category/appointment-of-arbitrators> accessed on 12/03/2016.

<sup>15</sup> Supra note 10.

<sup>16</sup> 'The Current State and Future of International Arbitration: Regional Perspectives' by IBA Arb 40 Subcommittee.

#### **4.1 Political and Social Unrest**

In arbitration, parties have the right to pick the seat of arbitration. Parties have no obligation to elect the seat of arbitration to be in a specific country as they are at liberty to pick their country of choice. In Africa, there are some countries undergoing political and social unrest and this therefore, makes them unfavorable as venues for international commercial arbitration. As a result, parties in disputes are at times forced to pick countries that are outside Africa as the seat of arbitration as they are assured that their rights and security will not be undermined.<sup>17</sup>

#### **4.2 Failure to Endorse Homegrown Talent**

International commercial arbitration in Africa has just taken root and despite the fact that some countries and individuals in Africa have fully embraced it, some, if not most individuals, institutions and states in Africa, still find it alien to the continent. This in turn results in them choosing arbitrators outside the continent. In the long run, international commercial arbitration in Africa does not mature as the development of international commercial arbitrators lags behind.<sup>18</sup> African governments typically engage foreign legal firms for representation in international arbitrations.

One would be left wondering why African arbitrators are not considered for appointment.<sup>19</sup>

#### **4.3 Lack of a Harmonized Arbitral Legislation**

Lack of a harmonized arbitral legislation is both a good thing and a bad thing. A good thing because foreign investors are assured that in the event of a dispute, arbitration seated in Africa will be governed by laws that are in accordance with internationally recognized principles.<sup>20</sup> However, lack of a

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<sup>17</sup> G. Chukwudi Nwakoby and Charles Emenogha Aduaka 'Obstacles Facing International Commercial Arbitration,' *Journal of Law and Conflict Resolution*: <http://www.academicjournals.org/JLCR> accessed on 12/03/2016.

<sup>18</sup> Available at <http://kluwerarbitrationblog.com/category/appointment-of-arbitrators> accessed on 12/03/2016.

<sup>19</sup> Paul Ngotho, 'Challenges Facing Arbitrators in Africa', East Africa International Arbitration Conference, The Norfolk Hotel Nairobi July 28-29, 2014.

<sup>20</sup> Available at <http://kluwerarbitrationblog.com/category/appointment-of-arbitrators> accessed on 12/03/2016.

harmonized arbitral legislation forces parties to use numerous local and international legislation which as a result, encourage them to promote international commercial arbitration in other jurisdictions outside Africa, like Europe. There are some countries in Africa that have harmonized their arbitral legislation. The practice of law is to a large extent domestic. However, convergence of laws in areas like international trade and investment are taking place and therefore, harmonization of arbitral legislation would be beneficial.<sup>21</sup>

#### ***4.4 Societal Attitude***

Societies that have not yet warmed up to the idea of arbitration or alternative dispute resolution as a whole in Africa do not contribute to the growth and development of international commercial arbitration. As a result, Africa lags behind in this area as arbitrators in those jurisdictions are underutilized and despite having something to offer, they have no one to offer it to. Societies that embrace international commercial arbitration largely contribute towards making it better.

#### ***4.5 Corruption***

Corruption is one of the biggest challenges facing Africa today. Corruption inhibits growth and development in any society. Africa is still in denial as regards corruption hence no steps have been taken to curb that dreadful menace. African governments have been blamed for interference and corruption. Whereas some of these allegations are not true, corruption pose a hindrance to the arbitral process. This is because parties to arbitral proceedings perceive the tribunal as not being independent and impartial.<sup>22</sup>

#### ***4.6 Cost of Arbitration***

There have not been very clear guidelines on the remuneration of arbitrators in most jurisdictions in Africa, and foreigners are not always very sure what they would have to pay if and when they engage African international

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<sup>21</sup> -Available at [http://www.nyulawglobal.org/globalex/Unification\\_Harmonization\\_1.html](http://www.nyulawglobal.org/globalex/Unification_Harmonization_1.html) accessed on 12/03/2016.

<sup>22</sup> Muigua Kariuki, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' (May 2015).

arbitrators to arbitrate their commercial disputes. This is because the issue of remuneration is more often than not left to the particular institutional guidelines, which may not be favourable to the parties. For instance, the Kenyan branch of the Chartered Institute of Arbitrators, has its own rules and guidelines on the remuneration of its arbitrators. However, these are only applicable to those who practice arbitration under the institute and thus have limited applicability.<sup>23</sup>

However in Nigeria, Section 49 of the Arbitration and Conciliation Act, provides what constitutes the cost of arbitration.<sup>24</sup> The costs include: the fees of the arbitral tribunal which must state what each arbitrator is to earn; the travel and other expenses incurred by the arbitrators; the fees of the arbitral tribunal which must state what each arbitrator is to earn; the travel and other expenses incurred by the arbitrators; the cost of other experts and other assistance required by the arbitral tribunal; the travel and other expenses of witnesses; and the cost of legal representatives.<sup>25</sup>

#### ***4.7 Delay by National Courts***

Arbitration practice will be a meaningless and helpless system of dispute resolution without the involvement and assistance of the national courts. This is because courts' involvement in arbitration is inescapable in certain situations and at certain levels. The courts will be involved in a situation where parties have failed and disagreed as to who to appoint as an arbitrator. In such a situation, the appointment is done by the court on an application made to it by either party to the arbitration agreement. Another level of involvement of the court in arbitration practice is at the level of enforcement and impeachment of arbitral awards.<sup>26</sup>

The relationship of the courts and arbitration in the past was not a cordial one but with time, the pressure which favoured arbitration as a more

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<sup>23</sup> Ibid.

<sup>24</sup> Cap A 18 Laws of the Federation of Nigeria 2004.

<sup>25</sup> Ibid.

<sup>26</sup> Section 12(3) (b) and Section 35 of the Kenya Arbitration Act 1995 and Section 44 of the Arbitration and Conciliation Act of the Federation of Nigeria 2004.

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efficient, speedy, informal, friendlier and less expensive procedure, submerged the antagonism hence today, arbitration and courts are partners in dispensing justice (one in the private sense and the other in the public sense as a creation of the State).

However, whereas most courts in the developing countries have been guilty of delay in arbitration matters, some others are guilty of ignorance. Some judges, with respect, are not knowledgeable and skilful in arbitration process and the resultant effect is that in some cases, awards which are good on their face are often impeached and set aside for reasons which are absolutely doubtful and strange.<sup>27</sup>

#### ***4.8 Interference by Courts***

The courts in some countries, by virtue of their national arbitration legislation, are afforded a large opportunity to interfere with the arbitral process. Litigators infuse the arbitration system with the 'litigation mentality', which slows down the arbitral process through unnecessary requests for adjournments and interlocutory applications at the national courts, all which serve nothing but to delay the process and increase the associated costs. For example, Tanzania's arbitration law affords too great an opportunity for procedural intervention by the courts - obviously an undesirable characteristic for parties unfamiliar with the Tanzanian legal process.<sup>28</sup>

#### ***4.9 Legal and Institutional Framework***

Africa has an inadequate legal and institutional framework with regard to international commercial arbitration. Some African countries have provisions in their national legislation that are not in accordance with the UNCITRAL Model Law, the international standard for arbitration, thereby creating a challenge since international arbitrators find it difficult to practice

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<sup>27</sup> Supra note 17.

<sup>28</sup> Robert Vincent Makaramba (Hon Mr, Justice), 'Arbitration as a Mechanism to Speed up Delivery of Justice' (The United Republic of Tanzania, The Judiciary Round Table Discussion on Curbing Delays in Commercial Dispute Resolution, A paper presented at the Round Table Discussion, Dar es Salaam International Conference Centre, 20 July, 2012). Also see Kariuki Muigua, Supra note 22.

in those countries because the legal and institutional framework is not in tune with best practice.<sup>29</sup>

#### ***4.10 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 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. Courts often refer to “public policy” as the basis of the bar.<sup>30</sup> Some African countries’ arbitration statutes do not have a clear delineation of which cases are arbitrable, posing a challenge to the tribunal which would first need to consider if the matter may possibly be handled through arbitration.<sup>31</sup>

#### ***4.11 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 or 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.<sup>32</sup>

#### ***4.12 Varying Cultures of the Parties in Dispute***

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 on issues, prejudices and conflicts of interest, especially in international economic relations. Some may seek to subject their disputes to another

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<sup>29</sup> Collins Namachanja: The Challenges Facing Arbitral Institutions in Africa, Chartered Institute of Arbitrators Kenya Journal (2015)3(2) Alternative Dispute Resolution pg 144.

<sup>30</sup> Supra note 22

<sup>31</sup> Supra note 29.

