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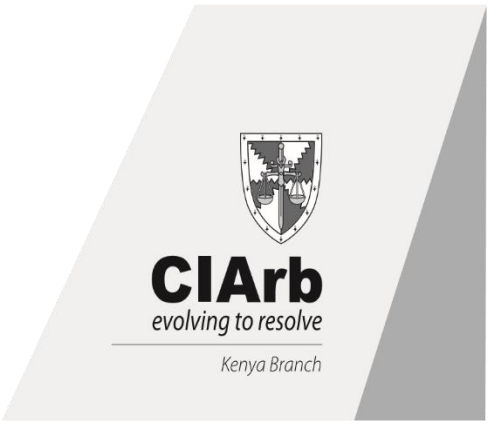
ALTERNATIVE DISPUTE RESOLUTION

JOURNAL VOLUME 12 ISSUE 3 2024



ALTERNATIVE DISPUTE RESOLUTION

Volume 12 Issue 3 **2024**

Alternative Dispute Resolution is a journal of the Chartered Institute of Arbitrators (Kenya Branch)

For Marketing opportunities contact: *marketing@ciarbkenya.org*
Chartered Institute of Arbitrators, Kenya,
Nicholson Drive, Off Ngong Road,
Between Bemuda Plaza and Central Church of Nazerene
P.O. Box 50163-00200, Nairobi
Tel: 2712481, 2722724, Fax: 2720912
Mobile 0734-652205 or 0722-200496
Email: info@ciarbkenya.org
Website: *www.ciarbkenya.org*

Typesetting by:
New Edge GS,
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 366 839,
Nairobi, Kenya.

Published by:
Glenwood Publishers Limited
P.O. Box 76115 - 00508
Tel +254 2210281,
Nairobi, Kenya.

This Journal should be cited as ***(2024) 12(3)*** *Alternative Dispute Resolution:* ***ISBN 978-9966-046-14-7***

Editor's Note

Welcome to the *Alternative Dispute Resolution (ADR) Journal*, Volume. 12, No.3, 2024.

The Journal is a publication of the Chartered Institute of Arbitrators, Kenya Branch. It provides a platform for scholarly debate and in-depth investigations into both theoretical and practical questions in Alternative Dispute Resolution. The Journal covers pertinent and emerging issues across all ADR mechanisms.

The Journal has witnessed tremendous growth in terms of its readership since it was launched. It is now one of the most cited publications in the fields of ADR and Access to Justice in Kenya and across the globe. I wish to thank our global audience for enabling the Journal to reach these heights. We welcome feedback from our readers to enable us steer the Journal to even greater standards.

The Journal is peer-reviewed and refereed in order to ensure credibility of information and validity of data.

This volume exposes our readers to a variety of salient topics and concerns in ADR including: *Building Peace in Africa through Alternative Dispute Resolution; Reforming Kenya's Law on Probation and Aftercare Services to Promote Alternative Dispute Resolution; Public Policy as a Ground of Setting-Aside an Arbitral Award:Musings on the Centurion Engineers Civil Appeal Judgment; Striking a Balance: A Delicate Dance Between Sanctity and Scrutiny; Upholding Ethics, Integrity and Best Practice in Mediation; Examining The Efficacy of Mediation as A Tool for Accessing Justice in Kenya: Opportunities, Challenges, and Future Perspectives; Exploring the Role of Mediation in Promoting Small and Medium Enterprises (SMEs) and Fostering Economic Growth in Kenya; Compulsory Resolution or Autonomy Erosion? The Debate on Mandatory Sports Arbitration; Navigating The ESG Maze: Emerging Trends In Arbitration And Corporate Accountability; The Emergence of the International Commercial Court: A Threat to Arbitration of Investor-State Dispute in Kenya; Constitution of Kenya 2010 Article 159.2. (c): Ancestry, Anatomy, Efficacy & Legacy;* and *Arbitral Tribunals: Do they have the power to issue interim measures during the proceedings?*

The Editorial Board encourages and welcomes submission of scholarly papers, commentaries, case summaries and book reviews aimed at providing critical analysis of developments in case law, legislation and practice in Alternative Dispute Resolution and related fields of knowledge. Submissions should be sent to the editor through admin@kmco.co.ke and copied to info@ciarbkenya.org. The Editorial Board considers each article submitted but does not guarantee publication. We only publish papers that adhere to the Journal's publication policy after a critical, in depth and non-biased review by a team of highly qualified and competent internal and external reviewers.

CIArb-K takes this opportunity to thank the publisher, contributing authors, editorial team, reviewers, scholars and those who have made it possible to regularly publish this high impact Journal that continues to shape the discourse on ADR and Access to Justice in Kenya and across the globe.

Prof. Kariuki Muigua Ph.D, FCIArb, Ch.Arb, OGW.
Editor.
Nairobi, April 2024.

List of Contributors

Hon. Prof. Kariuki Muigua

Professor of law at the University of Nairobi, Faculty of Law; Prof. Kariuki Muigua is a distinguished law scholar, an accomplished mediator and arbitrator with a Ph.D. in law from the University of Nairobi and with widespread training and experience in both international and national commercial arbitration and mediation. Prof. Muigua is a Fellow of Chartered Institute of Arbitrators (CIArb)-Kenya chapter and also a Chartered Arbitrator. He is a member of the Permanent Court of Arbitration, The Hague. He also serves as a member of the National Environment Tribunal. He has served as the Chartered Institute of Arbitrator's (CIArb- UK) Regional Trustee for Africa from 2019 -2022.

Prof. became the first winner of the Inaugural CIArb (Kenya Branch) ADR Lifetime Achievement Award 2021. He was also the winner of the ADR Practitioner of the Year Award 2021 given by the Nairobi LSK and the ADR Publisher of the Year 2021 awarded by CIArb Kenya. He was the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. The African Arbitrator of the Year award is the highest and most prestigious ADR and Arbitration Award in Africa.

Prof. is an Advocate of the High Court of Kenya of over 30 years standing and practicing at Kariuki Muigua & Co. Advocates, where he is also the senior advocate. His research interests include environmental and natural resources law, governance, access to justice, human rights and constitutionalism, conflict resolution, international commercial arbitration, the nexus between environmental law and human rights, land and natural resource rights, economic law and policy of governments with regard to environmental law and economics. Prof. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), Wangari Maathai Institute for Peace and Environmental Studies (WMI) and the Faculty of Law, University of Nairobi.

Prof. Kariuki Muigua can be reached through muigua@kmco.co.ke or admin@kmco.co.ke

Marion Injendi Wasike
Marion Wasike is an Advocate of the High Court Kenya. She currently serves as the Head of Legal Services at the Kenya Women Finance Trust (KWFT) Microfinance Bank.

Dr. Kenneth W. Mutuma
Dr. Kenneth Wyne Mutuma is a Chartered Arbitrator of the Chartered Institute of Arbitrators as well as a Certified Professional Mediator. He is an advocate of the High Court of Kenya of over twenty-two years standing and a senior lecturer at the University of Nairobi, Faculty of Law. He is the Managing Partner at Kihara & Wyne Advocates, a dynamic medium sized firm based in Nairobi. Dr. Ken holds several academic qualifications including a Doctorate and Masters in Law from the University of Cape Town as well as a law undergraduate degree from the University of Liverpool. He is also a qualified Architect having graduated with a Bachelor's Degree in Architecture from the University of Nairobi. He has extensive senior management experience across local and international settings as well as practical knowledge of interdisciplinary issues.

Dr. Ken possesses a comprehensive understanding of the practice and procedures in ADR having acted as adjudicator, arbitrator and mediator in a wide range of disputes. He sits as a member of the Dispute Resolution Panel of the Architectural Association of Kenya (AAK) and also has vast experience in ADR training having engaged in the various participant training events as a trainer for the Chartered Institute of Arbitrators (Kenya Branch).
Dr. Mutuma can be reached through kenmutuma@gmail.com or wyne@kenyanjurist.com

Kamau Karori SC, MBS
Kamau Karori is a Senior Counsel, Senior Partner and head of the dispute resolution practice group at DLA Piper Africa, Kenya (IKM Advocates) with over twenty-five years post qualification experience. He has been involved in numerous matters that have formed and developed jurisprudence in Kenya. In recognition of his exemplary service to the legal practice, the President of the Republic of Kenya conferred on him the title and rank of Senior Counsel. He was

also conferred the award of Moran of the Order of the Burning Spear (MBS) by the President in recognition of his distinguished service to the country.

Karori is a Chartered Arbitrator and an active member of the Chartered Institute of Arbitrators, Nairobi Centre for International Arbitration (NCIA), the Kigali Centre for International Arbitration (KCIA), the Africa Arbitration Association (AfAA) as well as the International Chamber of Commerce Kenya (ICC Kenya). He currently serves as Kenya's delegate in the International Centre for Settlement of Investment Disputes (ICSID) panel of arbitrators. He has already been appointed as a wing arbitrator in an ICSID tribunal.

Based on his extensive experience in the field, he has been retained by several multinationals, State Law Office, State Corporations, and individuals to advice and/or act as counsel and arbitrator in various dispute resolution matters.

He has regularly received accolades both from clients, peers and from leading international directories including Chambers Global where he has been consistently ranked in tier 1 in both in dispute resolution and Arbitrators and is recognized as one of the leading lawyers and arbitrators in Africa. In a recent edition of the Chambers Global Guide, he is described as being "revered for his outstanding litigation and arbitration skills" and "for the prominent work" he undertakes. Legal 500 have also listed him in the Arbitration Private Practice Powerlist: Africa.

Karori's expansive practice covers a wide range of matters that include corporate and commercial disputes, Banking and Finance, Tax, Mining and Extractives, Construction, Infrastructure, Energy, Consumer Goods, Constitutional and Electoral disputes amongst a multitude of other areas. In recognition of his status and expertise, Karori is regularly invited by the Kenya Judicial Training Institute to train Judges of the High Court and Court of Appeal. *Kamau can be reached: kamau.karori@ikm.dlapiperafrica.com*

Michael Sang
The Author holds a Master of Laws (LLM) in International Law from the University of Cape Town, South Africa and a Bachelor of Laws (LLB) from Moi University, Eldoret. The author is also an Advocate of the High Court with a Post Graduate Diploma in Law and employed in public service as a Prosecutor holding the position of **Senior Assistant Director of Public Prosecutions (SADPP).**

The author is in charge of Counter - Terrorism and Transnational Organized Crime at the Office of the Director of Public Prosecutions and is based in Nairobi. The author can be contacted through emails **sang7michael@gmail.com or michael.sang@odpp.go.ke**

Atundo Wambare, Esq.
Atundo Wambare Esq is a lawyer, a member of the Institute of Chartered Mediators & Conciliators (ICMC). He holds an Llb from Mount Kenya University (MKU). A Certified Professional Mediator (CPM) and a Coutt Annexed Mediator.

Atundo is a partner at Wambarelaw & Assiociates, he is also the founder of Justice & Mercy Legal Aid Center which focusses on Alternative Dispute Resolution (ADR) to help the financially indigent through mediation.
Atundo can be reached through wambarelawi@gmail.com

James Njuguna
James is an Advocate of the High Court of Kenya. He is a law lecturer at Embu University. He practices law at Kariuki Muigua & Co Advocates as the lead lawyer. He holds a Master of Laws (LLM) degree from University of Nairobi and a Bachelor of Laws (LLB) degree from Mount Kenya University. He holds a Post Graduate Diploma from the Kenya School of Law and a Higher Diploma in Management, Kenya Institute of Management (KIM). He has a vast knowledge of the legal practice of conveyancing, civil and criminal law in Kenya.

A Member of Chartered Institute of Arbitrators (MCIArb). He is a certified mediator by MTI East Africa. A church Council Member, Worldwide Gospel

Church of Kenya (Buruburu). James, has special interests in Alternative Dispute Resolution, Intellectual Property and Constitutional law and conflict management and Sustainable Development. His has published the following articles; *Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice, Towards Effective Management of Community Land Disputes in Kenya for Sustainable Development, Mediation as a Tool of Conflict Management in Kenya: Challenges and Opportunities, Applicability of Arbitration in Management of Community Land Disputes, Arbitration as a Tool for Management of Community Land Conflicts in Kenya*
James can be reached through njuguna@kmco.co.ke

Nyamboga George Nyanaro
Nyamboga George Nyanaro is a final year law student at the University of Embu and a student member of the Chartered Institute of Arbitrators (CiArb). He also serves as the Editor-in-chief/Communications director at the University of Embu. He is passionate about alternative dispute resolution (ADR) and its intersections with various fields of law, such as environmental/climate justice, sports law, intellectual property law, natural resources, international law, and constitutional law.

George has a remarkable track record as a mooter, reader, and researcher. He has won the KenyaMun International Law Commission Essay Writing Competition twice in a row (2023-23 and 2023-24). He was also part of the University of Embu team that ranked second in the Kenyan rounds of the Stetson International Environmental Law Moot Court Competition, where their memorials were adjudged the best. Additionally, he secured the third position in the second edition of Dr. (now Professor) Kariuki Muigua's Essay Writing Competition, organized by the University of Nairobi Young Arbiters Society (YaS).

George's vision is to contribute to a peaceful and harmonious society through effective dispute resolution and problem-solving. He is currently working as a freelance legal researcher and can be contacted via email at *nyamboga.nyanarogeorge@gmail.com or phone at +254743307080.*

Paul Ngotho HSC

Paul Ngotho HSC is a Chartered Arbitrator and full-time arbitration practitioner, author and tutor. He holds an LL.M in International Dispute Resolution from the University of London. He is an adjunct lecturer at the University of Nairobi.

He is on numerous international arbitrator panels and has arbitrated a wide range of disputes. He has experience as sole, wing and presiding arbitrator.
He has written numerous arbitration articles, many of which have appeared and been cited in various peer reviewed professional journals and academic writings including LLM and PhD dissertations. He has authored five arbitration books, two of which are set for launch during the CIArb Kenya International Arbitration Conference in May 2024.

"…a very detailed person who is very passionate about anything that he does" Chambers & Partners 2020 Ranking.
His contact is ngothoprop@yahoo.com and www.ngotho.co.ke

David Onsare

David Onsare is an accomplished legal professional and a distinguished Advocate of the High Court of Kenya. As a partner at Maina & Onsare Partners Advocates LLP, he brings a wealth of expertise and dedication to his practice. David's holds an LLB (Hons) from The Catholic University of Eastern Africa and an LLM from The University of Nairobi, where he specialized in Corporate and Financial Law.

He has honed his skills and knowledge in various aspects of the field of Law. His commitment to excellence is further demonstrated by his status as a Fellow of the Chartered Institute of Arbitrators (FCIArb).

He is an active member of the Law Society of Kenya and the East Africa Law Society, where he consistently contributes to the advancement of legal discourse and practice in the region. His involvement underscores his dedication to staying at the forefront of legal developments and collaborating with fellow legal professionals. *Feel free to reach out to him through onsare.achochi@gmail.com*

Ibrahim Kitoo

Advocate of the High Court of Kenya, Certified Secretary, Public Procurement, Public Private Infrastructure Partnerships (CP3P) & Projects Management Professional (PMP) and Contracts Manager. He is a member of the World Association of PPP Units & Professionals (WAPPP), Arbitrator, Adjudicator, FIDIC Contracts Specialist and Mediator. He currently serves as a Legal Counsel and PPP Expert with the Public Private Partnerships Directorate, National Treasury, Kenya and is an Adjunct Faculty of the Strathmore University Business School lecturing Public Procurement Law, Public Private Partnerships Law, Policy & Practice and Corporate Law.

He has, among other previous roles, recently served as the Chief Legal Officer, Projects & Disputes Resolution with the Kenya Electricity Generating Company PLC. He holds LL.M (Public Finance & Financial Services Law – University of Nairobi); LL.B (University of Nairobi); and is an Alumni of the Oxford Leading Strategic Projects Programme; King's College London/FIDIC Summer School (2021) Programme; International Law Institute - Oxford Policy Renewable Energy Program Fellow (2022); York University, Schulich Business School Sustainable Infrastructure Program Fellow (2022); and Australia - International Development Assistance (IDA) Program African Fellow of the Public Private Infrastructure Partnerships Programme (2018). He holds various executive programme's certifications and trainings in Strategic Negotiations, Public Policy, Projects Management, Private Equity and Venture Capital all from the Strathmore University Business School; Contracts Management from the University of Southampton, Executive Course in International Investment Law & Arbitration - Queen Mary University of London; Advanced Investment Arbitration Program - World Bank's International Centre of Settlement of Investment Disputes (ICSID), Georgetown University Law Center and the International Law Institute; Advanced Project Finance Training under the auspice of the World Bank Group and the SADC Development Finance Resource Centre.