<sup>32</sup> Hogan Lovells, “Arbitrating in Africa’. Available at [http://www.hoganlovellsafrica.com/\\_uploads/Publications/Arbitrating\\_in\\_Africa\\_Hogan\\_Lovells\\_March\\_2013.pdf](http://www.hoganlovellsafrica.com/_uploads/Publications/Arbitrating_in_Africa_Hogan_Lovells_March_2013.pdf).

arbitrator who may not share a culture with either of the disputants but one aware of international best practices in arbitration.<sup>33</sup>

#### ***4.13 Uncertainty in Drafting***

This is poor drafting (Use of pathological arbitration clauses). 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.<sup>34</sup>

#### ***4.14 Confidentiality Requirements***

In some countries, there is no provision for confidentiality in arbitration, and the proceedings may be published unless the parties enter into a separate confidentiality agreement limiting disclosure of their dealings. This puts arbitration in the same league as litigation in terms of disclosure, and poses a threat to the development of arbitration as a more favourable course of action.<sup>35</sup>

#### ***4.15 Duration of Arbitral Proceedings***

Some of the advantages of arbitration over litigation are speed, efficiency, and informality. Parties patronize arbitration because they want their matter to be disposed of within the shortest time. This also explains why arbitral proceedings are not subject to the rules of the Civil Procedure Act and the Evidence Act.

Some scholars and antagonists have criticized arbitration as being too technical and slow because of the long period and duration of its proceedings. In fact, this has made some to see arbitration as litigation by another name. In international commercial arbitration, parties have the right to choose the applicable law to the arbitration.

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<sup>33</sup> Russell J. Leng and Patrick Regan, 'Social and Political Cultural Effects on the Outcome of Mediation in Militarized Interstate Disputes', Available at <http://cpd.dinghamton.edu/paper/social-effects-full.pdf> Accessed on 16th March 2016.

<sup>34</sup> Kariuki Muigua, *Supra* note 22; Also see Collins Namachanja, *Supra* note 29.

<sup>35</sup> *Ibid.*



The law as specified by the parties may have a limitation period for undertaking any step in the matter. The parties have a right, based on the principles of party autonomy, to specify the time for undertaking any step in the proceedings. The duration for the arbitration is then dependent on the parties, the arbitrators, and the applicable law.<sup>36 32</sup> Clear cut procedures on how to tackle certain scenarios and punitive measures on unnecessary and avoidable delay have not been put in place, therefore posing the challenge of international commercial arbitrations taking longer than they should.

#### ***4.16 Lack of Professional Interaction***

Arbitration practitioners and advocates need to interact in order to know and appreciate one another.<sup>37</sup> Movement within Africa is restrictive and quite costly. This has as a result led different countries within Africa to form their own alliances in promoting international commercial arbitration within their jurisdictions thus creating very minimal professional interaction.<sup>38</sup>

For example, Nigeria has had a long experience in oil and gas contracts, disputes and arbitration. This should be viewed as a continental resource. The African countries which have just discovered oil have a readily available point of reference.<sup>39</sup>

### **5.0 How to Mitigate the Challenges of International Commercial Arbitration in Africa**

If Africa mitigates the challenges it faces in international commercial arbitration, there will be no reason why it cannot be at par with the rest of the world.

Collins Namachanja, a Chartered Arbitrator and a member of the Chartered Institute of Arbitrators in his article: 'The Challenges Facing Arbitral Institutions Africa', has comprehensively outlined the challenges facing

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<sup>36</sup> Supra note 17.

<sup>37</sup> Paul Ngotho, 'Profile' (2014) <http://www.ngotho.co.ke/profile.html> accessed on 14/03/2016.

<sup>38</sup> Ibid.

<sup>39</sup> Supra note 19.

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Arbitral institutions in Africa and provided sound solutions to mitigate those challenges.<sup>40</sup> If those solutions can be implemented then Africa can be able to cure the challenges facing arbitral institutions. Arbitral institutions in Africa play a big role in International Commercial Arbitration.

Paul Ngotho, a fellow of the Chartered Institute of Arbitrators and a member of the Royal Institution of Chartered Surveyors, focused on the challenges facing arbitrators in Africa and suggested solutions to those problems.<sup>41</sup> Africa should implement those solutions so as to assist arbitrators in Africa. Arbitrators and legislation governing arbitration constitute the heart of arbitration. If arbitrators are undergoing challenges that affect arbitration, solving those problems will solve half of the problems linked to international commercial arbitration in Africa.

Dr. Kariuki Muigua, has comprehensively written about some of the challenges facing international commercial arbitration and arbitral institutions in Africa.<sup>42</sup> A comprehensive legal regime should be established and adequate infrastructure put in place for purposes of proper and efficient governance of international commercial Arbitration.

Africa should also seek to harmonize its arbitral legislation. The importance of harmonization is that, African countries that lack an established legal regime with regard to Arbitration will benefit.

Further, Africans will have confidence in the system here at home as it will be easier to understand and there will also be less legislation to look through on the subject of international commercial arbitration. Governments, institutions and individuals in Africa should aim at endorsing home grown talent. It is expensive for any government, individual or institution to refer their dispute to another country for purposes of arbitration. This is so for a number of reasons:

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<sup>40</sup> Supra note 29.

<sup>41</sup> Supra note 19.

<sup>42</sup> Supra note 22.

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- a) The parties seeking to refer their matter to another country outside Africa for arbitration is marketing that other country and its arbitrators;
- b) The arbitrators back in Africa are left without work which they are qualified to do;
- c) Different countries, people and institutions have different disputes. By referring matters abroad, the arbitrators back in Africa are robbed of diversification in terms of knowledge that they would have acquired; and
- d) As more people become more informed about arbitration, those who refer their disputes abroad become confident about the services rendered in international commercial arbitration by those foreign institutions and this as a result, diminishes the confidence fellow Africans have on local arbitrators and local institutions.

There is therefore need for courts, arbitrators and arbitral institutions to work together. However, this can only be achieved if judges are trained on arbitration and its importance as well as on international laws. Knowledge of those key areas will, to a large extent, eliminate delays by courts and interference. It will also give the judges an opportunity to appreciate international commercial arbitration.

Africans should also come together to eradicate corruption. Corruption is a deadly disease but luckily a curable one. It is a real problem in Africa even though Africa has shied away from admitting it. The first step to healing is acceptance. Curing Africa of corruption will cure numerous if not all illnesses that ail Africa as a continent. One of the illnesses that result in corruption and has adversely affected international commercial arbitration in Africa is political and social unrest. Political and social unrest emanates from lack of transparency in Africa which is the other face of corruption. Curing corruption will eradicate cases of:

- a. Interference by courts.
- b. Political interference.

- c. Referral of disputes to other jurisdictions outside Africa, among others.

Educating and informing the general public as well as the business community about the advantages of international commercial arbitration will play a big role in propelling Africa forward in terms of international commercial arbitration. This is because, not all matters that are referred to other jurisdictions outside Africa are referred because of lack of confidence in Africa or African arbitrators.

Some arbitral proceedings are forced to have their seat in other jurisdictions outside Africa because of lack of expertise in specific disciplines. This problem can be sorted out if people from all disciplines other than the legal profession, quantity surveying or the engineering profession are encouraged to become arbitrators. It will mean diversification which is an important aspect that Africa cannot afford to sacrifice. Mentorship for arbitrators is important so that they do not turn arbitration into private litigation.

## **6.0 Conclusion**

Arbitration has increasingly become an important alternative dispute resolution mechanism in many parts of the world, including Africa. All societies in which there exist the right to trade freely, have settled for arbitration as the key alternative dispute resolution mechanism.

It is therefore, important that Africa mitigates the challenges it faces with regard to international commercial arbitration. Failure to do so will diminish International trade and Investment and kill international commercial arbitration in Africa.

The challenges identified and discussed in this paper together with the proposed solutions will, if implemented, go a long way in propelling arbitration in Africa to the international level.

## **Book Review: Contemporary Issues in Arbitration**

*By: W.A. Mutubwa\**

**Author:** Paul Ngotho, FCIArb (Chartered Arbitrator)

**Publisher:** Homecoming Publications, 2016

**Pages:** 239

**ISBN:** 978-996-1884-0-3

This work comes out at a timely moment when the gospel of arbitration and Alternative Dispute Resolution (ADR) are currently gaining currency, both domestically and on the African continent.

Domestically, ADR and by extension arbitration, has been demystified under the Constitution of Kenya 2010. It is no longer an elitist method of dispute resolution but now forms a cardinal part of the exercise of judicial authority under the Kenyan legal system. Article 159 of the Constitution is instructive to this end.<sup>1</sup> Arbitration under the Civil Procedure Rules is also as vibrant as ever.<sup>2</sup> Currently, the High Court Commercial and Family Divisions are running a pilot programme on Court annexed mediation.<sup>3</sup> Indeed, the Kenyan Judiciary has realised that only ADR can help deal with the never ending problem of case backlog.

On the regional plane, the African continent now boasts of at least twelve centres dedicated to international arbitration.<sup>4</sup> In a nutshell, Africa is

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<sup>1</sup> Article 159 2(c) specifically enjoins Courts and tribunals to embrace alternative dispute resolution mechanisms including arbitration in their exercise of judicial authority.

<sup>2</sup> Under Order Section 59 as read with order 46 of the Civil Procedure Act and Rules, 2010.

<sup>3</sup> See [www.judiciary.govt.ke](http://www.judiciary.govt.ke) for details on the program.

<sup>4</sup> The Cairo Regional Centre for International Commercial Arbitration (CRCICA), 1979, the Lagos Regional Centre for International Commercial Arbitration (LRCICA), 1989; Arbitration Foundation of South Africa (AFSA), 1996; the Ugandan centre for Arbitration and Dispute Resolution (CADER), 2000; the Kigali Centre for international Arbitration, 2012; the Lagos Court of Arbitration (LCA), 2012; the LCIA-MIAC Arbitration Centre,

repositioning itself to take a prominent role in resolving commercial disputes particularly, those emanating from commercial transactions concluded or undertaken on the continent – all inspired by the mantra *finding African solutions to African disputes*.

Aptly titled “*Contemporary Issues in Arbitration*,” the book is divided into three parts. The first part addresses general current issues facing arbitral institutions in Africa, the emergence of arbitral institution in Africa such as the Nairobi Centre for International Arbitration and challenges facing the Arbitrators in Africa. Part 2 takes a practical approach to matters current to arbitration in Africa including mediation in insurance disputes, adjudication, mergers and acquisitions and oil and gas disputes as an emerging area for arbitration in East Africa. Part 3 offers a critique of the existing legal, jurisprudential and statutory provisions and principles germane to the Arbitration Act of Kenya 1995, and also offers incisive insights and shares useful experiences on claiming, defending and awarding interest in arbitration.

Paul Ngotho’s book is therefore a welcome contribution to the ever growing corpus of literature on arbitration in Africa. It is unique in at least three respects. Firstly, unlike most literature of this subject which tends to give focus and primacy to the theoretical and substantive content of the subject, Ngotho illuminates a hitherto ignored or overlooked perspective of arbitration that is equally of importance- a practical approach. From his personal experiences as an accomplished arbitrator, Ngotho sets out into the uncharted waters of arbitration practice in Africa. Secondly, his odyssey proceeds to unravel areas of discourse hitherto unattended in most of the existing literature in this field, particularly in Africa. For instance, the book discusses the perceptions of adjudication in Africa, corruption in arbitration and offers insights as well as practical lessons and solutions drawn from practice.

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Mauritius, 2012, the International Centre for Arbitration and Mediation Abuja (ICAMA) 2012; the Nairobi Centre for International Arbitration (NCIA), 2013 and the Nairobi Centre for Alternative Disputes Resolution (CADR), 2013.

Thirdly, and perhaps the most distinguishing aspects of the book, is its ability to speak to complex, and often controversial subjects, in an easy straight forward yet fulfilling manner without convoluting the same. Subjects that have hitherto eluded arbitral consensus for years and which remain the subject of academic and professional discussion such as costs, interest and the role of courts and arbitral institutions, are addressed albeit from a practical perspective. The ease and simplicity with which the author tackles concepts which may seem daunting even to the most seasoned practitioner of arbitration is remarkable.

The book is a fine mix of theory and practice, but most of all offers pragmatic proposals for expediting arbitrations. It offers real life skills both to the seasoned arbitrator and a quick reference point for the aspiring or budding dispute resolver.

*Book Review: Settling Disputes through Arbitration in Kenya, 3<sup>rd</sup> Edition - Faith Nguti*  
**Book Review: Settling Disputes through Arbitration in Kenya, 3<sup>rd</sup> Edition**

*By: Faith Nguti<sup>1</sup>*

**Author:** Kariuki Muigua, Ph.D., FCIArb (Chartered Arbitrator)

**Publisher:** Glenwood Publishers Limited, 2017

**ISBN:** 978-9966-046-12-3

Since the promulgation of the Constitution of Kenya 2010, the academic world has come alive and has enthusiastically built up the body of writing on Arbitration in Kenya. This clamour is undeniably attributed to Article 159 (2) (c) of the Constitution of Kenya 2010, which brought to the fore the various alternative dispute resolution mechanisms, including arbitration. The Constitution also required various national laws to incorporate alternative dispute resolution mechanisms.

Dr. Kariuki's various contributions to the Arbitration discourse is crowned by this book, which was first published in 2012. A pioneer authorship in this area of academia, this book has become a trusted manual for the arbitrator, the aspiring arbitrator, as well as the any person who is likely to appear before an arbitrator.

The author, Dr. Kariuki Muigua, pours more than 20 years of experience into the pages of this text and comprehensively takes the reader through the legal and practical ins and outs of conducting arbitration in Kenya. The book is thus meant to take the readers through the process of arbitration in a simplified, yet comprehensive manner, with the latest key amendments and case law on arbitration in Kenya.

The third edition of this book sees its further enrichment by taking into consideration the numerous changes in the legal landscape following the 2010 Constitution. This update is intended to capture the current state of

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<sup>1</sup> Legal Researcher, LLB (University of Nairobi), CPM (Mediation Training Institute, East Africa), (PG. Dip. Law KSL, December 2017).



*Book Review: Settling Disputes through Arbitration in Kenya, 3<sup>rd</sup> Edition - Faith Nguti*  
Arbitration to date and to better equip the practitioner and the legal mind for this fast evolving field.

Over the last 7 years, parties have sought the court's decision on various matters involving arbitration, and what has developed is a vast volume of precedent that has shaped the practice of arbitration. The author incorporates this body of law into the earlier text.

This book also evaluates how the courts have addressed some of the issues arising from the practice of arbitration in Kenya. This includes an analysis of the highly contentious decision of the Court in *Republic v. Mohamed Abdow Mohamed*, which tackled the question on the application of alternative dispute resolution in a murder suit. It also discusses some of the concerns that may arise in future, especially in the relationship between arbitration practice and the constitutional bill of rights.

The author has additionally highlighted on legislative updates such as the establishment of the Nairobi Centre for International Arbitration (NCIA), a creation of the Nairobi Centre for International Arbitration Act, No. 26 of 2013. The Centre will play a crucial role in prioritizing International Commercial Arbitration in Kenya, and will also foster Kenya as a preferred destination as a seat of arbitration.

Another legislative update is the incorporation of alternative dispute resolution mechanisms in land dispute handling and management. This move is evidenced in Section 4(2) (k) of the Land Act of 2012, Section 20 of the Environment and Land Court Act and Section 41 of the Community Land Act No. 27 of 2016, which incorporates the use of arbitration in community land disputes.

This book has earned a spot in every arbitrator's bookshelf as an all-in-one guide to Arbitration in Kenya, as the way of the future, for access to justice and for economic growth to be realised in Kenya.

## **Book Review- Arbitration in Africa: A Review of Key Jurisdictions**

*By: Charles Kimani<sup>1</sup>*

**Eds:** John Miles, Tunde Fagbohunlu SAN & Kamal Rasiklal Shah

**Publisher:** Sweet & Maxwell

**Date:** 2016

As the running theme, this book focuses on arbitration law regimes and practices of key African jurisdictions in this crucial time in the development of international dispute resolution on the continent.

It gives a comprehensive and thoroughly updated outlook on the state of arbitration law in African countries relevant to their political, judicial and legal framework, while factoring in their economic and political climate. The authors analyze the legal systems, their relation to arbitration regimes, both locally and internationally, and the state of enforcement of local and international arbitral awards, at a time when there are very limited publications giving such a unique critical and comparative analysis.

Government lawyers, arbitration practitioners and scholars can, through this book, review Africa's unique challenges and triumphs in arbitration practice, in a bid to place Africa in a position where it can maximize on the inflow of foreign direct investments to the continent. It also provides a reference point for international legal practitioners managing cases in Africa.

The need for African States to open and develop their own arbitration institutions to cover for an increasing number of cross border disputes cannot be emphasized enough; this book points out and develops that theme.

The book also highlights the varying commitments of different judicial systems in aiding arbitration. The essence of non-interference of arbitral proceedings by legal, political and judicial authorities in African countries is

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<sup>1</sup> LLB (KU); Founder & President, Young Arbiters Society.