Ibrahim can be reached through ibrakito@gmail.com

Juvenalis Ngowi

Juvenalis Ngowi is an advocate of the High Court of Tanzania and Zanzibar. He is a fellow of the Chartered Institute of Arbitrators. He holds an LLB from the University of Dar es Salaam and an MBA from the Eastern and Southern Management Institute (ESAMI). He also holds a certificate in International Commercial and Investment Arbitration.

Juvenalis is an accredited Arbitrator and a panel member of several Arbitral Institutions, locally and internationally, such as The Tanzania Institute of Arbitrators (TIArb), Kigali International Arbitration Centre (KIAC), China International Economic and Trade Arbitration Commission (CIETAC), Shanghai Arbitration Commission (SHAC) and ADGM Arbitration Centre. Juvenalis is a Dentons, Tanzania Office partner and heads the Department of Litigation and Dispute Resolution.

Ngowi can be reached through juvenalis.ngowi@dentons.co.tz

Murithi Antony

Murithi Antony has completed a Bachelor of Laws (LL.B) degree at the University of Embu, currently awaiting graduation. He is currently interning at Njuguna & Njuguna Co. Advocates where he acts as a legal researcher under expert guidance and mentorship by seasoned legal practitioners. With a profound passion for ADR, Murithi was the Founding President of the Young Arbiters Society, University of Embu Chapter. Additionally, he played a pivotal role as the Co-Founder of the University of Embu Legal Aid Clinic, where he served as the first Secretary General, successfully establishing a vital platform to provide legal assistance to those in need. He is also the Charter President of the Rotaract Club of University of Embu.

Murithi is a Sustainable Development Goals advocate, with particular focus on Climate Justice (SDG 13). Currently, he serves as the National Director of International Students Environmental Coalition (ISEC-Kenya), a student led non-organization dedicated to advancing environmental and climate justice. Additionally, he has undergone intensive training on climate change at Global Youth Coalition and has been certified.

Murithi Antony is an ardent writer and researcher with interests in ADR, Constitutional Law, Sustainable Development, and Climate Change, among others. Among his notable publications are "*Towards Enhanced Access to Justice: Leveraging the Role of Kenyan Law Schools in Promoting ADR*" (Alternative Dispute Resolution, 2023, 11(3), pp. 123-141) and "*From Rising Tides to Shrinking Rights: Probing the Intersection of Climate Crisis and Sexual Reproductive Health Rights in Africa*" (Journal of CMSD, 2024, Volume 11(2), pp. 38-64).

Further, Murithi exhibits a strong passion for innovation and technology. With expertise in web design and development, graphic design, and digital marketing, he is the founder and CEO of MuriTech Solutions, an organization that specializes in branding services, website development, and comprehensive digital marketing solutions for individuals and businesses.

Murithi Antony can be contacted through amurithi326@gmail.com

Alternative Dispute Resolution Journal – Volume 12 Issue 3

Building Peace in Africa through Alternative Dispute Resolution

By: ***Hon. Prof. Kariuki Muigua, OGW****

Abstract

The paper critically discusses the role of Alternative Dispute Resolution (ADR) mechanisms in peace building in Africa. It interrogates the need for peace in Africa and the efficacy of various initiatives adopted towards realizing this ideal. The paper argues that ADR mechanisms can play a fundamental role in building peace in Africa. The paper further posits that ADR mechanisms are able to enhance sustainable peace in Africa due to their focus on reconciliation and restorative justice. It proposes solutions towards building peace in Africa through ADR.

1.0 Introduction

The term peace has a lot of definitions and often involves ideas such as the normal, non-warring condition of a nation, group of nations, or the world; an agreement or treaty between warring or antagonistic nations, communities and groups to end hostilities and abstain from further fighting or antagonism; and a state of mutual harmony between people or groups, especially in personal relations[1]. Peace has also been associated to the concepts of harmony, tranquility, cooperation, alliance, well-being, and agreement[2]. It has been pointed out that peace is not merely the absence of violence but it also entails other facets[3].

* *PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. in Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; ESG Consultant; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law; Member of the Permanent Court of Arbitration (PCA) [October, 2023].*

[1] Herath. O., 'A critical analysis of Positive and Negative Peace.' Available at http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104-107.pdf?sequence=1&isAllowed=y (Accessed on 20/10/2023)

[2] Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Glenwood Publishers Limited, 2021

[3] Ibid

Consequently, the concept of peace has been classified into positive peace that entails attitudes, institutions and structures, that when strengthened, lead to peaceful societies and negative peace which entails the absence of violence[4].

Peace is one of the fundamental requirements for the realization of the Sustainable Development agenda[5]. The United Nations 2030 Agenda for Sustainable Development acknowledges that there can be no Sustainable Development without peace and no peace without Sustainable Development[6]. It seeks to foster peaceful, just and inclusive societies which are free from fear and violence[7]. Sustainable Development Goal 16 aims to achieve peaceful and inclusive societies for Sustainable Development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels[8]. Peace is therefore vital in the realization of the Sustainable Development agenda.

It has been contended that Alternative Dispute Resolution (ADR) mechanisms can play a fundamental role in enhancing sustainable peace and strengthening peace building efforts[9]. ADR entails a set of mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes[10]. ADR has also been defined a set of processes that are

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[4] Herath. O., 'A critical analysis of Positive and Negative Peace.' Op Cit

[5] Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Available at *https://kmco.co.ke/wp-content/uploads/2021/05/Towards-Peacebuilding-and-Conflict-Management-in-Kenya.docx-Kariuiki-Muigua-MAY-2021x.pdf* (Accessed on 20/10/2023)

[6] United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (Accessed on 20/10/2023)

[7] Ibid

[8] Ibid, Goal 16

[9] Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Op Cit

[10] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

applied to manage disputes without resort to adversarial litigation[11]. It encompasses various processes including negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others[12]. These mechanisms are viewed as ideal in enhancing access to justice due to their attributes which include privacy, confidentiality, flexibility, informality, efficiency, party autonomy and the ability to foster expeditious and cost effective management of disputes[13].

The paper critically discusses the role of ADR mechanisms in peace building in Africa. It interrogates the need for peace in Africa and the efficacy of various initiatives adopted towards realizing this ideal. The paper argues that ADR mechanisms can play a fundamental role in building peace in Africa. The paper further posits that ADR mechanisms are able to enhance sustainable peace in Africa due to their focus on reconciliation and restorative justice. It proposes solutions towards building peace in Africa through ADR.

2.0 ADR and Peace Building in Africa: Prospects and Challenges

Africa has been highly susceptible to intra and inter- state wars and conflicts for many years[14]. As a result, it has been contended that the history of Africa as a continent is replete with conflict[15]. There have been frequent conflicts across the African continent, which are fuelled by various factors, including but not limited to natural resources, fight for political control, poverty, negative ethnicity,

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[11] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

[12] Ibid

[13] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-developmentinKenyaSTRATHMORE-CONFERENCE-PRESENTATION.pdf* (Accessed on 20/10/2023)

[14] Olaosebikan. A., 'Conflicts in Africa: Meaning, Causes, Impact and Solution.' *African Research Review.,* Volume 4, No. 4 (2010)

[15] Ibid

religion, environmental causes, and external influence, among others[16]. Numerous civil wars have occurred in Africa in several countries including Sudan, Chad, Liberia, Sierra Leone, Nigeria and the Democratic Republic of the Congo (DRC)[17]. These conflicts have resulted in deaths and displacement of people creating a crisis of internally displaced persons, refugees and asylum seekers[18]. The Rwandan genocide which is estimated to have resulted in the deaths of more than one million people demonstrates some of the severe impacts of conflict in Africa[19]. Some African countries such as Somalia have been caught in a vicious cycle of conflicts and wars making them dangerous and unstable, a situation that has resulted in them being labelled as 'failed states'[20]. Military coups have also been a common occurrence in Africa especially in the 20th century further fuelling the incidences of conflict in Africa[21]. Such cases have fuelled political instability, insecurity and social problems including the use of child soldiers in armed conflicts[22].

Conflicts over natural resources have also been prevalent in Africa[23]. Despite being endowed with abundance of natural resources, Africa has over the years suffered from resource-based conflicts which usually form a threat to Sustainable

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[16] Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Op Cit

[17] Ibid

[18] Africa Center for Strategic Studies., 'African Conflicts Displace Over 40 Million People.' Available at *https://africacenter.org/spotlight/african-conflicts-displace-over-40-million-people/* (Accessed on 20/10/2023)

[19] United Nations., 'Outreach Programme on the 1994 Genocide Against the Tutsi in Rwanda.' Available at https://www.un.org/en/preventgenocide/rwanda/historical-background.shtml (Accessed on 20/10/2023)

[20] International Committee of the Red Cross., 'Somali Conflict.' Available at https://www.icrc.org/en/where-we-work/africa/somalia/somalia-conflict (Accessed on 20/10/2023)

[21] Africa Center for Strategic Studies., 'Africa's Crisis of Coups.' Available at *https://africacenter.org/in-focus/africa-crisis-coups/* (Accessed on 20/10/2023)

[22] Ibid

[23] Muigua. K., Wamukoya. D., & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

Development and has the potential of undermining economic development and sustainability[24]. It has been observed that the 'resource curse phenomenon' is widespread in Africa which refers to the paradox that countries endowed with natural resources tend be embroiled in conflicts and have incidences of poverty[25]. DRC and Nigeria are examples of African countries endowed in natural resources that suffer widespread poverty[26].

The prevalence of conflicts and wars has been a major hindrance in the achievement of Sustainable Development in Africa[27]. It has been contended that around Africa, social conflict has affected national and social development in unprecedented ways that have resulted in mass exodus of people to other areas, as refugees[28]. Conflicts have had adverse impacts on every aspect and corner of the African family, community and nation-state, with economic, cultural, political, social, and environmental costs[29]. As a result of the conflicts in Africa, peace has become more challenging to sustain and protracted and recurring conflict more difficult to prevent or resolve, often because their underlying causes are not well understood or addressed[30]. It has been observed that peace agreements, which are rarely fully implemented, typically cover proximate causes and seldom address the deep-rooted factors that cause or sustain conflict[31]. In addition, many countries in Africa continue to face multiple challenges to

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[24] Ibid
[25] Henri. A., 'Natural Resources Curse: A Reality in Africa.' *Resources Policy*, Volume 63, 2019
[26] Ibid
[27] United Nations., 'Promotion of Durable Peace and Sustainable Development in Africa.' Available at *https://www.un.org/osaa/sites/www.un.org.osaa/files/docs/2109875_osaa_sg_report_web_new.pdf* (Accessed on 20/10/2023)
[28] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[29] Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Available at *https://www.cambridgescholars.com/resources/pdfs/978-1-4438-5707-9-sample.pdf* (Accessed on 20/10/2023)
[30] United Nations., 'Promotion of Durable Peace and Sustainable Development in Africa.' Op Cit
[31] Ibid

societal stability and national cohesion thus threatening sustainable peace[32]. Building peace in Africa is therefore an imperative in the realization of the Sustainable Development agenda.

It has been contended that peacebuilding efforts aim at addressing the reasons that lead to conflicts and seek to support societies to manage their differences and conflicts without resorting to violence[33]. Building peace therefore entails a broad range of measures, either focusing on preventing, managing or addressing the effects of conflict[34]. Such measures can also be geared towards preventing the outbreak, escalation, continuation or reoccurrence of conflicts[35]. Building peace is vital in Africa in order to foster inclusive development, security and stability[36].

ADR mechanisms can play a pertinent role in building peace in Africa by preventing and managing conflicts and enhancing stability[37]. ADR mechanisms have been practiced in Africa for many centuries[38]. African communities were guided by values such harmony, togetherness, social cohesion and peace as expressed in phrases such as '*ubuntu*'[39]. Such values contributed to social harmony that ensured the stability of African societies and were subsequently

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[32] Ibid
[33] Muigua. K., 'Achieving Sustainable Development, Peace and Environmental Security.' Op Cit
[34] Ibid
[35] Ibid
[36] United Nations., 'Root Causes of Conflicts in Africa Must Be Addressed beyond Traditional Response, Special Adviser Tells Security Council Debate on Silencing Guns.' Available at https://press.un.org/en/2023/sc15249.doc.htm (Accessed on 20/10/2023)
[37] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit
[38] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017
[39] Muigua. K., 'Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya.' Available at *http://kmco.co.ke/wpcontent/uploads/2018/08/Heralding-a-New-Dawn-Access-to-Justice-PAPER.pd*f (Accessed on 20/10/2023)

incorporated in conflict management strategies[40]. African societies therefore developed conflict management strategies that were based on institutions such as the council of elders who ensured that the values and principles that guided African societies were respected and upheld[41]. Conflicts were an undesirable phenomenon in Africa societies and were seen as a threat to the social fabric that holds the community together[42]. As a result, there was need for expeditious and efficient management of conflicts and for preventing their escalation into violence, a situation which could threaten the social fabric[43]. African communities therefore developed and embraced conflict management strategies that were aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community[44].

It has been pointed out that conflict management in African societies took the form of informal negotiation, mediation, reconciliation and arbitration among other techniques which were administered by institutions such as the council of elders[45]. These techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation[46]. They were able to restore relationships and foster peace and social cohesion in African societies[47].
ADR mechanisms can therefore play a vital role in building peace in Africa. It has been contended that low-level disputes in Africa can spiral into violence and conflict due to the lack of effective judicial systems that can provide a credible

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[40] Ibid
[41] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successeschallenges-and-opportunities-1.pdf* (Accessed on 20/10/2023)
[42] Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015
[43] Ibid
[44] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit
[45] Ibid
[46] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit
[47] Ibid

and timely process for resolving differences[48]. Indeed, the judicial system in most countries in Africa faces problems such as costs, bureaucracy, complex legal procedures, illiteracy, corruption, distance from formal courts, backlog of cases in courts and lack of legal know how[49]. As a result of these problems, it has been observed that many African countries are still struggling to establish functional, timely, and trusted judicial systems[50]. These problems hinder effective access to justice in Africa and can threaten peace and stability where disputes and conflicts are not managed in a timely and efficient manner[51]. ADR has emerged as an increasingly popular channel outside formal procedures to resolve disputes in timely manner, while restoring the parties' sense of justice and fostering peace[52]. It has been argued that ADR processes can strengthen dispute settlement systems and bridge the gap between formal legal systems and traditional modes of African justice[53]. These processes may have particular value in stabilization and state building efforts especially when judicial institutions are weak and social tensions are high[54].

Some African countries are characterized by conflict, post conflict and fragile contexts, where societal tensions are high and justice systems typically do not function efficiently[55]. In such contexts, the need for prompt and expeditious management of disputes is of critical importance since without timely, accessible, affordable, and trusted mechanisms to resolve differences, minor disagreements

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[48] Ibid

[49] Ojwang. J.B, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

[50] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[51] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Op Cit

[52] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' *Pepperdine Dispute Resolution Law Journal*, Volume 18, Issue 3

[53] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[54] Ibid

[55] Kudonoo. E., 'The Peace Model: A Sustainable Approach to Conflict Prevention and Resolution in Africa.' *Current Politics & Economics of Africa*., Volume 9, No. 4 (2016)

can degenerate into broader conflicts contributing to cultures of violence and vigilante justice in some instances[56]. ADR mechanisms can address this problem by providing an avenue for timely, accessible, affordable and efficient management of disagreements and disputes[57].

It has been argued that ADR processes can enhance efforts towards building peace in Africa through objectives such as decongestion of the court system, the creation of access to justice, promotion of peaceful out of court settlements, conflict prevention or de-escalation, and timely management of conflicts[58]. Further, it has been contended that for efficient peace building in Africa, the root causes of conflicts must be addressed beyond traditional responses[59]. Towards this end, it has been argued that addressing the internal and external root causes of conflicts in Africa beyond the traditional response, which only tackled their symptoms, would create the capacities that help African countries overcome the peace and security challenges they face, which have deep historical roots[60]. Some ADR mechanisms such as mediation are able to achieve this goal since they address the root causes of conflict resulting in mutually satisfying and long lasting outcomes thus creating a suitable environment for peace by eliminating the likelihood of conflicts re-emerging in future[61].