*Book Review - Arbitration in Africa: A Review of Key Jurisdictions*  
*Reviewer: Charles Kimani*

developed, given the age old challenge arbitration has witnessed of subversion of its mandate by the courts. The protection accorded by African countries to arbitration clauses is also featured with a keen analysis on the courts' interpretation on arbitration clauses that lack clarity.

While focusing on Africa's arbitration landscape in both a current and historical context, this book highlights case law spanning various and diverse jurisdictions in the continent, subsequently rendering it a much needed reference for Arbitration matters in Africa.

Its editors are renowned legal practitioners specializing in the field of International Arbitration in Africa and beyond. John Miles, is the Managing Director of *JMiles & Co* a legal service entity based in Nairobi, Tunde Fagbohunlu SAN is partner and head of the Litigation, Arbitration and ADR Practice Group at *Aluko & Oyebode*, a leading Nigerian law firm while Kamal Rasiklal Shah is head of *Stephenson Harwood* LLP's Africa and India groups.

The proper application of law and jurisprudence in African countries can only be improved if those countries are alive to the state of arbitration in their respective jurisdictions; this book captures this state in a detailed and exhaustive fashion at the turn of every page.

*Do we need to Regulate Online Dispute Resolution in Kenya? - Alvin Gachie*  
**Do we need to Regulate Online Dispute Resolution in Kenya?**

By: Alvin Gachie<sup>1</sup>

**Abstract**

*This paper has discussed responses to the question of whether there is a need to regulate Online Dispute Resolution in Kenya. The first section introduces the concept of Online Dispute Resolution (ODR). The second section gives a background to the study on which this paper is based, giving the reader an understanding of the research on which this paper is grounded. The third section discusses the regulation-led approach in the United Kingdom, where the European Parliament has taken the lead in regulating dispute resolution mechanisms. It also explains the opposite approach, referred to in this paper as the market-led approach, characterised in the approach in the USA, where there is little state involvement in this private dispute resolution mechanism. This paper finds that law may be beneficial to regulating technology due to consumer protection concerns. For Kenya, the regulation-led approach is preferred to the market-led approach. This leads to a suggestion that Kenya should prioritise provision for Online Dispute Resolution in the legal framework.*

**1.0 Introduction**

This paper discusses whether there is a need for a new legal framework for Online Dispute Resolution (ODR) in Kenya. There is little focus in existing literature on whether a developing country such as Kenya should prioritise provision for ODR in the legal framework, or whether ODR ought to develop first and legal provision to follow. Some authors argue that there is a need to put in place a dedicated legal framework for ODR, to take into account the peculiarities of the dispute resolution mechanism. This approach would be

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<sup>1</sup> Advocate of the High Court of Kenya, LL.M (University of Nairobi), LL.B (Hons, University of Nairobi), Dip. in Law (Kenya School of Law). This paper is based on an LL.M Thesis by Alvin Gachie, 'An Evaluation of the Need for Regulation of Online Dispute Resolution (ODR) in Kenya' (LL.M Thesis, 2016)  
<[http://erepository.uonbi.ac.ke/bitstream/handle/11295/98426/Gachie\\_An%20Evaluation%20Of%20The%20Need%20For%20Regulation%20Of%20Online%20Dispute%20Resolution%20\(ODR\)%20InKenya.pdf?sequence=1&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/98426/Gachie_An%20Evaluation%20Of%20The%20Need%20For%20Regulation%20Of%20Online%20Dispute%20Resolution%20(ODR)%20InKenya.pdf?sequence=1&isAllowed=y)> accessed on 4 January 2017.

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similar to the European Union (EU) experience, which factors in consumer protection issues to support the call for enactment of an ODR law. On the other side of the debate are authors who argue that there is no need for a dedicated legal framework for ODR. This side favours a scenario where the private dispute resolution field is market-driven, with little state involvement, as in the United States of America (USA).

This paper introduces the concept of ODR, briefly presents the two opposing arguments, and concludes that there is no need for a legal framework for ODR in Kenya. The paper finds that while parallels may be drawn from the experiences in the UK and USA, there is a need to allow ODR to develop before incorporating it into the legal framework. At a time when there is little market interest in ODR, the state may, however, explore other ways of promoting uptake of the dispute resolution mechanism, but not through enacting statute. ODR may rely on the legal framework for Alternative Dispute Resolution (ADR) in Kenya.

Imagine you have bought an electronic item on an online shop, and the supplier delivers it to your office. The item works well for two weeks, then it malfunctions. You had not checked on the supplier's website where the brick-and-mortar shop is located. What a better time to find out! You go onto the supplier's website and learn that the warehouse is in Arusha, Tanzania. You live in Kericho, Kenya. The total cost of returning the item to the supplier, including the mobile phone airtime you would use to communicate with the supplier, are far much more than the Kshs 4,000/- you spent to buy the item and have it delivered.

You have a Business to Consumer (B2C) dispute with the supplier. You might consider not pursuing the dispute because the cost and speed may outweigh the benefit, but it does not mean that ignoring the dispute will make it go away. Online Dispute Resolution may have a solution to your problem. It may be used to resolve the dispute between you as the consumer in Kenya, and the supplier in Tanzania. The possibility that you may never meet the supplier, the distance between the parties, and the uncertainty of whether the process will be fair, are considerations that make it necessary to examine

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whether ODR should be regulated. This paper argues that the legal framework for ADR may support the emergence of ODR, and that there is no need for a dedicated legal framework for ODR in Kenya.

## **2.0 What is Online Dispute Resolution?**

ODR is defined as 'a form of appropriate dispute resolution that utilizes telecommunication (usually internet-based, but to a lesser extent, telephones and cellular phones) to facilitate speedy and efficient resolution, mainly by compressing or reducing the time, costs and geographic space that is shared between disputing parties'. The following definition of ODR presents it as the nexus between dispute resolution and technology, where technology supports the existing dispute resolution mechanisms:

*"ODR is ... technology supported dispute resolution. In that sense it can be any form of dispute resolution: technology supported mediation, technology supported arbitration, technology supported anything really."*<sup>2</sup>

ODR may be used to resolve disputes that arise from both online and offline interactions. ODR involves the resolution of disputes that arise from online and mobile electronic commerce (e-commerce), but also extends to family law, e-consumer protection and disputes arising from off-line commerce. ODR is a suitable cost-effective dispute resolution mechanism for high-volume, low-value claims between parties in distant geographical locations, where straightforward repetitive issues may arise between different consumers on a regular basis.

There are different forms of e-commerce transactions including B2C e-commerce transactions, Business to Business (B2B) e-commerce transactions, Government to Citizen (G2C) e-commerce transactions, and Consumer to Consumer (C2C) e-commerce transactions. The inherent nature of B2C

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<sup>2</sup> Alvin Gachie, 'An Evaluation of the Need for Regulation of Online Dispute Resolution (ODR) in Kenya' (LLM Thesis, University of Nairobi 2016) 64 <[http://erepository.uonbi.ac.ke/bitstream/handle/11295/98426/Gachie\\_An%20Evaluation%20Of%20The%20Need%20For%20Regulation%20Of%20Online%20Dispute%20Resolution%20\(ODR\)%20InKenya.pdf?sequence=1&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/98426/Gachie_An%20Evaluation%20Of%20The%20Need%20For%20Regulation%20Of%20Online%20Dispute%20Resolution%20(ODR)%20InKenya.pdf?sequence=1&isAllowed=y)> accessed 4 January 2017.

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online disputes makes them amenable to ODR. Therefore, disputes arising from online and mobile B2C e-commerce transactions are the best suited type of disputes for ODR. A person already using the internet and mobile phone to effect transactions would, according to this position, be more responsive to an attempt to resolve any dispute that may arise, using the same system.

### **3.0 Background**

This paper is based on a study on whether there is a need for regulation of ODR in Kenya.<sup>3</sup> The study evaluated the differing positions of regulation of ODR in the UK and the USA to determine whether either of the two approaches is favourable for Kenya. The study involved a desk-based review of literature, and interviews of ten respondents. This was not intended to be a representative sample. Rather, the study sought to draw opinions on whether there is a need to develop ODR law in Kenya. The study involved lawyers, academics, ODR experts and a judge.

In an effort to minimise the likelihood that the data provided by the respondents is traced back to them, the respondents have been anonymised. Many ethical guidelines for social science research suggest that it is important to anonymise research participants through assigning pseudonyms. While the author attempts to remove personal identifiers, it is acknowledged that it is impossible to completely hide the identity of respondents, as contextual identifiers in the responses may still be present. Further, their views have not been documented in any particular order: neither in the text nor in the footnotes.

### **4.0 Crossroads: Whether Kenya should Adopt a Regulation-led or Market-led Approach**

*A regulation-led approach in the United Kingdom versus a market-led approach in United States of America*

Developed countries such as the UK and the USA have better infrastructure to sustain internet connectivity than developing countries such as Kenya,

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<sup>3</sup> Alvin Gachie (n 2).