ADR mechanisms can therefore be utilized in building peace in Africa. It has been asserted that ADR mechanisms are effective in leading to peace building and conflict resolution in both interpersonal and community levels[62]. There have been instances where ADR processes have been successfully utilized as instruments of

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[56] Ibid
[57] Ibid
[58] Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Op Cit
[59] United Nations., 'Root Causes of Conflicts in Africa Must Be Addressed beyond Traditional Response, Special Adviser Tells Security Council Debate on Silencing Guns.' Op Cit
[60] Ibid
[61] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit
[62] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

peace building in Africa. For example, after the Rwanda Genocide, the Rwandan Government institutionalized *Gacaca* courts as a means to obtain justice and deal with a majority of the genocide cases that the formal Courts and International Criminal Tribunal for Rwanda (ICTR) could not handle[63]. The *Gacaca* was a form of ADR in traditional Rwanda which involved the use of elders to manage conflicts through restoration of social harmony, seeking truth, punishing perpetrators and compensating victims through gifts[64].ADR also plays a pertinent role in conflict management among the Kom People in Cameroon where traditional institutions are still relevant[65]. The aim of conflict resolution among the Kom is to accommodate all parties involved in the conflict, through genuine collaboration by all, in the search for effective compromise[66]. In doing so, unnecessary competition is avoided, because the ultimate aim of conflict management is amicable resolution by persuasion, mediation, adjudication, reconciliation, arbitration and negotiation, not necessarily reverting to the use of force or coercion at all cost, or at any cost[67]. These strategies are vital in fostering peace and social harmony.

However, the efficacy of ADR mechanisms in building peace in Africa is often hampered by several challenges. The current form of ADR in Africa was adopted from Western nations where it is understood as 'alternative' to the formal legal systems in such countries[68]. This can be traced back to the colonial era where

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[63] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

[64] Ibid

[65]Accord., 'Traditional Methods of Conflict Resolution.' Available at https://www.accord.org.za/conflict-trends/traditional-methods-of-conflict-resolution/#:~:text=The%20major%20sources%20of%20conflict,customs%20and%20traditions%2C%20were%20upheld. (Accessed on 20/10/2023)

[66] Ibid

[67] Ibid

[68] Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612865 (Accessed on 21/10/2023)

government-controlled dispute resolution replaced the customary law systems that were in place[69]. This resulted in subjugation of traditional and customary dispute resolution systems in favour of Western formal legal system[70]. In Kenya, the repugnancy clause was introduced. It curtailed the application of traditional and customary justice systems to the extent that they were not 'repugnant' to the western conception of 'justice and morality'[71]. This has hindered the growth of ADR mechanisms in Africa and their role in building peace since they are viewed as subservient to formal justice systems[72].

In addition, it has been asserted that inadequacies in areas such as government support, human resources, legal foundations and sustainable financing may hinder successful implementation of ADR mechanisms in Africa[73]. Inadequate government support hinders the role of ADR in peace building since it affects institution building and ultimately constrains the development of personnel and effective legal framework on ADR[74]. In addition, the implementation of ADR may face opposition from the legal profession who may view it as threat to their careers and the judiciary since judges may view it as a threat to their control over non-litigation resolutions or out of court settlements[75]. It is imperative to address these concerns and embrace ADR mechanisms in order to build peace in Africa.

3.0 Way Forward

Several reforms are required in order to enhance the role of ADR in building peace in Africa. It has been pointed out that there is need to enact proper

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[69] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution.' Op Cit

[70] Ghebretekle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' available at *https://www.ajol.info/index.php/mlr/article/view/186176* (Accessed on 21/10/2023)

[71] Judicature Act, Cap. 8, Laws of Kenya, S 3 (2)

[72] Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Op Cit

[73] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

[74] Ibid

[75] Ibid

legislations in order to facilitate the institutionalization of ADR mechanisms[76]. The benefits of legitimizing ADR mechanisms include elevating the status of ADR in dispute management, fostering public confidence, increasing the application of ADR mechanisms and promoting ethical practice[77]. Further, it has been contended that legislation can enhance the appropriateness of ADR by providing a framework for reference, review and reform, as well as institutionalizing much needed education and professional training in ADR[78].

Capacity building is also essential in enhancing the viability of ADR processes in building peace in Africa[79]. It is therefore imperative for all stakeholders in ADR including governments and international partners to invest in capacity building efforts including training and infrastructural support for ADR in order to advance best practice[80]. It has been contended that capacity building efforts should also involve the training of local and religious leaders, traditional authorities in African communities and chiefs, election officials, police and security personnel, human rights organizations, public complaints bureaus such as the office of the ombudsperson, and women and youth leaders[81]. Enhancing the ADR skills of these groups such as negotiation and facilitation skills will be of great value by increasing each country's conflict mitigation or prevention capacity[82]. There is also need to support ADR initiatives in conflict prone

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[76] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at https://kmco.co.ke/wp-content/uploads/2018/08/*legitimising-alternative-dispute-resolution-mechanisms-in-kenya.pdf* (Accessed on 21/10/2023)

[77] Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Op Cit

[78] Ibid

[79] Ntuli. N., 'Africa: Alternative Dispute Resolution in a Comparative Perspective.' Available at https://www.csq.ro/wp-content/uploads/CSQ-22.pdf#page=36 (Accessed on 21/10/2023)

[80] Ibid

[81] Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Op Cit

[82] Ibid

countries and communities in Africa in order to bolster conflict mitigation and efforts towards peace[83].

It is also necessary to foster synergies between formal institutions such as courts and ADR systems including informal or traditional justice systems through measures such as formulating clear referral systems providing for referral of disputes from courts to ADR and vice versa[84]. This has the potential to scale up access to justice and to create a sustainable system of peaceful, nonviolent conflict resolution and mitigation[85]. Such synergies will accelerate the use of ADR in both formal and informal settings. It has been contended that one of the great advantages of ADR is flexibility and thus ADR processes can adapt to the people and the dispute at hand, and are equally effective in formal legal systems, traditional disputing mechanisms and broad-based multiparty conflicts[86]. Enhancing synergies between formal and informal justice systems can therefore enhance the use of ADR in both settings.

Further, it has been argued that there is need to monitor the growth and progress of ADR in Africa in order to maximize the efficiencies and complementarities of ADR with the official judicial process[87]. This includes inter alia measuring key qualitative and quantitative data such as ADR usage, number of cases filed and managed through ADR, the amount of time spent on each case, number of successful ADR settlements, number of qualified ADR institutions and practitioners and community acceptance and compliance with ADR outcomes[88]. Such initiatives can help in determining how ADR affects a country's conflict

[83] Ibid
[84] Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit
[85] Uwazie. E., 'Alternative Dispute Resolution and Peace-building in Africa.' Op Cit
[86] Ibid
[87] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit
[88] Ibid

vulnerability and mitigation capability a move that can result in adjustments in the scope and focus of ADR efforts towards building peace[89].

Finally, it is pertinent to continue embracing ADR mechanisms for enhanced access to justice in Africa[90]. African countries should adopt and embrace effective ADR systems that are flexible in design and rooted in satisfying the interest of parties and in the administration of justice in a culturally sensitive manner[91]. ADR mechanisms have been hailed for their ability to promote peace building and conflict resolution at all levels and enhancing stabilization and state building efforts in Africa[92]. These mechanisms have been part and parcel of the African culture since time immemorial and were able to foster peace, cohesion and social harmony in African communities, reconciliation and restorative justice[93]. It is therefore necessary to view these mechanisms as 'Appropriate' and not 'Alternative' in order to effectively embrace them towards building peace in Africa.

4.0 Conclusion

Building peace is a vital concern in Africa as a result of the frequent conflicts across the continent, which are fuelled by various factors, including but not limited to natural resources, fight for political control, poverty, negative ethnicity, religion, environmental causes, and external influence, among others[94]. The prevalence of conflicts and wars has been a major hindrance in the achievement

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[89] Ibid

[90] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Op Cit

[91] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

[92] Ibid

[93] Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective.' Available at *https://kmco.co.ke/wp-content/uploads/2023/10/Preparing-for-the-Future-ADR-and-Arbitration-from-an-African-Perspective.pdf* (Accessed on 21/10/2023)

[94] Muigua. K., 'Towards Effective Peacebuilding and Conflict Management in Kenya.' Op Cit

of Sustainable Development in Africa[95]. ADR mechanisms can play a pertinent role in building peace in Africa by preventing and managing conflicts and enhancing stability[96]. ADR processes are able to restore relationships and foster peace and social cohesion in Africa due to their focus on reconciliation and restorative justice[97]. However, the role of ADR mechanisms in building peace in Africa is hindered by several factors including the notion of them being 'Alternative' to formal justice systems, inadequacies in areas such as government support, human resources, legal foundations and sustainable financing[98]. Building peace in Africa through ADR therefore requires several reforms including enacting proper legislations in order to facilitate the institutionalization of ADR mechanisms, capacity building including training and infrastructural support, fostering synergies between formal institutions such as courts and ADR systems, monitoring the growth and progress of ADR in Africa and enhancing access to justice through ADR in Africa[99]. Building peace in Africa through ADR is achievable.

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[95] United Nations., 'Promotion of Durable Peace and Sustainable Development in Africa.' Op Cit

[96] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

[97] Ibid

[98] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' Op Cit

[99] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

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https://www.un.org/osaa/sites/www.un.org.osaa/files/docs/2109875_osaa_sg_report_web_new.pdf

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The Emergence of the International Commercial Court: A Threat to Arbitration of Investor-State Dispute in Kenya

By: ***Marion Injendi Wasike*** [*] ***&***

Dr. Kenneth W. Mutuma, PhD[*]

Abstract

The emergence of International Commercial Courts represents a pivotal shift in the landscape of dispute resolution within the field of international economic law. These courts, proliferating across various regions from the special economic zones of the Gulf to Asia and Europe, embody a new era that aligns with contemporary shifts towards unilateralism in international economic adjudication. The Kenyan scenario, characterized by a statutory establishment of an "Arbitral Court" aimed at handling proceedings in international commercial arbitration, outlines a crucial turning point that refocuses arbitration within a national jurisdictional framework. This development, while seen as an advancement in the legal infrastructure, raises pivotal questions regarding its potential impact on traditional arbitration channels, especially in the investor-state dispute context within Kenya. International commercial courts offer a unique blend of domestic and international legal principles, often incorporating the English common law system to create a hybrid judicial platform that caters to cross-border transactions. While these courts are designed to attract foreign investment and streamline the adjudication process on a global scale, their introduction could potentially skew preferences away from conventional arbitration methods. This dual-edged nature presents both opportunities

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[*] *Marion Wasike is an Advocate of the High Court Kenya. She currently serves as the Head of Legal Services at the Kenya Women Finance Trust (KWFT) Microfinance Bank.*

[*] *Dr. Kenneth Wyne Mutuma is an Advocate of the High Court of Kenya. He holds a Doctorate and Master's in Law from the University of Cape Town, and a Bachelor of Laws from the University of Liverpool. He is also a Chartered Arbitrator, Fellow of the Chartered Institute of Arbitrators, and a Certified Professional Mediator.*

and challenges - it enhances the adjudicatory capacity within the domestic sphere but may also pose a competitive threat to established arbitration frameworks, particularly in countries like Kenya where international commercial arbitration has been nurtured as a viable means for dispute resolution. This abstract posits that the proliferation of international commercial courts, including their introduction in Kenya, necessitates a thorough analysis of their implications on arbitration's role in investor-state disputes. By juxtaposing these emerging judicial entities against traditional arbitration paradigms, the discussion aims to unravel the complexities and potential shifts in dispute resolution preferences, highlighting the balance between innovation in legal adjudication and the sustenance of arbitration's revered position in the international legal order.

1.0 Introduction

Africa is in dire need of infrastructural development for it to compete globally.[1] Different countries have been compelled to develop both short and long-term strategic economic visions in the hope of economic progress.[2] For instance, Kenya's 2030 economic vision provides a blueprint framework of the state's commitment towards leapfrogging the country's economy. The birth of this noble vision was as a result of highly consultative discussions by the relevant stakeholders (Political class, religious leaders, Private sector, and the Citizenry) to give redress to the dwindled economy post the 2007-2008 post-election chaos.[3] The sole objective of the proposal was to aid Kenya change into an industrializing middle income country that provides quality life to its citizens.[4] The 3 pillars

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[1] Chantal Dupasquier & Patrick N. Osakwe, 'Foreign direct investment in Africa: Performance, challenges, and responsibilities' (2006) 17(2) Journal of Asian Economics 241-260.

[2] Archie Mafeje, 'Economic models and practice in Africa,' (1998) 46 sage journals publication.

[3] Ronan Porhel, 'The Economic Consequences of the Political Crisis,' (2018) East African open edition journals 231-258

[4] *http://vision2030.go.ke/vacancy/vision-2030-delivery-secretariat-vds-director-general-dg-vacancy-opportunity/* accessed on 14/08/2020

underpinning the realization of the vision are in three-fold dimension, namely; Economic & Macro, Social and Political Pillars.[5]

Africa, therefore, was prompted to adopt a market economy that was open to the outside world and abandon ancient economic models that did not have room for Foreign Direct Investment (FDI) as a major economic growth driver.[6] FDI for a developing country is essential as it positively advances economic growth in the following economic dynamics; the increase of domestic capital as well as it boosts efficiency on the basis of adoption of modern technology, management skills, marketing and innovation as global best practices. Second, FDI presents vital important pillars benefits in addition to cost whose effects are well captured in our general and policy operating environment. In this regard, the capability to diversify, the level of absorption capacity, targeting of FDI, and the several opportunities for links between FDI and local investment.[7]With its desire for economic development and invitation of foreign investors, Kenya is likely to face an increase in civil and commercial disputes with foreign aspects.[8]

Bilateral (trade between two states), multilateral (trade between more than two states), and private contractual agreements between multinational cooperation and a host state are some of the economic mechanisms underpinning the legal operations of the FDI in Kenya.[9] Within these contractual arrangements exist an inalienable right of parties' autonomy on how best to adjudicate on disputes

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[5]*https://web.archive.org/web/20130418235848/http://www.kenyaembassyireland.net/vision-2030.html* accessed on 14/08/2020.

[6] Supra Note 2.

[7]HalilKukaj, PhD, Faruk B. Ahmeti, PhD, 'Foreign Direct investment importance on transitional Countries: Case Study of Cosovo,' (2016) European scientific journal 288.

[8] US Department of State, '2021 Investment Climate Statements: Kenya' (2021) https://www.state.gov/reports/2021-investment-climate-statements/kenya/ accessed on 9/4/2024.

[9]Alexandre Gauthier, ISDS Mechanisms: There history and future 2015

arising and to be more precise the choice of law and forum to be used.[10] Foreign investors are likely not to give credence to domestic judicial mechanisms for perceptions in the obscurity of the local law; political control through arbitral policy and legislation formulation, and the inconsistency of interpretation of the law informs the reservations of the local judicial forum.[11] Arbitration, therefore, has remained as the primary way of dispute resolution in all matters of investor-state dispute.[12]

In addition, Arbitration has its downsides. S. Menon, the then CJ of the Singaporean Supreme Court, in his contribution to the formation international commercial stated that four areas of concern as threat to international arbitration being absence of ethical standards, judicialization, unpredictability as to the enforcement of the award and absence of concrete jurisprudence as a guide to this crawling courts.[13] These indicated concerns and the disapprobation of domestic courts, in addition to global worldwide demand for cross border dispute resolution mechanisms, has significantly led to the formation of international commercial courts or similar institutions.[14] Therefore, this paper fronts the International Centre for Settlement of Investment Disputes (ICSID) as the appropriate forum where investor-state dispute in Kenya should be handled as the avenues available in the country for arbitration are long, lack certainty, are costly, and ultimately experience judicial interference from the courts, making it hard for arbitration to grow.

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[10]Sunday A. Fagbemi, Party autonomy doctrine in international arbitration a myth or reality? 2016

[11]Fiska Silvia Raden Ror, China Dispute Resolution on FDI Vol 17, 2012.

[12]Albert Jan van den Berg ed, Legitimacy: Myths, Realities, Challenges vol. 18, 668

[13]Menon ICC: Towards a Transnational System of Dispute Resolution 2O15 Lecture

[14] Wei Cai and Andrew Godwin, Challenges and Opportunities for the China International Commercial Court 2019

2.0 International Centre for Settlement of Investment Disputes (ICSID) Legal Framework

The arbitral tribunal is a creature of the convention; hence parties that have backed the convention are at liberty to approach the court for their dispute to be determined through arbitration.[15] In the case of ***Waste Management v. Mexico,***[16] jurisdiction was defined as the tribunal's ability to consider a case.[17] The term jurisdiction of the tribunal is synonymously used with the notion of competence of the tribunal.[18] Article 41 of the ICSID Convention confers powers to the tribunal to make a determination on the questions of jurisdiction.[19] In assessing whether the tribunal has jurisdiction the following criteria according to the ICSID's Article 25 has to be complied with;[20] Firstly, both parties must consent to submit to the tribunal. An agreement to submit to the center's jurisdiction is proven on the existence of a bilateral treaty allowing ICSID to arbitrate all trade disputes amongst the international investor and the host nation.[21] Secondly, there has to be a legal dispute. A legal dispute is one which indicates a disagreement on a point of law or fact.