*Do we need to Regulate Online Dispute Resolution in Kenya? - Alvin Gachie* where weak infrastructure limits internet penetration.<sup>4</sup> In the UK and USA respectively, the level of internet use was estimated at 92.6% and 88.5% in the year 2016, contrasted against Kenya's 45%.<sup>5</sup> Kenya had approximately 21 million internet subscriptions, following a 3.7% increase in uptake from the year 2015.<sup>6</sup> On a global comparative scale, developing countries such as Kenya have low access to broadband networks, and the use of both fixed and mobile telephone surpasses internet use.<sup>7</sup>

In Kenya, the increasing penetration of mobile phones, established mobile-communication infrastructure and low levels of internet connectivity all indicate that ODR may be facilitated by wireless mobile devices, and not computers.<sup>8</sup> Low use of the internet in developing countries is associated with low disposable income.<sup>9</sup> With such low disposable income, a household would prioritise shopping for subsistence in physical markets, limiting engagement in e-commerce transactions such as online shopping.<sup>10</sup> This suggests that e-commerce has not reached its full potential in Kenya. As e-

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<sup>4</sup> Chandra Gnanasambandam and others, 'Online and Upcoming: The Internet's Impact on India' (McKinsey & Company Inc 2012) 25 - 28; Angela Kagwara and Maureen Wanjiru, 'Digital Divide: The Glaring Reality' (University of Nairobi 2009) 7,8 <[https://www.uonbi.ac.ke/wakagwara/files/digital\\_divide\\_conference\\_paper.pdf](https://www.uonbi.ac.ke/wakagwara/files/digital_divide_conference_paper.pdf)> accessed 24 November 2015.

<sup>5</sup> Internet Live Stats, 'Internet Users by Country' (Internet Live Stats, 2016) <<http://www.internetlivestats.com/internet-users-by-country/>> accessed 14 September 2016.

<sup>6</sup> Ibid.

<sup>7</sup> Christine Zhen-Wei Qiang, 'Broadband Infrastructure Investment in Stimulus Packages: Relevance for Developing Countries' 7 <[http://siteresources.worldbank.org/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/Resources/282822-1208273252769/Broadband\\_Investment\\_in\\_Stimulus\\_Packages.pdf](http://siteresources.worldbank.org/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/Resources/282822-1208273252769/Broadband_Investment_in_Stimulus_Packages.pdf)> accessed 24 November 2015.

<sup>8</sup> Doug Leigh and Frank Fowlie, 'Online Dispute Resolution (ODR) within Developing Nations: A Qualitative Evaluation of Transfer and Impact' (2014) 3 *Laws* 106.

<sup>9</sup> Luis Enriquez and others, 'Creating the Next Wave of Economic Growth with Inclusive Internet' (World Economic Forum 2015).

<sup>10</sup> GSV Radha Krishna Rao and G Radhamani, *WiMAX: A Wireless Technology Revolution* (Auerbach Publications 2007) 323; Paul Guinness, *Geography for the IB Diploma Global Interactions* (Cambridge University Press 2011) 47.



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commerce increases, the disputes that may arise from these business interactions may present a budding ground for ODR.<sup>11</sup>

On the one hand, it is argued that developing legal standards to support ODR systems is important to ensure the development of the sector. According to this position, 'a solid legal framework is needed to allow for the proper growth of online dispute resolution with its norms, market and technology.'<sup>12</sup> Supporters of this view argue that developing legal standards for ODR may assist to stimulate growth in the area.<sup>13</sup> The UK position draws from the view that regulation of ODR is essential for development of the area.<sup>14</sup>

The UK consists of three distinct legal systems: England and Wales; Scotland; and Northern Ireland.<sup>15</sup> While there are differences with regard to property rights and the court system, the three systems are similar.<sup>16</sup> Many laws of the UK Parliament in London not only apply to England and Wales, but also to Scotland and Northern Ireland.<sup>17</sup> In this paper, reference to the 'legal

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<sup>11</sup> Rafal Morek, 'Regulation of Online Dispute Resolution: Between Law and Technology' <[http://www.odr.info/cyberweek/Regulation%20of%20ODR\\_Rafal%20Morek.doc](http://www.odr.info/cyberweek/Regulation%20of%20ODR_Rafal%20Morek.doc)> accessed 17 November 2015.

<sup>12</sup> Ibid; Pablo Cortés, 'Online Dispute Resolution for Consumers' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2010) <<http://www.mediate.com/pdf/cortes.pdf>> accessed 17 November 2015.

<sup>13</sup> Louis Del Duca, Colin Rule and Zbynek Loebel, 'Facilitating Expansion of Cross-Border E-Commerce - Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems - Work of the United Nations Commission on International Trade Law' (2012) 1 Penn State Journal of Law & International Affairs 81 - 82.

<sup>14</sup> Karolina Mania, 'Online Dispute Resolution: The Future of Justice' (2015) 1 International Comparative Jurisprudence 76, 85.

<sup>15</sup> European Union, 'United Kingdom' (*European Union*, 5 July 2016) <[http://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom\\_en](http://europa.eu/european-union/about-eu/countries/member-countries/unitedkingdom_en)> accessed 14 September 2016; Sarah Carter, 'A Guide to the UK Legal System' (*Globalex - Hauser Global Law School Program, New York University School of Law*, 2015) <[http://www.nyulawglobal.org/globalex/United\\_Kingdom1.html](http://www.nyulawglobal.org/globalex/United_Kingdom1.html)> accessed 19 May 2016; Tom Bolam, 'Common Mistakes in Choice of Law and Jurisdiction Clauses' (*Lexology*, 22 September 2015) <<http://www.lexology.com/library/detail.aspx?g=8f9476e8-b712-4726-b675-21463a3355e9>> accessed 19 May 2016.

<sup>16</sup> Tom Bolam (n 15).

<sup>17</sup> Ibid.

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framework in the UK' connotes laws that apply throughout the UK,  
especially with regard to the UK involvement in the EU.

The UK is a member of the EU.<sup>18</sup> By virtue of this relationship, EU laws affect the legal framework on ODR throughout the UK.<sup>19</sup> A referendum on 23<sup>rd</sup> June, 2016 displayed support for 'Brexit', the process of withdrawal of the UK from the EU. The legal result of Brexit is that the EU laws cease to apply to the withdrawing state.<sup>20</sup> However, the effect of withdrawal on the legal framework is not immediate.<sup>21</sup> The trigger process is the approval by the UK Parliament to invoke Article 50 of the Treaty of the European Union.<sup>22</sup> This is likely to commence in 2017, leading to a conclusion of the official legal Brexit in 2019.<sup>23</sup> The UK remains a member of the EU until the official legal Brexit.<sup>24</sup> EU law influences the UK legal system until the UK Parliament either repeals certain pieces of EU legislation or enacts local legislation in particular areas.<sup>25</sup> For this reason, this paper discusses EU law on ODR as part of the legal framework of the UK.

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<sup>18</sup> UK Crown, 'Countries in the EU and EEA' (*UK Crown*, 2016) <<https://www.gov.uk/eu-eea>> accessed 14 September 2016; European Union (n 15); Vaughne Miller and others, 'Research Briefings - Brexit: What Happens Next?' (UK House of Commons 2016) Briefing Paper 07632

<<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7632#fullreport>> accessed 14 September 2016.

<sup>19</sup> Vaughne Miller and others (n 18) 10, 11.

<sup>20</sup> Consolidated Texts of the European Union Treaties as amended by the Treaty of Lisbon 2007, art 50(3); Eva-Maria Poptcheva, 'Article 50 TEU: Withdrawal of a Member State from the EU' (European Parliament 2016) Briefing <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS\\_BRI\(2016\)577971\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf)> accessed 15 August 2016.

<sup>21</sup> TEU (n 20), art 50(3); Eva-Maria Poptcheva (n 20).

<sup>22</sup> TEU (n 20), art 50; David Davis, 'Exiting the European Union: Ministerial Statement' (UK House of Commons, 5 September 2016) <<https://www.gov.uk/government/speeches/exiting-the-european-union-ministerial-statement-5-september-2016>> accessed 14 September 2016.

<sup>23</sup> Ashley Cowburn, 'Brexit "could Be Delayed until Late 2019"' with Whitehall Departments Not yet Ready to Trigger Article 50' *The Independent* (14 August 2016) <<http://www.independent.co.uk/news/uk/politics/brexit-date-article-50-eu-referendum-result-europe-theresa-may-a7189851.html>>.

<sup>24</sup> Vaughne Miller and others (n 18) 8.

<sup>25</sup> Sarah Gordon, 'Untangling Britain from Europe Would Cause Constitutional "havoc"' *Financial Times* (20 June 2016) <<http://www.ft.com/cms/s/2/d7ae7b70-361a-11e6-9a05-82a9b15a8ee7.html#axzz4HQhVRMft>> accessed 16 August 2016.

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The EU has designated laws dealing with ODR, including Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR), as well as Regulation (EU) No. 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes. The UK adopted Regulation (EU) No. 2015/1051 through the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015, made by the Secretary of State designated for the purposes of section 2(2) of the European Communities Act 1972(a), in relation to matters relating to consumer protection. ODR is therefore well seated in the law in the UK. The aim of the provision for ODR in the law in the UK is to improve consumer confidence for both online and offline transactions.<sup>26</sup>

In contrast to the position in the UK, the USA Federal Arbitration Act of 1970 mandates strict use of arbitration for B2C disputes.<sup>27</sup> However, the USA law does not proactively support ODR systems through regulation.<sup>28</sup> As a result, the ODR systems in the USA operate in the private realm.<sup>29</sup> The USA position is that regulation of ODR is not needed because the system developed without specific provision in the law and therefore should continue in the hands of private players.<sup>30</sup> This argument is supported by the example of the development of the mobile money services in Kenya, which developed in the

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<sup>26</sup> UK Department for Business, Innovation and Skills, 'Explanatory Memorandum to the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015' (2015).

<sup>27</sup> Amy Schmitz, 'Consumer Redress in the United States', *The Transformation of Consumer Dispute Resolution in the European Union: A Renewed Approach to Consumer Protection* (Oxford University Press 2016) 3.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Esther van den Heuvel, 'Online Dispute Resolution as a Solution to Cross-Border E-Disputes' 21, 22 <<http://www.oecd.org/internet/consumer/1878940.pdf>> accessed 4 October 2016.

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hands of private players without a precedent in other countries for regulators to follow in providing regulation.<sup>31</sup>

*Is there a need for introduction of a legal framework to govern the area of ODR in Kenya and to facilitate resolution of disputes arising from B2C e-commerce transactions?*

B2C e-commerce disputes may be resolved through the court process, administrative process or ADR.<sup>32</sup> In Kenya, litigation through the courts is provided for under the Civil Procedure Act (Cap 21) and the Civil Procedure Rules of 2010. The Kenya Information and Communications (Dispute Resolution) Regulations made pursuant to the Kenya Information and Communications Act of 1998 provide for a consumer in a B2C e-commerce dispute with a telecommunications service provider to file a complaint with the Communications Authority of Kenya. A consumer may also resort to ADR as envisioned under Article 159 of the Constitution of Kenya of 2010, which provides that the courts and tribunals shall support the use of ADR.

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<sup>31</sup> Alvin Gachie (n 2) 64.

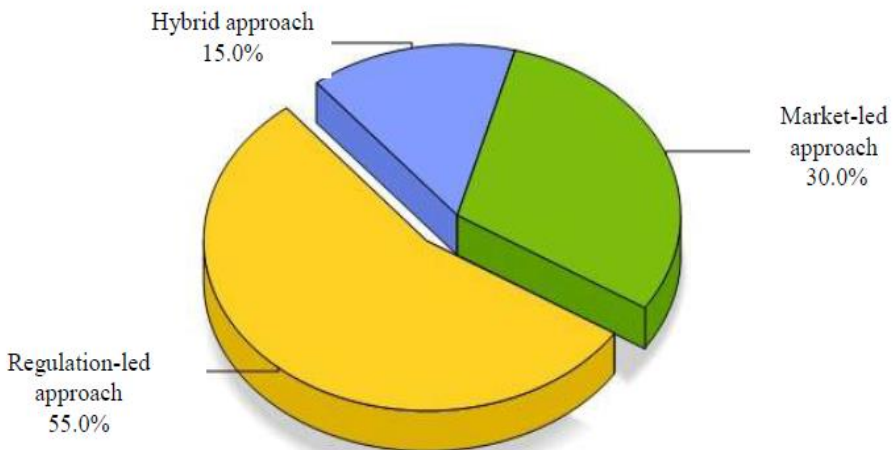
<sup>32</sup> Feliksas Petrauskas and Eglė Kybartienė, 'Online Dispute Resolution in Consumer Disputes' (2011) 18 *Jurisprudence* 921; Pablo Cortés (n 12) 172, 173; Llewellyn Joseph Gibbon, 'Creating a Market for Justice; a Market Incentive Solution to Regulating the Playing Field: Judicial Deference, Judicial Review, Due Process, and Fair Play in Online Consumer Arbitration' (2002) 23 *Northwestern Journal of International Law & Business* 4, 5, 11 - 15  
<<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1555&context=njilb>> accessed 14 September 2016; Colin Rule, Vikki Rogers and Louis Del Duca, 'Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments' (2010) 42 *Uniform Commercial Code Law Journal* 225 - 228 <<http://colinrule.com/writing/ucclj.pdf>> accessed 14 September 2016; Urša Jeretina, 'Administrative Aspects of Alternative Consumer Dispute Resolution in the European Union (EU), Slovenia and Croatia' (2016) 9 *NISPAcee Journal of Public Administration and Policy* 191 - 192 <<https://www.degruyter.com/downloadpdf/j/nispa.2016.9.issue-1/nispa-2016-0009/nispa-2016-0009.xml>> accessed 14 September 2016.

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Would a legal framework for ODR be of any use in Kenya? Should Kenya prioritise development of legal standards for ODR in the country drawing from the UK experience, or alternatively should ODR develop independent of the law drawing from the USA experience?

The dominant view of respondents to the paper on which this paper is based, on whether Kenya should adopt a regulation-led approach towards ODR, or whether the technology should develop first, leaned in favour of the regulation-led approach. While the frequency of references to a regulation-led approach stood at 55%, the frequency of references to a market-led approach was 30%. There was a third approach that emerged from the responses: a hybrid approach which carved a frequency of 15%. These respondents were of the view that the two dominant approaches may be merged, with the best of the UK regulation-led direction fused with the USA market-led direction.

Figure 1 shows the frequency of responses concerning the question on the need for regulation of ODR in Kenya. The figure shows a 30% frequency favouring the market-led approach, a 55% frequency tending towards the regulation-led approach, and a 15% frequency in support of a hybrid approach.



**Figure 1: The need for regulation of ODR in Kenya, Source: Author**

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Respondent Q was emphatic about providing for ODR in the law. The provisions on ODR should however not be transplanted from another country without concern for the local realities in Kenya, but instead, should take into account the society the law seeks to regulate.<sup>33</sup> Highlighting the development of M-PESA before regulation was put in place for it, Respondent Q remarks:

*"...it is time to codify (technology into law) getting the practices of ... corporates, getting the practices of our advanced nations and then customizing our own local instance of the law...It is high time we had the law because the technology has been ahead of it anyway as we speak today."*

According to Respondent H:

*"I know there are those who say that the industry should regulate itself. That it shouldn't (have) the law. You have to have the law because there is the question of cyber security. You need the law to regulate the technology. The kind of law(s) you need (are) the so-called...technologically neutral laws... Or the laws with technologically neutral provisions because the technology is always changing. They're always changing. If you have...laws that are static and ... not dynamic, it means ... the law (will also need to) chang (e)."*

Similarly, Respondent N noted that if the development of the law is proactive, responding to potential issues that may be presented by technology before they arise, then the result would be fewer disputes. On the contrary, if the development of the law is reactive, addressing the problems presented by technology when they arise, then the instances of disputes may be high:

*"(T)echnology has become a very key facet of how business is conducted across the world, including in (Kenya). You need to have the law saying something*

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<sup>33</sup> Jacob K Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) 1 International Journal of Humanities and Social Science 240  
<[http://www.ijhssnet.com/journals/Vol.\\_1\\_No.\\_6;\\_June\\_2011/25.pdf](http://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf)> accessed 28 September 2016.