This legal requirement can easily be met by mere infringement of a Bilateral Investment Treaty (BIT). Equally, the legal dispute must arise directly from the underlying transaction. Lastly, the transaction must qualify as an investment. The requirements of an investment are an objective one, which can be deduced to have the following typical features: duration of investment, there should be some consistency in profit and return. A degree of risk ought to be there for both

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[15] Article 1 ICSID Convention 1965
[16] ICSID Case No. ARB (AF)/98/2 Dissenting Opinion of Keith Highest, Para. 58.
[17] Ibid
[18]G. Born, International Commercial Arbitration 2014
[19] Article 41 of the ICSID Convention provides: the competence of the tribunal to deal with questions challenging its own jurisdiction
[20] Article 25 of ICSID Convention
[21] R. Dolzer & C. Schreuer, Principles of International Investment Law 2008

parties. The time and effort required would have to be significant. The operation should be significant in terms of the growth of the host country.[22] Therefore, this easily calls for a reconciliation of this feature to the investment in question, which permits the tribunal to adjudicate the case in a manner that safeguards the investment.

3.0 Reconciling Kenyan and International Commercial Court Legal Regime to the Global Current Trends in Arbitration

Arbitration is an alternative procedure in which disputes between two parties are efficiently resolved.[23] Undeniably, the concept of arbitration has gained momentum globally, becoming the preferred primary avenue for dispute resolution in capital-intensive investment between the investors and state.[24] Central to this process is the global recognition that such a process is immune to judicial interference save for enforcement purposes as well as alleviate any possibility of bias either from the arbitrator or from the local regime.[25] A look at the operating legal regime in Kenya and international commercial courts on the conduct of arbitration proceedings highlights cogent weaknesses questioning the safety of investments, impartiality, the time factor, and cost of such a process.[26] Such outcomes make Kenya undesirable for arbitration between investor-state disputes hence comparatively attracting ICSID as a safe haven for dispute resolution.

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[22]Schreuer, Commentary, Article 25, Para. 122

[23] Frank Sander, 'Alternative Methods of Dispute Resolution: An Overview' (1985) 37(1) University of Florida Law Review.

[24] Ibid.

[25] Ibid.

[26] Massimo Benettelli, 'Determining the Applicable Law in Commercial and Investment Arbitration: Two Intertwined Road Maps for Conflicts-Solving,' (2022) 37(3) Foreign Investment Law Journal 687–722.

3.1 The Constitution of Kenya 2010

Article 159(2)(c) of our Constitution recognizes the role of arbitration in dispute resolution and encourages all courts to support it. Before the enactment of the constitution, arbitration did not have a constitutional underpinning; hence the place of arbitration lacked constitutional backing.[27] The current constitutional framework incorporates arbitration as an avenue outside the normal judicial proceedings. The Constitution states that courts and tribunals should be guided by the ideals of, among other things, promoting alternative forms of dispute settlement such as reconciliation, mediation, arbitration, and traditional dispute resolution processes when exercising judicial authority. According to Clause (3) traditional conflict resolution processes shall not be used in a way that violates the Bill of Rights; and this is incompatible with this Constitution or any written legislation, or resulting in effects that are incompatible with justice and morality.[28]

The operation of Article 159(2C) safeguards the place of arbitration within our country. Therefore, courts in many cases have implored parties to utilize that route first as opposed to directly approaching the court for redress. For this avenue to be available or invoked by a party, they must prove by way of an express contractual agreement that the parties therein intended to solve their dispute by way of arbitration. This position as observed in the case of ***Syvana Mpabwanayo Ntaryamira v Allen Waiyaki Gichuhi & Another;***[29] which affirmed that,

"a person who willingly entered into an agreement with an arbitration clause ought not to be permitted to fall back on the Constitution in order to avoid his obligations to refer

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[27] Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling).

[28] The Constitution 2010, Article 159 (2C)

[29] Syvana Mpabwanayo Ntaryamira v Allen Waiyaki Gichuhi & Another JR No. 449 of 2015.

the disputes, which properly fall within the arbitration clause to the agreed alternative dispute resolution mechanism. The court went further to hold that where a party challenges the manner in which the arbitral proceedings are being conducted, the same ought to be in accordance with the terms of the arbitration or the legislation guiding the arbitration process and he ought not to resort to judicial review proceedings as a port of first call''[30]

This is a good practice in the development of arbitration since it seeks to offer the parties an opportunity to resolve the matter prior to intervention by the courts.[31] In Investment State Dispute Settlement (ISDS), this doctrine equally applies to parties.[32] However, the rule for the exhaustion of local solutions prior to the submission of a dispute to a foreign arbitral tribunal continues to draw skepticism among investors. Notwithstanding the benefits of the doctrine, investors opine the following as the constitutive reasons why the doctrine need not apply in ISDS; firstly, the premonition that local avenues for dispute resolution are inherently biased and tilted towards the state hence prejudicing foreign investors.[33] Secondly, it is propounded that the local avenues may be devoid of the necessary tools to adjudicate on the dispute competently. This entails the requisite expertise of the arbitrators to handle the dispute at issue, making them inept to comprehend the substratum and merits of the case.[34]Despite this array of reasons in protest of the doctrine, African countries have stood their ground to demonstrate the capacities of the local avenues. Such is the position as captured in Article 159(2c) of the 2010 Constitution as well as seminal case law that have become precedents on how we handle disputes with specific provisions on arbitration as an avenue of resolving any contract-related disputes.

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[30] Ibid
[31] Massimo (n27).
[32] Ibid.
[33]Kavaljit Singh, Burgard Ilged, Rethinking BITs; 2016 at 46
[34] Ibid

The current approach of ISDS reflects a paradigm shift from the old regime of treaty formation.[35] Certain investment agreements have completely rejected the depletion of local remedies rule.[36] An example of such an investment agreement is the ***Cambodia-Croatia which concerns itself with the promotion and reciprocity of investments***.[37] The investment agreement explicitly does away with the doctrine by providing that;[38]

"In case of arbitration, each Contracting Party, by this Agreement, irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to this Centre. This consent implies the renunciation of the requirement that the internal administrative or judicial remedies should be exhausted . . ."

These kinds of treaties are operational and often require the arbitration clause to be interpreted as a waiver to the doctrine of exhaustion doctrine, more so in an arbitration brought under the ICSID Convention.[39] The provision under Article 26 of the Convention, however, puts a caveat where the contracting party explicitly necessitates the exhaustion of local remedies as conditional to the consent before the centre. Emerging from ICSID's provision of Article 26, it is abundantly evident that the ancient rule of domestic exhaustion doctrine is waived in the circumstances of application of the Convention.[40]

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[35] Won-Mog Choi, 'The Present and Future of The Investor-State Dispute Settlement Paradigm' (2007) 10(3) Journal of International Economic Law 725-747.
[36] Ibid.
[37] Agreement Between on the Promotion and Reciprocal Protection of Investments, Cambodia-Croatia Entered into force 15th June 2002.
[38]Ibid Article 10
[39]Article 26 of the ICISD Convention on consent.
[40]AMERASINGHE, 'International law local remedies' (2004) at 269.

3.2 The Arbitration Act of 1995

This is the parent Act governing the conduct of arbitration and was amended in 2010 to incorporate the UNCITRAL Model and operations in Kenya. The statute covers both domestic and international arbitration,[41] save where an individual is enforcing a foreign award; hence the New York Convention (NYC) shall apply. A synopsis of the legislative instrument showcases that the Act is divided into eight parts in the arbitral proceeding process; preliminaries and general provisions, composition and jurisdiction of the arbitral tribunal, conduct of the arbitral tribunal, award by the arbitrator(s), enforcement of the award, and recourse to the High Court over the award and the process.[42]The Act further incorporates the execution of foreign awards from international arbitration in line with the NYC, which Kenya ratified in 1989 and further became a member of ICSID.

3.3 Kenyan Courts and Attitude Towards Arbitration

Arbitration in Kenya is a crawling avenue in dispute resolution in light of the promulgation of the constitution 2010. The degree of infancy of the Supreme law of the land has raised serious doubts as to the competence of the Kenyan courts to handle investments disputes between foreigners and the state in arbitral disputes regulated by Bilateral Investment Treaties. The notable features that have been witnessed within our legal system in the growth of our jurisprudence in the field of arbitration have elicited emotions as to whether the arbitral framework in Kenya is ripe for ISDS.[43] The following are some of them:

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[41]Section 2 of the Arbitration Act of 1995.

[42]*https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/kenya accessed on 26/05/2021*

[43] Patrick N. Wachira, 'Arbitration In Kenya: Facilitating Access To Justice By Identifying And Reducing Challenges Affecting Arbitration,' (2015) http://erepository.uonbi.ac.ke/bitstream/handle/11295/93192/Nguyo_Arbitration%20in%20Kenya%3A%20facilitating%20access%20to%20justice%20by%20identifying%20a

The first issue is the intrusive nature from our courts.[44] Arbitration avenue should limit the interference by the courts so as to expedite dispute resolution as well as alleviate any fears that foreign investors may have in regards to how the dispute might be resolved. The formulation of BITs and International Investment Agreements (IIAs) between foreign nationals and the state may choose not to opt for the arbitration Act as the instrument in which the arbitral proceedings are to be governed. This is in light of the provisions of the Act, which presents the court with an invasive power over the arbitral procedures before the start of the suit.[45]It flows then from the legislative instrument that a party in a legal tussle in an arbitration proceeding prior to the beginning of the proceeding has recourse before the High Court to challenge the legality or practicability of the arbitration agreement or the lack of a dispute over things that have been agreed to be arbitrated.[46]

Section 6 of the Arbitration Act was designed to mirror and apply the exhaustion of local remedies first prior to approaching domestic courts for resolution. However, the same can be construed to give a party in an arbitration proceeding a leeway to challenge the arbitration agreement's totality. The exceptions provided for in Section 6 clearly invite the court to delve into the legality of the arbitration agreement and further examine whether a dispute exists between the parties to warrant independent arbiter adjudication. The effect of section 6 is that parallel proceedings may be occasioned when challenging the claim before the arbitral tribunals while the other challenging the legality of the existence of a dispute or the practicability of the arbitration agreement. The effect of such parallel proceedings is the creation of unwarranted anxiety as to the outcome of

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nd%20reducing%20challenges%20affecting%20arbitration.pdf?sequence=3&isAllowed=y

[44] Ibid.

[45] Section 6 of the Arbitration act 1995 which provides for stay of proceedings to give arbitration a chance pending the outcome of the case

[46]Ibid.

the judicial process, which is supreme to the arbitral process; hence may force the arbitration process to wait for the outcome of the Court.

Further implications lie as to the cost of litigation since parties will be enjoined as respondents to defend the legality of the existence of a dispute or the arbitration agreement itself hence becoming an expensive litigious process contrary to the arbitration objectives of cost-efficiency. Finally, the implication of section 6 of the arbitration Act may go against the time upon which a cause of action arising from an arbitration agreement arises hence technically denying an innocent party standing before an arbitral tribunal that will have been rendered without jurisdiction hence required to down its tools.

Secondly, it has been recorded and acknowledged that arbitration as a process enjoys some limited scope of judicial interference. This is so proven at an appellate level in matters relating to the award. Arbitration has arguably been preferred simply on the basis that its decisions are final hence distinguishing it from the traditional sources of dispute resolutions.[47]The Arbitration Act of Kenya limits court interference with the arbitral proceedings unless under the circumstances strictly permitted by law.[48] The circumstance giving rise to the courts' interference include; incapacity of the arbitrator, the arbitration agreement was not valid, failure to give proper notice to the arbitrator, the arbitral award deals with a dispute not enshrined in the agreement, the composition of the arbitral tribunal, the making of the award was induced by corruption, coercion, fraud.[49]

The arbitration Act equally allows the courts to entertain questions relating to matters of law before the High Court as well as a further appeal to the court of

[47]Walters Kluwer, 'Do Arbitration Users Really Value Finality?' (June 4 2018).
[48]Musila Wambua, 'C hallenges of implementing ADR,' (2013).
[49] Section 35 of the Arbitration Act 1995.

appeal.[50] The entrenchment of this provision has been said to underscore arbitration as a fast process.[51]The widening of the scope of arbitral appeals in matters of law has been considered essential as it alleviates the grave fear of non-development of the law as points of law are determined by private individuals (tribunal), which then precludes such decisions from becoming of precedential value.[52] Finality of the award is a principle in arbitration that enjoys global recognition. It's one of the principles that make arbitration attractive as the successful party hardly anticipated any local judicial bottlenecks in giving effect to the award. The domestic courts while underscoring the importance of the award, the court in ***Transworld Safaris Ltd v Eagle Aviation & 3 Others;***[53] held that;

"Awards have now gained considerable international recognition and courts, especially commercial ones, have the responsibility to ensure that the arbitral autonomy is safeguarded by the court as arbitral awards are surely and gradually acquiring the nature of a convertible currency due to their finality."[54]

Flowing from this judgment, it was evident that courts are hesitant from interfering from arbitral awards other than in circumstances offered under section 35 of the arbitration Act and those permitted under the New York Convention.

[50] Section 39 of the Arbitration Act 1995
[51]Melissa Ng'ania, Review of finality principle under Section 39 of the Arbitration Act 2018.
[52]Hon. Chief Justice rebalancing relation between courts and arbitration lecture, the Bailii Lecture 2016.
[53]Transworld Safaris Ltd v Eagle Aviation & 3 Others [2003] eKLR
[54] Ibid

4.0 Global Trends in Investor State Dispute Arbitration Before ICSID and Challenges: A Comparative Study Between Kenya and South Africa

ICSID as an avenue for arbitration dispute has over the years been a beacon on all matters pertaining to investor-state dispute with empirical evidence on the admirable elements of a good arbitral system as well as sound progressive jurisprudence which is in tune with the modern global economic dynamics.[55] ICSID is a globally recognized premier arbitration forum that has adjudicated over five hundred and twenty-five cases within its 50 years of existence with parties, councils, and arbitrators drawn from virtually every part of the globe.[56] The volume of these cases decided under its auspices have touched on every part of investment including disputes in relation to expropriation, the applicability of international law, jurisdictional issues, etc. which have been instructive to all the players in the field of investment.[57]

Given that South Africa is one of the African countries that has moved away from the established investor-state dispute settlement mechanism in the shape of the ICSID, it was chosen as the basis for this comparative analysis. The country cancelled all bilateral investment treaties with European nations and put into effect the Protection of Investment Act. The Act introduced the removal of international investment arbitration at the ICSID. This provides a comparable case as it was performed through the introduction of local courts and tribunals as the first and final resort for foreign investment disputes.

There is no doubt that developing countries in Africa have over the years been recipients of foreign direct investment, which predominantly have been in the extractive frontier (e.g. oil and gas, gold, diamonds, cobalt and copper), spreading

[55] Frutos-Peterson, Claudia,' 50yrs of ICSID in Building International Investment' (2015).
[56]Ibid
[57] Ibid

across manufacturing and services sectors.[58] This growth can be attributed to the insufficiency of Africa's labor and natural resource endowments which fail to attract the required capital hence creating the need for foreign investment players that come to fill in the gap. Foreign nationals who are contracting parties to the convention in their quest to generate profits have often at times derogated on the inherent and other human rights to which individuals within the host state adversely get affected without some legal clarity of holding them accountable with conventional wisdom lining on the theory that good human rights conditions may be good for FDI.[59]

Multinational corporations (MNCs) expose these countries' vulnerability to social, economic, and cultural rights, particularly in the areas of labor abuse, pollution, and other harmful environmental degradation.[60] This is further coupled with the introduction of unsafe products and importation of technology.[61] The repression of political rights, which includes the displacement of indigenous peoples, is crucial[62] as well as offering support to oppressive regimes.[63]The legal systems of any country always vest powers to the State for the protection of its citizens' rights. This is on account of the social contract theory, which makes all citizenry subjects to collectively enforced social arrangements for as long as such arrangements have property, i.e. legitimate, just, and

[58]Ayodele Odusola, 'F oreign investment paradox in Africa,' (2021).
[59] Blanton, G. Blanton, 'F oreign investor attraction' (2017).
[60] P. Abadie, 'A New Story of David and Goliath,' (2004).
[61] Robert J. Fowler, 'International Environmental Standards For Transnational Corporations,' (1998).
[62]U. Baxi, 'What Happens Next is up to You: Human Rights at Risk in Dams and Development',(2001).
[63] M. Sheffer, BIT: A Friend or Foe to Human Rights, 2011.

obligatory in return for States protection.[64] This obligation to the state is anchored in Article 21 of the Constitution.[65]

The obligation of the State to protect its citizenry is not relinquished through the formulations of Bilateral Investments treaties which international Human rights law appears to impose obligations to the host state but not to the foreign national[66] which have ridden on that gap and have become purveyors of impunity to the detriment of the welfare of the host state citizenry. International Human rights law lacuna on imposing human rights obligations to foreign nationals has therefore provided a Centre stage for host states to form BITs that give cognizance on this secluded branch of law.[67]

The character of this reality was observed in the ***Banro Tribunal;***[68] in the Republic of Congo. Banro Corporation was a foreign national Company engaged in gold mining in Congo. The presence of Banro Corporation resulted in several displacements of people directly and indirectly. Directly because there was forcible relocation of part of a people and indirectly relocation due to people being forced to relocate as a result of mining and explorative actions within the geographical area.[69]These forced evictions curtailed the basic human rights of the people within the environment as well, which went against the elaborate commentary of the UN Committee on Economic, Social and Cultural Rights,

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[64]D'Agostino, Fred, Gerald Gaus, and John Thrasher, "Contemporary Approaches to the Social Contract", (2021).