*Do we need to Regulate Online Dispute Resolution in Kenya? - Alvin Gachie about how those relationships are entered. How, for example, in terms of contracting what's the effect of the postal rule in an online situation? Effectively the law has to say something about technology so there has to be a more direct than in indirect relationship. If it's indirect which means as and when disputes come up then the law would address those then it takes a very reactive role as opposed to a proactive role, which then can take care of a lot of loopholes and solve a lot of disputes before they actually come up."*

The regulation-led approach draws from the UK experience. This approach has provision in the law for issues including consumer protection, as safeguarded in the EU ODR and ADR laws. According to Respondent B:

*"... the EU is a model that could work in other places as well...if the EU system works well it will be a lot more comprehensive than ODR in the US. ODR in the US is mainly used by some very large companies, consumer oriented companies: EBay, Facebook, Twitter and so forth. They generate huge numbers of disputes and they need systems for dealing with that. The EU regulation applies to everybody."*

While an ODR system is online, there is still a need to have the same consumer protection safeguards as offline dispute resolution systems. While courts carry out dispute resolution, due to the nature of ODR, public-private partnerships may be useful. According to Respondent Z:

*"a lot of it will come down in the end if the courts are going to be adopting more and more technology and more and more technology based solutions within courts, that you have to depend first of all on, whether or not the courts want to do that in-house or whether they want to do that externally...businesses have much greater freedom and motivation to improve services, to make them faster, better, more efficient and better for the client, which is obviously much better than courts can do. As a result, you need to regulate the businesses that are providing these sorts of services to make sure that they are meeting the standards of current legal procedure. I think you have to legislate quite strongly. Just because something's online does not mean that it should be any less legally binding nor held to any lower standards. It should absolutely be of the same standards and you should legislate to that effect."*

The views of Respondent Z are backed up by those of Respondent J who, noting that using the law to positively impact the development of ODR would need support from the government, states:

*"... Kenya...has two options... The government could develop their own platform and form a public body dealing with these matters. Or ... like in the UK, (the government could invite) ...a public tender ... where they say, "We need somebody to do this. Who is willing to do it and for which price?" Then the government chooses the best of those who apply to do the job..."*

Respondent D, while expressing a need for regulation, expressed a reservation whether it would be high in priority noting as follows:

*"We still haven't gotten to the volumes that rationalize us spending money to get legislation on it, but it's something that we'll have to deal with I think sooner than later."*

The existing laws on ADR may be amended to provide for ODR. This approach favours amending existing law instead of putting in place a dedicated legal instrument. This is the view taken by Respondent X displayed in the following excerpt:

*"For B2B and B2C disputes, already an elaborate system has been established for ADR which can be evolved into the online space... The Arbitration Act has been put in place to give some legal force and recognition of this mechanisms... Kenya should not actively seek to regulate ODR but rather, to work with arbitrators and arbitration bodies to continually improve ADR and ODR, especially by clarifying that the existing mechanisms/regulations for ADR can be extended to ODR with the necessary modifications."*

This view supports reference to ODR in the existing ADR law. In doing so, it still lends support for regulation of ODR. Respondent X supports the approach of building on the legal framework already in place relating to



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dispute resolution, noting that amendment may be required for ODR to operate efficiently:

*“Since the law recognises freedom of contract, contracting parties are free to opt into the form of ADR they would like to govern any dispute in their contractual relationship. This would include ODR – the existing rules for ADR can possibly be applied – with the necessary modification... - to ODR, without the need for new regulations for ODR; or possibly with a slight amendment of the ADR rules to clarify that they can also be applied online. The above applies to B2C and B2B disputes. When it comes to disputes that have to go to court, if we are saying that courts can adopt the use of technology in resolving cases for example conducting hearings through video conferencing, this might call for the passing of a few regulations/amendments on the laws governing court procedures.”*

The regulation-led approach recognises consumer protection as a key confidence-builder in e-commerce and ODR.<sup>34</sup> Consumers must be comfortable that the law guarantees their protection from unscrupulous traders.<sup>35</sup> They must be sure that if they share information over the ODR system, their information is protected through a robust data protection

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<sup>34</sup> Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law, ‘Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis’ (29 June 2016); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society, ‘Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis’ (15 June 2016); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK, ‘Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis’ (17 June 2016); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation ([www.nation.co.ke/jwalu](http://www.nation.co.ke/jwalu)), ‘Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis’ (23 June 2016).

<sup>35</sup> Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 34); Interview with Mark Lavi, Senior In-house Counsel, Safaricom, ‘Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis’ (10 June 2016); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 34); Interview with Grace Mutung’u, ICT Lawyer, Kenya ICT Action Network (KICTANet), ‘Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis’ (29 June 2016).

*Do we need to Regulate Online Dispute Resolution in Kenya? - Alvin Gachie* framework.<sup>36</sup> Consumers must have confidence in the viability of e-commerce, the stability of the public infrastructure providing these services, and the integrity of the system from cybercrime.<sup>37</sup>

Perspectives on regulation of technology have been considered to be those of developed countries. What is your comment on this view? What considerations may be taken by a developing country in evaluating the need for regulation of ODR?

A number of issues arise that must be taken into consideration if Kenya is to develop the regulation on ODR. The form of the regulation to be put in place must be decided. It may either be through independent legislation,<sup>38</sup> reference to ODR in existing ADR law,<sup>39</sup> or through issuance of guidelines that encourage certain legal standards to be upheld.<sup>40</sup> The starting point is the view that the legal framework for ADR as at 2016 is inadequate to meet the peculiar challenges presented by ODR. According to Respondent Z:

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<sup>36</sup> Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation ([www.nation.co.ke/jwalu](http://www.nation.co.ke/jwalu)) (n 34).

<sup>37</sup> Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation ([www.nation.co.ke/jwalu](http://www.nation.co.ke/jwalu)) (n 34); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)', 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (9 July 2016).

<sup>38</sup> Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 34); Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)' (n 37); Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (15 July 2016).

<sup>39</sup> Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 35).

<sup>40</sup> Interview with Edward Muriithi Rinkanya, Principal Legal Officer for Dispute Resolution and Commercial Services, Communications Authority of Kenya, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (7 August 2016).

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“...the most sensible thing is to set up first of all a framework. Then once you have a framework that you are happy with things operating within that you then use that to promote actively bringing ODR into a country. You know exactly where you can operate within, how it's going to work. Then you give companies a real opportunity to open up an entirely new market waiting for them. It's huge not only in terms of revenue itself but the promise of access to justice is huge.”

The UK has put in place the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 recognising the use of the EU ODR platform established under Article 5 of Regulation (EU) No. 524/2013.<sup>41</sup> This serves as a reference to ODR in existing ADR law, through an amendment of the ADR statute or regulation. Another benchmark law in the UK is the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, which provides for approval of ADR entities that are competent to resolve disputes, including ODR-related disputes.<sup>42</sup> Further, the EU ODR Regulation, effective January, 2016 is also instructive in considering developing a legal framework for ODR in Kenya.<sup>43</sup>

All EU laws applicable in the UK before Brexit will still be in force until the exit is legally complete (possibly in 2019) or further into the future, if the UK enacts a separate Act or passes regulations to adopt the EU law.<sup>44</sup> There is no

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<sup>41</sup> Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015, Art 2.

<sup>42</sup> Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, Schedule 3.

<sup>43</sup> Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC 2013.

<sup>44</sup> Ashley Cowburn (n 23); Swati Dhingra and others, ‘The UK Treasury Analysis of “The Long-Term Economic Impact of EU Membership and the Alternatives”’: CEP Commentary’, *Brexit 2016 Policy analysis from the Centre for Economic Performance* (London School of Economics and Political Science 2016)  
<[http://cep.lse.ac.uk/pubs/download/brexit08\\_book.pdf](http://cep.lse.ac.uk/pubs/download/brexit08_book.pdf)> accessed 15 August 2016; Jiries Saadeh, ‘The European Union, Investment Treaties and Investment Arbitration Post-Brexit | Arbitration Blog’ <<http://arbitrationblog.practicallaw.com/the-european-union-investment-treaties-and-investment-arbitration-post-brexit/>> accessed 16 August 2016.

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need to re-invent the wheel, but there is a need to adapt the legal framework in other jurisdictions to conform to local realities.<sup>45</sup> Kenya may draw lessons from the UK experience, therefore, in considering preparing a legal framework for ODR. According to Respondent N:

*"...there's no shame in not wanting to reinvent the wheel. There's absolutely no shame in copying... Why would I need to reinvent the wheel and come up with a triangular wheel instead of something circular? Or I come up with something which is a lot more native?"*

A potential challenge for consideration that may limit development of ODR even if provision is made in the law, is the weak legal provision for e-commerce in Kenya.<sup>46</sup> Respondent N outlines the development of Information and Communication Technology (ICT) law in Kenya, highlighting the provision for e-commerce:

*"... the national ICT policy ... promulgated in 2006 ... addressed issues of electronic commerce and sought to ... recognize electronic transactions... That led to the Kenya Communications (Amendment) Act 2009, which is now known as the Kenya Information and Communications Act ... (of) 2013. That was an attempt by government, both Parliament and the ... recognize e-transactions.*

Respondent N deplors the inadequate provision for e-commerce in the law:

*"I think that (the law on e-commerce) is insufficient as it currently is drafted and that's why we still need to have an Electronic Transactions... Act. Digital*

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<sup>45</sup> Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 34); Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 34).

<sup>46</sup> Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation ([www.nation.co.ke/jwalu](http://www.nation.co.ke/jwalu)) (n 34).