[65] Article 21 of The Constitution of Kenya 2010.

[66]Mr. John Ruggie, on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/4/035 published February 9, 2007, para. 44.

[67] P. Dumberry and G. Aubin, 'How to Incorporate Human Rights Obligations in BIT?' (March 22, 2013).

[68] ICSID Case No. ARB/98/7, Final Award on Jurisdiction, excerpts (1 September 2000), at paras. 16-17

[69]https://miningwatch.ca/blog/2020/1/10/banro-corporation-democratic-republic-congo Accessed on 17/09/2021

which described forced evictions as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection,".[70]

Banro Corporation argued that for the relocated community, they erected dwellings, a market and a water system, in addition to giving them monetary compensation for their atrocities which included the murder of a 16-year-old.[71] However, it should be noted that the providence of structures and money cannot validate or erase the violent eviction of a group of people. In addition, the place chosen by the government official for relocation was barren, and the crops that the community grew in their fertile land no longer generated substantial yields, adding to the already terrible situation of being forcibly taken from their homes. [72] The allegations of human rights violations, however cannot invite the State to revoke the license of the foreign national as the same is not a constitutive element in the BITs, and the effect of such an action may subject the State to a humongous award in favour of the investor to the detriment of the State and largely its citizen. The foregoing is illustrative of the much-needed reform that guarantees the foreign national not only of the protection of their investment but also attach respect for human rights as the bare minimum in the BITs, which then will give the host state some legitimacy to revoke the licenses of errand contracting parties.

4.1 Investor-State Dispute Settlement in Africa and the AFCFTA Investment Protocol

Developing countries in Africa have developed a phobia for ICSID and frequently accuse the forum as politicized and against the welfare of the countries in

[70]UN CESCR), General Comment No. 7: right to housing against forced evictions Article 11 1997. para 3.
[71]J. Scheck and S. Patterson, "How a BlackRock Bet on African Gold Lost Its Luster", The Wall Street Journal, 3 November 2015.
[72]UN General Assembly, UNDHR, 10 December 1948 Article 25.

question. This has largely been attributed to the growing statistics where most African countries have been listed as Respondents for violating their investment treaty obligations.[73] ICSID case repositories indicate that since 1987 to date, 99 cases have been filed against African nations.[74] The outcome of investigations found that the African nations sued as respondents were found liable and ended up with huge fines owed to foreign investors. South Africa, Egypt, Libya, Zimbabwe and Tanzania are among the top countries that have been confronted with these adverse outcomes necessitating withdrawals or employing restrictive measures before accessing ICSID with the effect of putting investors' investments to risk.

South African development community (SADC) and Kenya have itemized the following as the shortcomings of the Investor-State Dispute ICSID forum; inconsistent and incorrect conclusions, as well as a lack of legitimacy and transparency, expensive costs of arbitration proceedings and arbitral awards.[75] Further, the countries have criticized foreign nationals' right to question the host country's legitimate welfare programs, a move which can be said to be intrusive to the governance of the state as well as their sovereignty.[76]For instance, Kenya holds the view that BITs have gradually safeguarded foreign investors, with the capital-exporting countries utilizing the agreements to further their market liberalization.[77] Other influential Kenyans have equally endorsed these remarks by stating that "*With the funds used in the protection of these legal risks, then we can really begin to question whether it is necessary to sign them. If we cannot reject the BITs, then we need to make sure they are free of ambiguity*".[78]

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[73] T. Chidede, ISDS and the AFCFTA Reciprocity Investment Protocol, 2021.
[74] See www.investmentpolicy.unctad.org/news accessed 17/9/2021
[75] T. Chidede, 'ISDS in Africa and the AFCFTA Investment Protocol, Building capacity to help Africa trade better,' (2021).
[76] Ibid
[77] Elizabeth Kivuva, 'Kenya's foreign trade disputes costly – experts,' (25th April 2019).
[78] Ibid

The sentiments shared by Kenyans stem from existing literature which suggests that the Kenyan Government spends a considerable amount of not less than five hundred million to defend a case filed by investors under BITs, according to a regional trade negotiation institute known as the Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI).[79] Such a legal expenditure has hugely contributed to the cry for the exit of Kenya from ICSID and pursue another forum which is cost-effective. The outcry by SEATINI as to the legal cost involved before the ICSID forum comes in the wake of ***Cortec Mining ltd and Another v. Kenya***,[80] being a claim instituted by the Claimants for over two hundred billion. The firm claimed that the move by the Kenyan government to cancel its license was a breach of the UK-Kenya BITs obligation to treat them fairly and equitably. The upshot of the finding by the Tribunal is that the Claimant's plea was dismissed; however, the Tribunal declined to grant Kenya an award of 650 million, being an award of cost but only gave them 50% of the award being 320 million.

Therefore, the accusations are well-founded as to the cost of litigation as Kenya in defending the claim as respondents was denied legitimate expenditure in which it procured to defend its suit. This was coming at a time when Kenya had signed 19 BITs with countries such as France, Netherlands, Finland, Germany, Iran, Japan, UK etc. of which 11 are in force.[81] Some of these BITs already pose a threat to litigation by being codified in foreign languages such as the BIT agreement between Kenya and France which is in the French language hence capable of raising legal implications.[82]

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[79] https://eassi.org/tag/seatini/ accessed on 18/9/2021

[80] ICSID Case No. ARB/15/29

[81] *https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya* accessed on 18/9/2021

[82] France- Kenya BIT (2007)

4.2 South Africa Exit from ICSID

South Africa, as one of the SADC nations, expressed dissatisfaction regarding the conduct of international arbitration by ICSID, leading them to adopt certain measures whose outcome was to exclude ICSID as the appropriate forum for dispute resolution. This has been achieved by the country through the withdrawal of the investor-state dispute in the country just as other nations like Ecuador have done.[83] The South African government was unhappy with the rulings of ICSID and therefore resolved to withdraw from its jurisdiction within the settings of making BITs. Central to the departure was the case of ***Piero Foresti, Laura de Carli v Republic of South Africa;***[84] where the South African government policies and laws were put under a test to show to what extent they are protective of investment secured pursuant BITs.

Of importance, the foresti case was the second to subject South Africa investment policy to the legal protection required under BITs. The first was the case of a Swiss national lodging a claim under the Swiss-RSA BIT. The Swiss-South African investment treaty was used to bring this international arbitration action against South Africa in 2003. A Swiss investor bought a private wildlife lodge and farm in the north-eastern section of South Africa during the apartheid years and significantly upgraded it. Protests in this instance destroyed the foreign investor's property, which was thereafter demolished by South African citizens. Thus, the South African government was taken to international arbitration by the Swiss investor. South Africa, according to the complaint, had broken the Full Protection and Security Agreement. The South African government was deemed to have

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https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1569/france---kenya-bit-2007- Accessed on 18/09/2021

[83] Olivet "Why did Ecuador leaves its BITs?" (2021).

[84] ICSID Case No ARB(AF)/07/1.

failed in its obligation to protect and secure the Swiss investor, and the country was fined.[85]

The 2010 Foresti case and the Swiss case before ICSID triggered the South Africa government to terminate all their BITs in 2015.[86] The foresti case involved a group of Italian investors who initiated a claim under the auspices of ICSID challenging the enactment of Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA), termed the Black Economic Empowerment policy which was deemed as expropriation of the investors common law entitlements to exploit and mine minerals and therefore constituted a breach of Article 5 of their BIT with Italy and Luxembourg.[87] The Tribunal found the South African government in breach of the BIT and proceeded to give an award.

The loss stemming from these cases made South Africa to do a risk assessment and advantages linked to BITs. The government discovered that the foreign investment regime mostly concentrated on superficial concerns of commercial interests, while matters of national interest were left to an unpredictable system of international arbitration, undermining the state's constitutionality and domestic policymaking space.[88]Sadly, the government came to the judgment that BITs encourage investment and strengthen the rule of law, especially in jurisdictions where the court systems are weak or prejudiced against foreigners, as advocates argued. Such a position, according to the government, is debatable. It further claimed that there is no link between FDI inflows and the signing of BITs.[89] The Protection of Investment Act was signed into law in July 2018 by President Cyril Ramaphosa. The Protection of Investment Act, among other things, establishes a mediation and arbitration process to be handled by the South

[85] Schlemmer,'F foreign investment' (2016) ICSID Review .
[86] Jackwell Feris, 'Challenging the status quo,' (2014).
[87] Ibid
[88] M Qumba, E xit from BIT by South Africa' (2019).
[89] Ibid

African Department of Trade and Industry, as well as a clear preference for domestic courts as a forum for addressing investor-state conflicts.[90]

5.0 Recommendations and Concluding Thoughts

Whereas there is growing dissatisfaction of investor-state dispute in the manner in which contracting parties submit to ICSID as a forum for dispute resolution, the same can be resolved through reforms both of the institute as well as in the making of BITs for the purpose of ensuring that there is a flow of investment in Kenya which is not impaired by domestic legislation which denies the foreign national of their commonwealth entities under the disguise of local empowerment. Further, there is an immediate need for the creation and renegotiation of BITs which seeks to impose reasonable conditions to the foreign national to respect human rights obligations to have a cohesive operation within the state with the locals, which are key to any investment prosperity in Kenya.

In addition, respect for human rights will not in any way exclude the ICSID but entrench accountability of the foreign national of both the state and foreign national at the precincts of domestic court for purposes of damages as well as determination on the appropriateness of actions undertaken by the host state.[91] This will hugely aid in reducing the humongous award issued against the host state in the event the breach was occasioned by human rights violations by the host state.

The following raft of measures and proposals shall ensure the purity of the arbitration process cannot be impeached hence; not only will it guarantee an

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[90] The Protection of Investment Act 22 of 2015.

[91] Martin Hemmi, 'Using International Investment Arbitration for Compensating Victims of Torture' (2020) *https://icsid.worldbank.org/sites/default/files/parties_publications/C6106/2021.01.08%20Parties%27%20Post%20Hearing%20Briefs/Claimants%27%20Post%20Hearing%20Submission/Legal%20Authorities/CL-0279.pd*f accessed 8/4/2024.

influx of Foreign Direct Investment but equally an alternative dispute resolution forum which is just, expeditious, cost-effective and certain attributes not common in the emergence of newly created commercial courts. This study's conclusion aligns with the hypothesis established at the start of this research. For international arbitration to be a viable option in Kenya and attract foreign direct investment, the following raft of measures has to be employed in order to cement the place of an investor-state dispute as a preserve of ICSID.

5.1 Formulation of BIT's Whose Content Contains a Robust Human Rights Approach to Hold Contracting States Accountable

International treaties lay down obligations to which parties in the treaty must respect.[92] The obligation to respect means that States ought to refrain from meddling with or restricting the enjoyment of human rights.[93] The doctrine of *Pacta Sunt Servanda* applies to any treaty agreement, which makes it imperative for an agreement to be kept.[94] The principle in relation to international agreements suggests that every treaty in force binds the parties to it, and they must uphold it in good faith.[95] This will curtail on the previous trend whereby foreign investors are granted substantive rights without being bound by any responsibilities under these accords.[96] Respect for human rights should textually be found at the preamble of BITs. The preamble is an important aspect of a treaty's framework, as it can serve to suggest and color the treaty's intent and purpose.[97]

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[92] Richard D. Kearney and Robert E. Dalton, 'The Treaty on Treaties', (1970) 64 American Journal of International Law 495–561

[93] Miguel Solanes & Andrei Jouravlev, 'Revisiting privatization, foreign investment, international arbitration, and water,' (Santiago, Chile, 2007) 1-82.

[94] Jason W. Yackee, 'Pacta Sunt Servanda and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality,' (2008-2009) 32 Fordham Int'l L.J. 1550.

[95] Ibid.

[96] Ibid

[97] Klabbers Johannes , 'Treaties and Their Preambles . in M J Bowman & D Kritsiotis (eds) Conceptual and Contextual Perspectives on the Modern Law of Treaties,' (Cambridge University Press , 2018) 172-200.

As a result, it is critical that a treaty provision establishes binding legal duties that compel businesses to adopt a specified behavior. The provision should also establish a mechanism for an arbitral tribunal to effectively penalize non-compliance. This will mitigate litigation exposure by the host state upon revocation of license as well as the host state will be in a position of bringing a counterclaim in response to a statement of claim filed against by an international investor seeking compensation for breach of terms of BIT and therefore mitigating on a large sum of money as the claimant's hands will be tainted as well.[98] Further, this will ensure that issues of the supremacy of the constitution are litigated at the arbitral level, and all that the domestic courts will be left with is to enforce.[99]

5.2 The Supreme Court Be Clothed with Original Jurisdiction to Determine Issues of Enforcement of the Award

Supreme Court jurisdiction is captured in the Constitution as the apex court which is the final arbiter and interpreter of the Constitution.[100] Therefore, this paper calls for the expansion of the Supreme Court jurisdiction for both the enforcement of the award and any party who has an objection to the same will be heard and judgment issued which will be final. Such an approach will be suitable and shall serve the ends of justice as opposed to the legal complications emanating from the Supreme Court jurisprudence in *Nyutu Agrovet Limited v Airtel Network Kenya Limited*;[101] which permitted the right of appeal to an arbitrator's award even to the superior courts negating the most attractive feature that of finality within arbitral proceedings. Such local legal proceedings undoubtedly hamper investor-state dispute arbitration and further create confidence in ICSID as the appropriate forum where such a determination shall

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[98] Ibid.
[99] Ibid.
[100] Constitution of Kenya 2010, Article 163.
[101] [2015] eKLR.

be handled. This recommendation seeks to bring an end to the arbitral proceedings as well as curtail judicial intrusion in arbitration matters, as pointed out by Prof. Muigua where he opines that; unwarranted judicial review of arbitral proceedings will simply defeat the object of the Arbitration Act and thus the role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration but will also be a clear negation of the legislative intent of the Arbitration Act (emphasis added).

5.3 Vesting ICSID Tribunal with Cost Allocation Powers

The paper serves to make arbitration a popular avenue where both the investor and the host state willingly submit to the forum without pondering so much on the cost of litigation involved. Towards this end, the paper proposes a cost allocation mechanism that assesses the amount of work done by taking into account; the narrowing down of issues at the preliminary stage at the trial, the amount of documentation that should be restricted with respect to the agreed issues for determination and the length and conduct of hearings which have to be very limited.

5.4 The High Court Power as the Final Arbiter to the Appointment of the Arbitrator Should Be Curtailed

The Nairobi Centre for international arbitration (NCIA) should be vested with the power to appoint arbitrators where contracting parties dispute the appointment of an arbitrator. This is to remove any possible judicial interference with the process of arbitration pursuant to the objectives of the Act.

5.5 Amendment to the Enforcement of Tribunal Award Requirement

The applying party must present the court with (a) the original arbitral award or a duly certified copy of it; and (b) the original arbitration agreement or a duly certified copy of it in order for the court to recognize an international arbitral award. Since section 4 of the Act changed the regulations for communication and

definition of arbitration agreements, the requirement for an original arbitration agreement or certified copy should be removed. This would also be consistent with the UNCITRAL Model Law's 2006 article 35(2) recommendation.

5.6 Make Nairobi Centre for International Arbitration a Non-Entity of the State

This could take form in the nature of the centre being limited by a guarantee or a nonprofit organization. If the government of Kenya is to gain the trust of the business sector, both local and international, it must entirely separate itself from the funding and operation of the center. It would be critical if Kenya took a page from the Mauritius International Arbitration Centre's setup, management, and business community participation, as well as relationships with other organizations in the same field. Other institutions to learn from would be the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). Therefore, this calls for the amendment of section 4 of the NCIA Act to make the center either a nonprofit or a company limited by guarantee, as well as Section 16 to stop the center from receiving funding from the state. In addition, an amendment to Section 6 is necessary to allow the Law Society of Kenya (LSK) to appoint its directors in conjunction with other stakeholders.

Conclusion

To conclude, the emergence of the International Commercial Court poses a potential threat to the arbitration of investor-state disputes in Kenya. While the ICC offers a centralized and specialized forum for resolving international commercial disputes, its potential impact on the established system of investor-state arbitration in Kenya raises concerns. The potential for parallel proceedings, conflicting decisions, and increased costs could undermine the efficiency and effectiveness of the existing arbitration framework. As Kenya navigates this evolving landscape, it is crucial to carefully consider the implications of introducing the ICC and to ensure that any changes serve to enhance, rather than disrupt, the resolution of investor-state disputes in the country. Balancing the

benefits of the ICC with the need for coherence and consistency in dispute resolution will be essential in safeguarding Kenya's attractiveness as an investment destination.

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Striking a Balance: A Delicate Dance Between Sanctity and Scrutiny

By: ***Kamau Karori SC, MBS***

Abstract

The continuing debate – between upholding the inviolability of arbitral awards and judicial intervention in cases of egregious injustice points to the need for delicate balancing between non-interference and the need to correct unmistakably unjust awards. The urgency of this discourse is informed by the need to prevent consumers or potential consumers of arbitration services opting to exclude arbitration clauses due to perceived deficiencies.

This article seeks to navigate the genesis of the debate, delicately dissect the different perspectives, and draw comparisons with global practices.

1. Introduction

One of the recurring conversations in all arbitration conferences in Africa is how African countries can position themselves as being arbitration friendly and thus become attractive seats or venues for international and regional arbitrations. The main difficulty that many African states still face is proving to the international community that their courts will adopt a non-interventionist approach to the arbitral process, and an environment that ensures enforcement of arbitral awards.

A less spoken issue is whether there can be circumstances that, when objectively looked at, would justify intervention either during the course of the arbitration proceedings or on applications to set aside arbitral awards. This question has engaged the minds of judges, arbitration practitioners and academics for years.

The issue is not that courts should be encouraged to get actively involved in arbitration. There is a general agreement that at the core of arbitration is the principle of party autonomy and therefore the need to respect and uphold the outcome of arbitration proceedings. What is in contention is whether all awards must be respected and upheld.

2. The Debate: Purists vs. Idealists

2.1 The Purists' View

One school of thought is that any award, however wrong or incorrect, must be respected and upheld. This view posits that since the award is the product of a party driven process, the courts should not intervene for any reason.[1] I call this the purist's view.

At the core of the argument by the purists is that once parties select arbitration, they choose its good and bad and that even where the outcome is less than optimal, they must be prepared to live with it. To the subscribers of this view even in instances where awards are obviously wrong and may be even unjust, they consider party autonomy, even with all its drawbacks, as being sacrosanct. At the extreme, this view posits that because judges can also get it wrong there is therefore no assurance that the reviewing court will also not make the same or worse mistakes than was made by the arbitral tribunal. To this community no circumstance(s) warrant interrogation or review of an award once made.

2.2 The Idealists' View

At the other end of the spectrum are those who subscribe to the view that arbitrators, like any other humans, are not infallible and will at times make decisions that are grossly unjust or plainly incorrect and which therefore require review.[2] I call this the idealist's view.

The idealists view proceeds from the premise that at the core of any dispute resolution mechanism is a just outcome. The view here is that where the outcome of arbitration is so demonstrably abhorrent, unfair, or unjust, it is in the interest of and for the benefit of arbitration that such awards are set aside to maintain the dignity of arbitration. To this community, bad awards taint the image of arbitration as a justice system and fuel the narrative that it is a closed shop or

[1] Zaherah Saghir and Chrispas Nyombi, 'Delocalisation in international commercial arbitration: a theory in need of practical application' [2016].
[2] Aparna Aggarwal, 'The Extent of Judicial Intervention in Arbitral Awards' [2023].

cartel committed to protecting its members however incompetent or compromised; that its purpose is to ensure protection of the decisions rendered through its process rather than ensuring delivery of justice as the overriding objective. To the proponents of this view, the end result of arbitration, like any other accepted system of disputed resolution must be a just outcome. To the idealists, bad awards must be called what they are and should not be allowed to stand lest people lose faith in arbitration. To them, the hard work and commitment of good arbitrators and institutions charged with managing arbitrations is undone by bad awards.

3. Real-World Implications

3.1 Business Perspectives

This discussion is not theoretic. At a forum last month, the general counsel of a blue-chip company in Kenya stated that the company had decided to remove arbitration clauses from all its agreements including in its standard terms of condition. He explained that this decision was informed by two factors. First, the company was concerned about the quality of some of the arbitrators and arbitral awards and the absence of a mechanism for reviewing bad awards other than on the very limited grounds for setting aside. Second, he complained of instances of perfectly correct awards being set aside by judges of the High Court on very flimsy grounds thus forcing the parties to restart the whole process of arbitration without regard to the time taken and costs incurred in the concluded arbitration.

Such comments fuel the debate without providing an answer. The purists obviously celebrate and feel vindicated by such complaints regarding interference with arbitral awards. They would view the attitude of the company as stemming from the eagerness by the courts to set aside awards thus undermining the benefits of arbitrations such as party autonomy and speed in resolution of disputes. On the other hand, the idealists would view the issue as being the negative perception of arbitration as being a closed shop that does not permit of correction even in the face of obvious miscarriage of justice. This

discussion is timely and important. The spectre of presumed consumers of arbitration electing out of it is disturbing.

3.2 Threats to Arbitration's Standing

Challenges to awards delivered by arbitrators are not limited to *ad hoc* appointments but extend to cases managed by international systems of dispute settlement. While in the case of agreements governed by or under the auspices of international bodies such as the International Centre for Settlement of Investment Disputes (ICSID) and International Chamber of Commerce (ICC) the parties have less wiggle room because of the nature of the agreements or instruments pursuant to which those arbitrations are conducted, the fact that there still many applications challenging awards rendered by international tribunals should be a cause for worry. If governments and investors follow the route of the Kenyan company and bolt out of arbitration, this will seriously sully the perception of arbitration and seriously undermine its place in the dispute resolution system.

The discussion regarding how courts and arbitrators should treat awards is as old as history. Leading arbitration institutions such as the ICSID[3] and the ICC[4] have provisions for some form of review of arbitral awards. This, to the idealists, is a recognition that tribunals may at time make erroneous decisions and that relooking at those decisions is more supportive than inimical to the practice of arbitration. Equally important is the reservation by states of the right by national courts to set aside or refuse to recognize awards in certain circumstances.[5] This reservation is based on the sovereignty principle that recognises the right or need of governments to establish mechanisms for national courts to consider applications to set aside or refuse to recognise both domestic and international awards for the limited purposes of ensuring that such awards are not inimical to national interests or public policy.

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[3] The ICSID Arbitration Rules, Chapter XI.
[4] The ICC Rules of Arbitration, Article 36.
[5] Alan Redfern, 'Law and Practice in International Commercial Arbitration' [2004], Para. 9-36.

The undeniable fact is that arbitration as a system of dispute resolution would lose its attraction and relevance if the decisions made by arbitrators were not generally accepted by the users of the system. Similarly, it would also lose general acceptance if it was easily susceptible to interference by courts. Businesspeople choose arbitration because they want to retain control of the process including choice of the tribunal. They do no expect that the product of the process would be open to review or reconsideration by national courts. That is why the UNCITRAL model law, on which most arbitration statutes are modelled, provides for very limited grounds for setting aside arbitral awards.[6] Running through all those grounds is due process and rules of natural justice. In other words, there is recognition that where the process adopted by the tribunal infringed basic rules of natural justice such as failure to give notice of hearings or failing to deal with matters referred to it by the parties[7] then such an award does not constitute a just determination of the dispute.

At the end of the day, parties must feel comfortable that what they aimed to achieve through arbitration has been achieved or is achievable. If the purpose was merely to avoid the courts and obtain a quick determination of the disputes together with the other benefits of arbitration, then the view taken by the purists may be the way to go. If, however, parties still expect a fair and accountable outcome at the end of the process then the idealists' route would be preferable. The determinant of this issue must ultimately be the consumers of the services who are expected to either enforce or comply with the outcome of the arbitration process.

4. The Role of Courts: Straddling the Divide

The answer to the question of how courts should deal with arbitration must be based on the objective or purpose of arbitration as a dispute resolution mechanism. The question is and should be whether arbitration is merely a process with clearly defined steps ending with an award, or whether it is a system

[6] The UNCITRAL Model Law on International Commercial Arbitration, Article 34(2).
[7] Arbitration Act of Kenya section 35

designed to deliver justice with an award being a means of ensuring a just outcome at the end of the process rather than the end of the process.

4.1 The Nyutu Case

It is this very conundrum that the Supreme Court of Kenya sought to address in the discussed, yet most misunderstood decision of **Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)**.[8] Although the court was dealing with the question of whether the decision of the High Court on an application to set aside an arbitral award was appealable, the contending submissions by the parties took the same purists versus idealists divide. On the one hand the respondent argued the purists view that the judgement of the High Court should be the one and only instance of court intervention and therefore the judgement of the High Court must be final and unappealable. The appellants on the other hand urged the idealist view that where the High Court makes a demonstrably erroneous error and, in the process, improperly sets aside a correct award or upholds an obviously erroneous award then there should be a mechanism for correcting such a bad decision. In its judgement, the Supreme Court sought to straddle the divide between the two views. While emphasising the need for courts to recognise the sanctity and finality of arbitral awards, it recognised that in certain instances, the decisions made by the High Court on applications for setting aside awards may be so grossly unjust as to require an appellate mechanism to correct those mistakes. One of the examples it gave is where the setting aside of an award is based on grounds other those set out in Section 35 of the Arbitration Act. Although the Supreme Court did not deal with applications for recognition, the rationale would apply to such applications by parity of reasoning.

4.2 Confusion and Controversy

The Nyutu case ought to have provided the much-needed clarity on the attitude of the courts towards arbitral awards. Unfortunately, the recent Supreme Court of Kenya decision in **Bia Tosha Distributors Limited vs. Kenya Breweries**

[8][2019] eKLR.

Limited & 6 others[9] introduced more confusion as to what constitutes public policy and therefore the circumstances where it is permissible for the courts to intervene. In considering the issue whether it is permissible for a party to an arbitration agreement to file suit claiming violation of the constitution, the court took the view that once a party claims infringement of its constitutional rights, it is entitled to move to court without undermining the arbitration agreement between it and the party alleged to have infringed. This is a confusing view considering that it is very rare that both parties declare a dispute. Usually, it is one party that feels aggrieved and elects to commence proceedings. Should such a party ignore the arbitration clause and move to court citing violation of the constitution, it is difficult to imagine how such proceedings do not undermine the arbitration agreement especially if the Respondent objects to the jurisdiction of the court. The finding that the mere allegation of infringement of the constitution is a sufficient basis for a party to avoid the arbitration route and go straight to the courts[10] risks undermining Kenya's efforts to promote itself as being arbitration friendly. Investors would naturally be wary of situations where the national courts can refuse to enforce awards rendered by international or foreign tribunals on the basis of a constitution of a country that they do not belong or subscribe to or, even worse, one they are in dispute with[11].

5. Public Policy

At play in both the *Nyuttu* and *Bia Tosha* cases, was the issue of the correct public policy considerations to adopt. The confusion created by the apparent contradiction in the two decisions is demonstrative of the fact that public interests, which inform public policy, are elusive and difficult to legislate[12]. This is one reason why the courts and legislatures have found it impossible to come up with a class of circumstances or instances that engage public interest considerations. What constitutes public interest is fluid. Public interests are

[9](Petition 15 of 2020) [2023] KESC 14 (KLR).
[10]Ibid.
[11] Redfern and Hunter on International Arbitration, Seventh Edition, page 1 paragraph 1.03
[12] Christ for all Nations Vs Apollo Insurance Company Limited (2002) 2 EA page 9

generational and change with time. What is of profound public interest today may very well be a non-issue to the next generation; and what is normal and acceptable today may be deemed a danger to public good in a few years. The yardstick for what constitutes public interest or public policy will continue to be elusive. Even between judges and academicians, there are significant differences; what is unacceptable to one judge may be less so to another; some judges are more easily shocked than others. The same would apply to parliamentarians especially when issues involving religion or cultural practices are involved. It is therefore hardly possible or even desirable to try and lock down what circumstances will constitute valid public policy grounds. All the courts can do is fashion out examples of issues that the current generation considers are of such nature that they not only shock the conscience of the court but are also inimical to an identified public interest.

6. Conclusion

The debate of which between the purists and idealist view should prevail is healthy and necessary. It is important that decision makers recognise that there are serious contentions underlying both views. This is especially important for courts which must carefully evaluate the different considerations in deciding, on a case-by-case basis, how to handle challenges to arbitration proceedings or awards. This is the delicate middle ground between the purist and ideal views.

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The ICSID Arbitration Rules, Chapter XI.

The ICC Rules of Arbitration, Article 36.

The UNCITRAL Model Law on International Commercial Arbitration, Article 34(2).

Reforming Kenya's Law on Probation and Aftercare Services to Promote Alternative Dispute Resolution

By: ***Michael Sang*** *

Abstract

This paper engages in a comprehensive exploration of Kenya's Probation of Offenders Act within the context of the growing role of Alternative Dispute Resolution (ADR) principles in the nation's criminal justice system. Drawing inspiration from international legal instruments such as "The Beijing Rules," "Bangkok Rules," and "Tokyo Rules," the study evaluates the Act's provisions, strengths, and limitations. Noteworthy positive features, including the recognition of non-custodial sanctions and an inclusive ADR approach, are scrutinized alongside identified shortfalls, such as the limited scope of probation assessments and the marginal role of Probation and Aftercare Services. Proposing innovative reforms, the paper introduces pre-charge and pre-bail social inquiry reports, linking them with the Office of the Director of Public Prosecutions (ODPP) Diversion Policy. Additionally, the study advocates for the prioritization of Probation and Aftercare Services to foster a rehabilitation-focused criminal justice ethos. The narrative concludes with a call for thoughtful reforms that align Kenya's criminal justice system with international standards, emphasizing a balanced and compassionate approach to justice.

Key Words*: Reform, Kenya, Probation, Aftercare Services, Alternative Dispute Resolution, Probation of Offenders Act, Rehabilitation.*

1. Introduction

In the pursuit of a fair and effective criminal justice system, the international community has long recognized the importance of incorporating alternative

* *LLB, Moi University; LLM, University of Cape Town, South Africa; PG Dip. in Law Kenya School of Law. The views expressed in this article are, of course, the authors' own and do not express the views of the institution to which he is affiliated.*

dispute resolution (ADR) mechanisms.[1] In this context, the focus of this discussion centers on Kenya's Probation of Offenders Act and the potential for reform to align with international standards, emphasizing ADR principles. A key aspect of this examination involves a comprehensive analysis of the growing role of ADR in the Kenyan criminal justice process and its application within the Probation and Aftercare Services. As I delve into this exploration, the paper navigates through the international legal landscape, drawing insights from pivotal instruments such as "The Beijing Rules," which guide the administration of juvenile justice, and the "Bangkok Rules" and "Tokyo Rules," which offer guidelines for non-custodial measures. These instruments provide a rich tapestry of principles emphasizing rehabilitation, gender sensitivity, and the preferential use of non-custodial measures.

The discourse then transitions to a closer examination of Kenya's Probation of Offenders Act, dissecting its provisions, strengths, and limitations. I scrutinize the positive ADR features embedded in the Act, such as its recognition of alternative (non-custodial) sanctions and its inclusive approach to ADR, as evidenced in Section 4 mandating pre-sentence reports. Further exploration delves into the Act's intersection with other legal instruments and regulations, illustrating the interconnectedness of Kenya's criminal justice framework.

The discussion doesn't shy away from acknowledging the shortfalls present in the Probation of Offenders Act, particularly the limited scope of probation assessment reports and the marginal role of Probation and Aftercare Services and other professionals. I also scrutinize the absence of specific provisions for juvenile justice, recognizing it as a crucial area for improvement.

Turning attention to proposals for strengthening ADR in Kenya's Probation and Aftercare Services, I explore innovative ideas such as pre-charge and pre-bail social inquiry reports that accommodate the views of the prosecutor. Drawing

[1] Oumah Jude (2023) 'An Analysis of Effectiveness and Challenges of Rehabilitation and Reintegration in Probation and Aftercare Service'

inspiration from international examples, such as the United Kingdom's use of pre-sentence reports, I propose linking these reports with the Office of the Director of Public Prosecutions (ODPP) Diversion Policy. This approach ensures an informed and collaborative decision-making process, avoiding potential overreach and fostering a more holistic view of offenders' circumstances.