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signatures...(have) been working ... for over a decade in many Western countries. Since the law recognized that digital signatures can be used on documents in 2009, which was technologically speaking still fairly late, the (Communications Authority) has only started putting in place regulations on licensing of the entities that would supply these digital signatures ... From 2009 will be a decade in the next three years. Nothing has happened."

According to Respondent N, while the law recognises the digital signatures may be used, without regulations from the Communications Authority of Kenya on how they apply, the law is not implemented. Further, in relation to B2C transactions, there is a challenge with low levels of appreciation of how e-commerce works, including how digital signatures are used. This removes the utility of having laws in place, if they are not beneficial in practice:

*"(T)he law says, "We recognize that you can use digital signatures for purposes of attesting to certain documents that you've entered into with the purpose of contracting." I have been in a situation where my bank cannot allow me to electronically sign a document. They need me to go to the bank and physically do that. The (Communications Authority) has not licensed ... entities that will offer (digital signatures). It does not mean they're not offered. There are people who offer (digital signatures) abroad... There's a high level of ignorance in the commercial sector as to the utility of (digital signatures). There are companies who in terms of e-bills internally allow people to append electronic signatures. Depending on who their client (or) suppliers are... It's good to have it in the law but we're not practical."*

Another stumbling block would be to encourage wilful adoption of ODR by parties, as stated by Respondent B:

*"I think the challenge for online dispute resolution, which is the same challenge for mediation, is to get both parties to agree to it. If only one party wants to have mediation or ODR and the other party doesn't, then you can't force anything."*

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It is believed that stronger e-commerce laws than those present in Kenya would promote development in the area of ODR.<sup>47</sup> The issue of unreliable electricity connection came to light.<sup>48</sup> The development of e-commerce and ODR alike, would require better public infrastructure than what is currently available.<sup>49</sup> This would also require greater effort in increasing internet penetration in the country in light of the comparative lower levels than in the UK or the USA.<sup>50</sup> In 2016, only 16% of Kenyan adults had a smart phone, and only 18% accessed the internet at least once a month.<sup>51</sup>

Beyond this, Kenya does not have an effective addressing system.<sup>52</sup> The UK and the USA have well laid out addresses not only in the urban areas but also in the far-flung areas, facilitating efficient delivery of goods and services. Kenya lags behind with unmarked addresses making it difficult for e-commerce to progress, therefore creating an unfavourable environment for development of ODR.<sup>53</sup> It is therefore noted that aligning the laws with the emergent technology is not the solution to all problems. It is not a guarantee

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<sup>47</sup> Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation ([www.nation.co.ke/jwalu](http://www.nation.co.ke/jwalu)) (n 34).

<sup>48</sup> Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34).

<sup>49</sup> Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of 'ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)' (n 37); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation ([www.nation.co.ke/jwalu](http://www.nation.co.ke/jwalu)) (n 34).

<sup>50</sup> Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with Professor Ethan Katsh, Director, National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies at University of Massachusetts Amherst, 2014-2015 Affiliate Researcher at Harvard University Berkman Center for Internet and Society (n 34).

<sup>51</sup> Central Bank of Kenya, Kenya National Bureau of Statistics and Financial Sector Deepening (FSD) Kenya, 'The 2016 FinAccess Household Survey' (Financial Sector Deepening (FSD) Kenya 2016) 19 <<http://fsdkenya.org/publication/finaccess2016/>> accessed 16 September 2016.

<sup>52</sup> Interview with Grace Mutung'u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 35).

<sup>53</sup> Ibid.

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that once the laws are put in place, then ODR would thrive in Kenya.  
According to Respondent J:

*"...it would be beneficial if there is some governmental support. I don't think legislation is a panacea. I think what you need more is resources and maybe legislation in terms of muscle to require traders or businesses to have the legal obligation to form or even to participate in ODR. For instance, if you have complaints against utilities or financial bodies it should be somehow monitored. It should also enable an ODR route for customers and consumers to complain when they have a reason to do so, and not just to force them to go to the court to elevate a complaint against a business. In that sense, I think the European approach would be better to enable the use of ODR."*

### **5.0 What is the way forward for Regulation of ODR in Kenya?**

Kenya should adopt a regulation-led approach to promote the development of ODR. The legal framework for ODR in Kenya may be developed either through enacting a law dedicated to the area, or through recognising ODR in the existing ADR law. Alternatively, ODR may be included in the legal system through preparation of ODR regulations under the ADR law, or through the Kenya Information (Dispute Resolution) Regulations of 2010. According to Respondent G:

*"The best way under the law is (to) give the Minister the power to make regulations from time to time."*

Once ODR is provided for in the law, Kenya may consider development of a pilot ODR system. The cost implications of establishing ODR systems must be taken into account. A pilot ODR system may be developed by the Communications Authority of Kenya to address the question of viability of ODR. Development of ODR systems may be taken up as a government-led initiative, where an internal department initiates a pilot project.<sup>54</sup> The Communications Authority of Kenya, for example, already has the Kenya Information and Communications (Dispute Resolution) Regulations, 2010

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<sup>54</sup> Interview with Dr Pablo Cortés, Senior Lecturer, Leicester School of Law, University of Leicester, UK (n 34); Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law (HiiL), The Hague, The Netherlands (n 38).

*Do we need to Regulate Online Dispute Resolution in Kenya? - Alvin Gachie* which may be used as a launch-pad for ODR regulation.<sup>55</sup> This should be accompanied by public awareness campaigns on the benefits of ADR in general, and ODR in specific, to further give life to the constitutional provision hailing the importance of out-of-court solutions to disputes.

Cybersecurity issues must also be addressed, for e-commerce to flourish and ODR to bud.<sup>56</sup> Further, levels of awareness among consumers, businesses, the judiciary and Advocates must be checked to create room for adoption of ODR.<sup>57</sup> Government bodies for example the Communications Authority of Kenya would be key information points to disperse knowledge not only on ODR but also on the existing ADR mechanisms, making the different stakeholders amenable to the dispute resolution mechanisms.<sup>58</sup> According to Respondent N:

*“ODR ... draws heavily from the principles used in ADR. People need to be sensitized that you need not have necessarily contracted through online means. You might have contracted in the brick-and-mortar world but you can use that dispute to take it onto an ODR platform and use it to settle... People need to be (made aware by) ... the relevant regulatory institutes, ... (the Communications*

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<sup>55</sup> Interview with Edward Muriithi Rinkanya, Principal Legal Officer for Dispute Resolution and Commercial Services, Communications Authority of Kenya (n 40); Interview with Mark Lavi, Senior In-house Counsel, Safaricom (n 35); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation ([www.nation.co.ke/jwalu](http://www.nation.co.ke/jwalu)) (n 34).

<sup>56</sup> Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 37); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation ([www.nation.co.ke/jwalu](http://www.nation.co.ke/jwalu)) (n 34); Interview with Grace Mutung’u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 35).

<sup>57</sup> Interview with Justice Adam Mambi, Judge of the High Court of Tanzania, Expert on ICT/Cyber Law & Intellectual property law, Author of ‘ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community (2010)’ (n 37); Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34); Interview with Grace Mutung’u, ICT Lawyer, Kenya ICT Action Network (KICTANet) (n 35); Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation ([www.nation.co.ke/jwalu](http://www.nation.co.ke/jwalu)) (n 34).

<sup>58</sup> Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law (n 34).



*Do we need to Regulate Online Dispute Resolution in Kenya? - Alvin Gachie Authority) being one of them... (It is) a government mandate to publicize and let people know."*

## **6.0 Conclusion**

This paper has discussed responses to the question whether there is a need for regulation of ODR in Kenya. The first section introduces the concept of ODR. The second section gives a background to the study on which this paper is based, giving the reader an understanding of the research on which this paper is grounded. The third section discusses the regulation-led approach in the UK, where the European Parliament has taken the lead in regulating the dispute resolution mechanisms. It also explains the opposite approach, referred to in this paper as the market-led approach, characterised in the approach in the USA where there is little state involvement in this private dispute resolution mechanism. The study on the legal framework for ODR in the UK and the USA revealed that law may be beneficial to regulating technology due to consumer protection concerns.

For Kenya, the regulation-led approach emerged as the preferred one. This leads to a suggestion that Kenya should prioritise provision for ODR in the legal framework. While the market-led approach in the USA has still seen development of ODR for B2C e-commerce disputes, there is concern that consumers may not adequately be protected under these private-led systems. The frequency of references to a regulation-led approach was 55%, the market-led approach drew a frequency of 30% in the responses. A hybrid approach was also suggested, adopting parts of the regulation-led approach to certain aspects of ODR, and parts of the market-led approach to other aspects of ODR. References to a hybrid approach had a frequency of 15%. A regulation-led approach is anticipated to support development of ODR in Kenya, ensuring consumers are well taken care of in the legal framework.

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ISBN 978-9966-046-13-0



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