Finally, the discussion extends to the role of Probation and Aftercare Service, urging for its prioritization within the criminal justice process. By recognizing and enhancing the role of probation officers, Kenya can embrace a more rehabilitation-focused and community-centered approach, aligning with global standards outlined in the international instruments.[2] In this comprehensive exploration, I navigate the intricate intersection of Kenya's Probation of Offenders Act, international legal instruments, and innovative proposals for reform. The overarching objective is to contribute to the ongoing discourse on fostering a criminal justice system in Kenya that is not only rooted in the principles of justice but is also adaptive, humane, and aligned with global best practices.

2. The Growing Role of ADR in the Kenyan Criminal Justice Process

2.1 Overview of the Role of ADR in the Criminal Justice System

The growing role of Alternative Dispute Resolution (ADR) in the Kenyan criminal justice process reflects a global trend towards seeking alternatives to traditional litigation.[3] ADR methods are gaining recognition for their effectiveness in resolving disputes, reducing case backlog, and promoting a more collaborative approach to justice.[4] In the context of the criminal justice system in Kenya, ADR plays a significant role in several aspects.

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[2] Ibid

[3] Ibid

[4] Ngetich R, 'Effectiveness of Alternative Dispute Resolution Mechanism (ADR) in Case Backlog Management in Kenyan Judicial System: Focus on Milimani High Court Commercial Division.' (*UoN Digital Repository Home*, 1 January 1970) http://erepository.uonbi.ac.ke/handle/11295/109800 accessed 7 April 2024

The Kenyan judicial system often faces challenges related to case overload and delays.[5] ADR mechanisms, such as mediation and arbitration, offer a way to divert certain cases away from the formal court process, alleviating the burden on the courts and facilitating quicker resolutions.[6] ADR emphasizes restorative justice principles, which focus on repairing harm caused by criminal behavior and reintegrating offenders into the community.[7] This approach encourages dialogue between victims and offenders, fostering a sense of accountability and rehabilitation.[8]

ADR methods are generally more cost-effective than traditional litigation.[9]By reducing the time and resources involved in court proceedings, ADR contributes to the efficient use of judicial resources and taxpayer funds.[10] ADR fosters community involvement in the resolution of disputes.[11] In criminal cases, this can mean engaging community leaders, social workers, and other relevant stakeholders in the resolution process, promoting a more comprehensive and community-centered approach to justice.[12]

ADR methods, particularly in cases involving interpersonal conflicts or non-violent offenses, can help preserve relationships between the offender and the

[5] Ibid
[6] 'Formalisation and Flexibilisation in Dispute Resolution' (*Brill*, 29 September 2014) https://brill.com/edcollbook/title/25031 accessed 7 January 2024
[7] 'Roles of Probation and Parole Officers' [2011] Corrections in the Community 219
[8] Ibid
[9] Deffains B, Demougin D and Desrieux C, 'Choosing ADR or Litigation' (2017) 49 International Review of Law and Economics 33
[10] Boyarin Y, 'Court- Connected ADR—a Time of Crisis, a Time of Change' (2012) 50 Family Court Review 377
[11] Tyagi N, 'ADR Institutions, Role of ADR Practitioners, and Frequency of Resolution of Matrimonial Disputes' [2021] Women, Matrimonial Litigation and Alternative Dispute Resolution (ADR) 117
[12] Hallevy G, 'Is ADR (Alternative Dispute Resolution) Philosophy Relevant to Criminal Justice? - Plea Bargains as Mediation Process between the Accused and the Prosecution' [2008] SSRN Electronic Journal

victim.[13] This is essential for communities and families affected by criminal behavior.[14]ADR supports rehabilitation efforts by focusing on addressing the underlying causes of criminal behavior.[15]Through dialogue and collaboration, ADR can contribute to the successful reintegration of offenders into society.[16]

2.2 ADR Aspects in Kenya's Criminal Justice Process

In Kenya, the use of ADR in the criminal justice process aligns with constitutional and legal provisions that emphasize rehabilitation, reconciliation, and alternative sanctions.[17] Article 159 of the Kenyan Constitution, which addresses the administration of justice, provides a foundation for incorporating ADR principles into the criminal justice system.

Article 159(2) (c) of the Kenyan Constitution emphasizes the use of alternative forms of dispute resolution, including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms. This provision underscores the constitutional recognition of reconciliation as a valid and preferred approach to justice.[18] ADR in criminal cases often aligns with restorative justice principles, seeking to rehabilitate offenders and promote reconciliation between victims and offenders. By engaging in dialogue and addressing the root causes of criminal behavior, ADR methods contribute to the rehabilitation process.[19]

ADR fosters community involvement in the rehabilitation and reconciliation process. Local community leaders and social workers may play a role in

[13] Umbreit M and Hansen T, 'Victim-Offender Mediation' [2017] The Mediation Handbook 97

[14] Ibid

[15] ansari zeeshan [2023] Criminal justice reform: Addressing inequities and enhancing rehabilitation

[16] Ibid

[17] Muigua K and Kariuki F, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) 1 Strathmore Law Journal 1

[18] Constitution of Kenya, 2010, Article 159(2) (c)

[19] Edwin Kigen (2023) 'The Vital Role Communication Plays In Bolstering Solutions Towards Tackling Multifaceted Challenges In Community Based Corrections'

facilitating discussions between the parties involved, promoting a sense of accountability and community support.[20]

ADR allows for the customization of sanctions based on the unique circumstances of each case. Instead of relying solely on punitive measures, ADR processes may involve the development of alternative sanctions that focus on addressing the underlying causes of the offense.[21] Alternative sanctions in ADR can include community service and restitution to the victim. These measures not only hold offenders accountable but also provide an opportunity for them to contribute positively to the community they have affected.[22]

A key aspect of alternative sanctions is the reduction of reliance on custodial sentences.[23]ADR mechanisms can propose non-custodial measures, such as probation, counseling, or educational programs, which align with rehabilitation goals while ensuring public safety.[24]

3. ADR in Kenya's Probation and Aftercare Services: An Analysis of the Probation of Offenders Act

3.1 Importance of ADR in Probation and Aftercare Services

The incorporation of ADR in Kenya's Probation and Aftercare Services, as outlined in the Probation of Offenders Act, brings several important benefits. The importance of ADR in this context is multifaceted, addressing key challenges in the criminal justice system and contributing to the overall improvement of probation and aftercare services:

[20] Ibid
[21] Reynolds, J. W. 'Does ADR Feel like Justice?' (2019) 88 Fordham Law Review 2357.
[22] Ibid
[23] (*Alternatives to incarceration*) https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/3_Alternatives_Incarceration.pdf accessed 7 January 2024
[24] Ibid

1. Reducing Prison Congestion:

ADR methods, when applied to probation and aftercare services, allow for the development of customized rehabilitation plans for offenders.[25]By tailoring interventions to individual needs, ADR can be instrumental in preventing unnecessary incarceration and reducing the overall burden on prisons.[26]A central tenet of ADR in probation services is the promotion of non-custodial measures. Instead of sending offenders to prison, ADR facilitates alternatives such as probation, community service, or counseling, thereby directly contributing to the reduction of prison congestion.[27]

2. Minimizing Judicial Backlog:

ADR mechanisms, including mediation and arbitration, can be more time-efficient than traditional court processes.[28] By diverting certain cases away from the formal court system and resolving them through ADR, judicial backlog is minimized, ensuring that the courts can focus on more complex matters.[29]ADR can streamline the probation and aftercare processes by addressing issues and disputes outside of the courtroom.[30] This efficiency allows probation officers and related professionals to focus on facilitating rehabilitation and support services for offenders rather than being entangled in lengthy legal proceedings.[31]

[25] Pruin I, 'Prisons, Probation and Aftercare Services' [2018] Prisoner Resettlement in Europe 435

[26] Volpe, M. R. 'Promises and Challenges - ADR in the Criminal Justice System' (2000) 7 Dispute Resolution Magazine 4.

[27] Ibid

[28] Gu W, 'Courts and Dispute Resolution' [2021] Dispute resolution in China 20

[29] Quist TM, 'Book Review: Negotiating Responsibility in the Criminal Justice System' (2000) 25 Criminal Justice Review 121

[30] Grace, M. T. 'Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms' (2009) 34 Vermont Law Review

[31] Ibid

3. Improving Communal Relationships:

ADR emphasizes community involvement and engagement in the resolution of disputes.[32]This is particularly important in probation and aftercare services, where community support is crucial for the successful reintegration of offenders.[33] ADR fosters a sense of community ownership in the rehabilitation process.[34] ADR practices align with restorative justice principles, focusing on repairing harm and rebuilding relationships.[35] In the context of probation and aftercare, this approach can lead to improved communal relationships by promoting understanding, forgiveness, and support for the rehabilitation and reintegration of offenders.[36]

ADR encourages the development of community-based solutions to conflicts and challenges within the probation system.[37] This approach not only strengthens ties between the justice system and the community but also enhances the effectiveness of rehabilitation efforts.[38]

3.2 Positive ADR Features of the Probation of Offenders Act

3.2.1 Recognition of alternative (non-custodial) sanctions

The Probation of Offenders Act in Kenya plays a crucial role in recognizing and promoting alternative (non-custodial) sanctions as a positive aspect of the country's criminal justice system. The long title of the Act, which states that it is "An Act of Parliament to provide for the probation of offenders," inherently

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[32] Tyagi N, 'ADR Institutions, Role of ADR Practitioners, and Frequency of Resolution of Matrimonial Disputes' [2021] Women, Matrimonial Litigation and Alternative Dispute Resolution (ADR) 117

[33] Ibid

[34] Taxman FS, 'Probation, Intermediate Sanctions, and Community-Based Corrections' [2012] Oxford Handbooks Online

[35] Ibid

[36] Ibid

[37] Razac O, Gouriou F and Salle G, '"Preventing Reoffending": Conflicts between Rationalities within the French Probation System' [2014] Champ pénal

[38] Ibid

implies an acknowledgment of the need for alternatives to custodial sentences.[39] Probation, as a form of alternative sanction, involves supervising and supporting offenders in the community rather than incarcerating them.[40]This reflects a commitment to rehabilitation and reintegration.

By specifically addressing the probation of offenders, I argue that the Act recognizes the importance of tailoring sanctions to individual circumstances. This customization is a fundamental aspect of Alternative Dispute Resolution (ADR) principles, allowing for the development of rehabilitation plans that consider the unique needs of each offender. By emphasizing alternatives to imprisonment, the Act contributes to efforts aimed at reducing recidivism rates. Non-custodial measures have the potential to address the root causes of criminal behavior and provide offenders with the tools they need to lead law-abiding lives.

3.2.2 Inclusive approach to ADR

The Probation of Offenders Act in Kenya demonstrates a positive and inclusive approach to ADR through provisions such as Section 4, which mandates a pre-sentence report.[41] Section 4 of the Act emphasizes an individualized approach to addressing offenders. The requirement for a pre-sentence report indicates a commitment to understanding the unique circumstances of each case. This aligns with the principles of ADR, which often involve tailoring solutions to the specific needs and characteristics of the parties involved.

The Act goes beyond a simple sentencing process by mandating a pre-sentence report that includes recommendations for suitable periods of supervision, rehabilitation programs, and measures to reduce the risk of re-offending.[42] This comprehensive assessment reflects an inclusive approach to ADR, acknowledging that effective resolution involves addressing underlying issues

[39] The Probation of Offenders Act, long title
[40] Taxman FS, 'Probation, Intermediate Sanctions, and Community-Based Corrections' [2012] Oxford Handbooks Online
[41] Ibid, sec 4
[42] Ibid

and facilitating rehabilitation. By including recommendations for rehabilitation programs in the pre-sentence report, the Act underscores a commitment to the rehabilitation and reintegration of offenders into society. This approach is consistent with the restorative justice principles often associated with ADR, emphasizing the positive transformation of offenders.

3.2.3 Provision in other statutes and regulations

The positive ADR features within the Probation of Offenders Act are complemented by various provisions in related regulations and standing orders, reflecting a comprehensive and collaborative approach to criminal justice.

3. Kenya Prisons Standing Orders Chapter 47[43]

The requirement for a report from the Probation Officer before recommending release for a prisoner serving a sentence for murder or manslaughter demonstrates a collaborative effort between prison authorities and probation officers.[44]

This provision ensures that the decision to release a prisoner takes into account the assessment of the Probation Officer regarding the prisoner's acceptability at home, aligning with the rehabilitative goals of ADR.

2. Section 31 of The Prisons Act[45]

The authorization for a probation officer to remove a remand prisoner from prison custody for inquiries at the direction of the court emphasizes the collaborative role of probation officers in the criminal justice process.[46] This provision recognizes the Probation Officer as a professional authorized to conduct inquiries on behalf of the court, highlighting the integration of probation services into the broader criminal justice system.

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[43] Kenya Prisons Standing Orders, Chapter 47
[44] Ibid
[45] Prisons Act, sec 31
[46] Ibid

3. Community Service Orders Act, Section 12[47]:

Designating probation officers appointed under the Probation of Offenders Act as community service officers for the purposes of the Community Service Orders Act demonstrates the versatility of probation officers in contributing to alternative sanctions beyond traditional probation.[48] This provision reinforces the idea that probation officers can play a key role in community-based sanctions, aligning with the rehabilitative and community-centered principles of ADR.

4. Diversion Policy Guidelines and Explanatory Notes by ODPP 2019[49]

The guideline on diversion timeframes, taking into account the offender's rehabilitation needs and the seriousness of the offense, reflects a nuanced and individualized approach to dispute resolution.[50] The inclusion of probation officers in the decision-making process emphasizes their role in diversion schemes, promoting alternatives to imprisonment based on the specific circumstances of each case.

5. Diversion Policy by ODPP 2019[51]

The recognition of the Probation and Aftercare Service as a foundation for developing alternatives to imprisonment aligns with the overarching goals of ADR[52]. Community-based sanctions, facilitated through probation services, are acknowledged as effective means of social reintegration and reducing recidivism, emphasizing a rehabilitative and restorative approach.[53]

[47] Community Service Orders Act, Sec 12
[48] Ibid
[49] Office of The Director of Public Prosecutions (ODPP) (2019)Diversion Policy Guidelines and Explanatory Notes
[50] Ibid
[51] ODPP (2019) Diversion Policy
[52] Ibid
[53] Ibid

6. The Probation of Offenders (Central Probation Committee) Rules and Probation of Offenders Rules

The establishment of the Central Probation Committee[54] and the delineation of duties for probation officers in the Probation of Offenders Rules[55] emphasize the structured and organized nature of the probation system. These rules underscore the importance of committees and officers in overseeing probation processes, ensuring consistency and professionalism in the implementation of alternative sanctions.

3.3 Shortfalls of ADR in the Probation of Offenders Act

3.3.1 Limited scope of probation assessment reports

One of the shortfalls in the Probation of Offenders Act, particularly in the context of Alternative Dispute Resolution (ADR), is the limited scope of probation assessment reports, which are not explicitly anchored in the Probation of Offenders Act itself. The Probation of Offenders Act may not explicitly provide a comprehensive legal foundation for the scope and content of probation assessment reports. This can lead to a lack of clarity and consistency in the information gathered and presented in these reports.

Without clear guidelines or provisions within the Act, probation officers may lack specific directions on what elements should be included in the assessment reports. This can result in variations in the quality and depth of the reports, impacting the effectiveness of the probation process. I also argue that the absence of a standardized framework within the Probation of Offenders Act may contribute to inconsistencies in the assessment process. Different probation officers may use different criteria and methods, potentially leading to inequitable treatment of offenders and varying recommendations.

[54] Probation of Offenders (Central Probation Committee) Rules, rule 2
[55] Probation of Offenders Rules, rule 2 & 3

The limited scope of probation assessment reports may result in gaps in the identification of rehabilitation needs and the formulation of comprehensive rehabilitation plans for offenders. This can hinder the effectiveness of probation as a tool for the social reintegration of offenders.[56] In legal proceedings, the limited anchoring of probation assessment reports in the Probation of Offenders Act may result in these reports not receiving the attention they deserve. This could impact their utility in informing sentencing decisions and alternative sanctions.[57]

3.3.2 Marginal role of Probation and Aftercare Services and Other Professionals

Another shortfall in the ADR framework of the Probation of Offenders Act is the marginal role of Probation and Aftercare Services (PACs) and other professionals in the decision-making process. This is exacerbated by the absence of an express provision requiring prosecutors to consult PACs or investigation officers when deciding on diversion. The Probation of Offenders Act may not explicitly mandate or encourage active participation by Probation and Aftercare Services in the decision-making process related to diversion. This limited involvement can undermine the holistic and rehabilitative goals of ADR.[58]

The absence of a requirement for prosecutors to consult with PACs or investigation officers during diversion decisions reflects a gap in collaborative decision-making. Prosecutors may make decisions without considering the insights and expertise of professionals who play a crucial role in rehabilitation and community reintegration.[59]

Without explicit provisions for collaboration, there is a risk that prosecutors may lack access to comprehensive information on an offender's background,

[56] Rocque, M., Bierie, D. and MacKenzie, D. (2010) Social bonds and change during incarceration: testing a missing link in the reentry research. *International Journal of Offender Therapy and Comparative Criminology*, 52, 673-685.
[57] Ibid
[58] Ibid
[59] Ibid

rehabilitation needs, and suitability for diversion. This can result in decisions that may not fully consider the broader context of the offender's circumstances. A marginal role for PACs and other professionals in diversion decisions can potentially undermine the rehabilitation focus of the criminal justice system. Effective diversion requires a thorough understanding of an offender's situation, and excluding key professionals may hinder the development of appropriate diversion plans.[60]

3.3.3 Little Victim Participation

Another shortfall in the ADR framework of the Probation of Offenders Act is the limited participation of victims in the process. This lack of victim participation can impact the overall effectiveness of the criminal justice system and the rehabilitative goals of ADR. The Probation of Offenders Act may not provide sufficient mechanisms or opportunities for victims to actively participate in the decision-making process, particularly in matters related to probation and alternative sanctions. This lack of input can diminish the sense of justice for victims.

Restorative justice principles, which emphasize the involvement of victims in the resolution process, may not be fully realized if victims have little participation. In cases where ADR methods are employed, the potential for restoring relationships and addressing the harm caused may be compromised. Victims often seek a role in the justice process to voice their concerns, express their views on potential resolutions, and find a sense of closure.[61]Limited victim participation may lead to dissatisfaction among victims who feel excluded from decisions that directly affect them.[62]

[60] Ibid
[61] Bandes SA, 'When Victims Seek Closure: Forgiveness, Vengeance, and the Role of Government' [2000] SSRN Electronic Journal
[62] Ibid

A key aspect of ADR is the promotion of dialogue between parties involved in a dispute.[63] In cases involving offenders and victims, limited victim participation may result in missed opportunities for constructive dialogue, hindering the potential for understanding, empathy, and resolution.[64]

3.3.4 No provision for Juvenile Justice

Another shortfall in the ADR framework of the Probation of Offenders Act is the absence of specific provisions addressing juvenile justice. The Probation of Offenders Act may not contain specialized provisions addressing the unique needs and considerations of juvenile offenders. Juveniles often require distinct approaches to rehabilitation and reintegration into society, and the absence of specific provisions can lead to inadequacies in addressing their cases.

Juveniles have distinct developmental needs and vulnerabilities compared to adult offenders.[65]A lack of specific provisions may overlook the importance of tailoring rehabilitation and intervention strategies to the developmental stage of juvenile offenders, hindering effective ADR in juvenile cases. Without provisions that consider the specific circumstances of juvenile offenders, there is a risk of inappropriate sanctions being applied. A lack of tailored ADR measures may result in outcomes that do not prioritize the best interests of the juvenile and may not contribute to their rehabilitation.[66]

The absence of specific provisions for juvenile justice may be inconsistent with international standards and conventions that emphasize the importance of a separate and specialized approach to dealing with juvenile offenders. This may include principles outlined in the United Nations Convention on the Rights of the

[63] Roberts, S., and Palmer, M., Dispute Processes: ADR and the Primary Forms of Decision-Making (Cambridge University Press, 2005)
[64] Ibid
[65] Emeka TQ and Walters N, 'Juveniles behind Bars' [2013] Special Needs Offenders in Correctional Institutions 21
[66] Ibid

Child.[67] Juvenile justice often emphasizes a restorative approach, focusing on rehabilitation, education, and the prevention of reoffending. The absence of provisions tailored to juvenile offenders may result in missed opportunities to implement restorative justice practices that are particularly beneficial for this demographic.[68]

Without explicit provisions protecting the rights and interests of juvenile offenders, there is a risk that they may be subject to harsher treatment or sanctions that are not in line with a rehabilitative and age-appropriate approach.

4. Proposals for Strengthening ADR in Kenya's Probation and Aftercare Services

4.1 Pre-charge social inquiry reports

4.1.1 United Kingdom - Recommendation for Kenya

In the context of strengthening Alternative Dispute Resolution (ADR) in Kenya's Probation and Aftercare Services, a valuable proposal is the introduction of pre-charge social inquiry reports. This concept involves conducting comprehensive social inquiries into an individual's circumstances before formal charges are laid.[69] Drawing lessons from the United Kingdom, where pre-sentence reports have been utilized effectively, this proposal aims to enhance the early identification of rehabilitation needs and support the implementation of alternative sanctions.

Lessons from the United Kingdom:

In the United Kingdom, pre-sentence reports are routinely prepared by probation officers to assist the court in making informed sentencing decisions. These reports include a detailed assessment of the offender's background, circumstances, and

[67] Ibid
[68] Ibid
[69] Bonta, J. &. (2017). Psychology of Criminal Conduct 6th Edition. Vancouver: Routledge Publishers.

rehabilitation needs. By conducting these inquiries early in the criminal justice process, the UK system allows for a more nuanced and individualized approach to sentencing, often involving community-based alternatives to imprisonment.[70]

Recommendations for Kenya

To implement pre-charge social inquiry reports in Kenya, several recommendations can be considered:

1. **Integration with ODPP Diversion Policy:**

There should be a clear link between the Office of the Director of Public Prosecutions (ODPP) Diversion Policy and Guidelines and the initiation of pre-charge social inquiry reports. This ensures that diversion options and alternative sanctions are considered from the early stages of the criminal justice process.[71]

2. Collaboration with Probation Officers:

Probation officers should play a pivotal role in the preparation of pre-charge social inquiry reports. Their expertise in rehabilitation and community-based interventions makes them well-suited for assessing an individual's circumstances and recommending suitable alternatives to formal charges.[72]

3**. Oversight by Criminal Justice Professionals:**

To avoid any potential concentration of power or undue influence by a single entity, oversight by another criminal justice professional is crucial. This could involve collaboration with forensic psychologists or other experts who can provide additional perspectives on the offender's mental health, risk assessment, and rehabilitation needs.[73]

[70] Ibid
[71] Ibid
[72] Ibid
[73] Ibid

4. Legal Framework Enhancement:
We should consider amendments to the legal framework, if necessary, to explicitly incorporate the concept of pre-charge social inquiry reports. This will provide a solid legal foundation for the initiation and utilization of such reports within the Kenyan criminal justice system.

Reference to United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") - Rule 11: Diversion:[74]
Rule 11 of "The Beijing Rules" focuses on diversion, which involves dealing with juvenile offenders without resorting to formal trial whenever appropriate.[75] Diversion aims to address juvenile delinquency through alternative measures that emphasize rehabilitation and community reintegration rather than punitive measures.[76]

The rule recognizes the need for a flexible approach in dealing with juvenile offenders. Instead of a formal trial, competent authorities are encouraged to consider alternative methods that are appropriate for the circumstances. The rule empowers law enforcement, prosecution, and other agencies dealing with juvenile cases to handle matters at their discretion without resorting to formal hearings. This flexibility is subject to the criteria established in the legal system and aligns with the principles of diversion. The consent of the juvenile or their parents or guardian is deemed necessary for any diversion involving referral to community or other services. This emphasizes the importance of informed decision-making and respects the rights and interests of the juvenile and their families.[77]

While discretionary disposition is encouraged, a review mechanism by a competent authority is established to ensure accountability. This ensures that

[74] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Rule 11
[75] Ibid
[76] Ibid
[77] Ibid

decisions to refer a case for diversion can be subject to a review process, adding a layer of oversight. Efforts are recommended to facilitate discretionary disposition, including the establishment of community programs. These may include temporary supervision, guidance, restitution, and compensation of victims. The emphasis on community-based interventions aligns with the rehabilitative focus of diversion.[78]

Integration with Pre-Charge Social Inquiry Reports and ODPP Diversion Policy

Pre-charge social inquiry reports can serve as a valuable tool for implementing diversion measures as suggested by "The Beijing Rules." By conducting comprehensive assessments early in the process, authorities can identify juveniles who may benefit from diversion and alternative measures. Pre-charge social inquiry reports provide an opportunity to align with the Office of the Director of Public Prosecutions (ODPP) Diversion Policy and Guidelines. The information gathered in these reports can inform decision-making in line with the principles and criteria outlined in the diversion policy.[79]

The emphasis on informed decision-making and obtaining consent, as highlighted in "The Beijing Rules," resonates with the principles of pre-charge social inquiry reports. The information gathered through these reports ensures that decisions are well-informed and consider the perspectives of the juvenile and their parents or guardian.

Pre-charge social inquiry reports can facilitate the development of community-based interventions, such as temporary supervision, guidance, and restitution, in line with the suggestions of "The Beijing Rules." This aligns with the broader goal of diverting juveniles away from the formal trial process toward rehabilitative and community-oriented measures.[80]

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[78] Ibid

[79] Bonta, J. &. (2017). Psychology of Criminal Conduct 6th Edition. Vancouver: Routledge Publishers

[80] Ibid

4.2 Pre-bail Social Inquiry Reports

4.2.1 New Zealand- Lessons for Kenya

The proposal for pre-bail social inquiry reports that accommodate the views of the prosecutor involves conducting comprehensive social inquiries into an individual's circumstances before deciding on bail conditions.[81] Drawing lessons from New Zealand, where a similar approach has been employed, this proposal aims to provide more informed and individualized bail decisions while considering rehabilitation needs and reducing the risk of reoffending.

Lessons from New Zealand

In New Zealand, pre-sentence reports are commonly used to inform bail decisions. These reports provide the court with information about an individual's background, personal circumstances, and potential risks. The aim is to tailor bail conditions that address the specific needs and risks of the accused while maintaining community safety.[82]

Lessons for Kenya

Implementing pre-bail social inquiry reports that also accommodate the views of the prosecutor in Kenya can bring about several benefits and lessons:

1. Individualized Bail Conditions:

Pre-bail social inquiry reports can contribute to more individualized bail conditions. By understanding an accused person's circumstances, including potential risk factors and support networks, authorities can tailor conditions that are both fair and effective.[83]

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[81] Vanstone and Maurice, (2011), The International Origin and Initial Development of Probation. An Early
Example of Policy Transfer. *The British Journal of Criminlogy*:48.6(2008):735-755

[82] Ibid

[83] Ibid

2. Risk Assessment and Rehabilitation Planning:
These reports can assist in conducting risk assessments early in the criminal justice process. Probation officers and other professionals can identify potential rehabilitation needs and design appropriate plans, contributing to a more holistic and proactive approach.[84]

3. Reduction of Flight and Reoffending Risks:
By gaining insights into an individual's background and ties to the community, pre-bail social inquiry reports that accommodate the views of the prosecutor can help mitigate flight risks. Additionally, addressing rehabilitation needs at an early stage can reduce the risk of reoffending during the pre-trial period.[85]

4. Community Support Consideration
Understanding an accused person's community support system is crucial. Pre-bail social inquiry reports can shed light on the availability of family and community support, which may be factored into bail decisions to ensure a smoother reintegration process.

5. Alignment with Restorative Justice Principles:
The use of pre-bail social inquiry reports aligns with restorative justice principles by considering the accused person's background and potential for rehabilitation. This approach fosters a more empathetic and rehabilitative perspective within the criminal justice system.

4.3 Pre-sentencing Reports
The proposal for pre-sentencing reports involves the preparation of comprehensive reports before sentencing, providing the court with detailed information about an offender's background, circumstances, and potential for

[84] Ibid
[85] Ibid

rehabilitation.[86] These reports are typically prepared by probation officers or other qualified professionals and aim to assist the court in making well-informed sentencing decisions.

It gives a detailed overview of the offender's criminal history, including past convictions and any patterns of criminal behavior. This information assists the court in understanding the extent of the offender's involvement in criminal activities.[87] It also constitutes an evaluation of the risk posed by the offender to the community. This may include an assessment of the likelihood of reoffending and the potential for harm to others.[88]

It identifies the offender's rehabilitation needs, such as substance abuse treatment, mental health interventions, or educational programs. This information guides the court in determining appropriate sentencing options that address these needs. It usually has recommendations for alternative sentencing options, such as probation, community service, or restorative justice programs. The goal is to present the court with a range of options that align with the principles of rehabilitation and community reintegration.[89]

Pre-sentencing reports contribute to more informed and thoughtful decision-making by providing the court with a detailed and nuanced understanding of the offender. The information gathered in pre-sentencing reports allows for the tailoring of sentences to the individual characteristics and rehabilitation needs of the offender, promoting a more individualized and just outcome. By identifying rehabilitation needs and proposing appropriate interventions, pre-sentencing reports emphasize a rehabilitation-focused approach to sentencing rather than solely punitive measures. The risk assessment component helps the court make

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[86]Kerbs, John J., Mark Jones, and Jennifer M. Jolley. (2009). "Discretionary Decision Making by Probation and Parole officers." *Journal of Contemporary Criminal Justice* 25.4: 424-441.
[87] Ibid
[88] Ibid
[89] Ibid

decisions that prioritize community safety, considering the potential for reoffending and harm to others.[90]

Recommendations for Implementation in Kenya:

1. Integration with Probation and Aftercare Services
Ensure seamless integration with Kenya's Probation and Aftercare Services, involving probation officers in the preparation of pre-sentencing reports.

2. Training and Capacity Building:
Provide training for professionals involved in the preparation of pre-sentencing reports to ensure consistency, thoroughness, and adherence to legal and ethical standards.

3. Legal Framework Alignment:
Align the legal framework to explicitly incorporate and guide the preparation and use of pre-sentencing reports within the sentencing process.

4. Victim Input:
Consider mechanisms for incorporating victim impact statements or input into pre-sentencing reports, ensuring a balanced consideration of the impact of the offense.

4.4 Prioritizing the role of Probation and Aftercare Service
The proposal to prioritize the role of Probation and Aftercare Service is centered on recognizing the significance of probation officers and their expertise in rehabilitation and reintegration within the criminal justice process. Prioritizing the role of Probation and Aftercare Service emphasizes a rehabilitation-focused approach to criminal justice. Probation officers are trained to assess an offender's

[90] Ibid

individual needs and design rehabilitation plans that contribute to successful reintegration into society.[91]

Probation officers play a crucial role in conducting individualized assessments of offenders.[92] Recognizing and prioritizing their role ensures that sentencing decisions and alternative sanctions are tailored to the specific circumstances and rehabilitation needs of each offender.[93] Probation officers are well-positioned to recommend and supervise community-based alternatives to imprisonment. This approach promotes a more humane and effective way of addressing offenses, keeping individuals connected to their communities while addressing underlying issues.[94]

Probation officers can play a crucial role in early intervention and diversion programs. By identifying individuals at the early stages of the criminal justice process, probation officers can recommend diversion options and alternative sanctions that prioritize rehabilitation over punitive measures.[95]

Recommendations for Implementation in Kenya

1. Capacity Building and Training:
Invest in training and capacity-building programs for probation officers to enhance their skills in rehabilitation, risk assessment, and alternative dispute resolution. This ensures that they are well-equipped to fulfill their prioritized role.

[91] Ibid
[92] Haqanee Z, Peterson-Badali M and Skilling T, 'Making "What Works" Work: Examining Probation Officers' Experiences Addressing the Criminogenic Needs of Juvenile Offenders' (2014) 54 Journal of Offender Rehabilitation 37
[93] Ibid
[94] 'Roles of Probation and Parole Officers' [2011] Corrections in the Community 219
[95] Ibid

2. Integration with Legal Framework:
Align the legal framework to explicitly recognize and prioritize the role of Probation and Aftercare Service in the criminal justice process. This could involve amendments to existing legislation to emphasize their contributions.

3. Collaborative Protocols:
Establish collaborative protocols between Probation and Aftercare Service and other criminal justice entities, including law enforcement, prosecution, and the judiciary. This ensures effective communication and coordination in the pursuit of rehabilitation goals.

Reference to International Instruments: Bangkok Rules and Tokyo Rules

1. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)[96]
The Bangkok Rules highlight the need to consider non-custodial measures for women offenders, emphasizing alternatives to imprisonment that are responsive to the gender-specific needs and circumstances of women. Rule 26, for example, calls for the development of non-custodial measures, including community service, probation, and suspended sentences, with a focus on rehabilitation and reintegration.[97]

Lessons and Implications:
Lessons from the Bangkok Rules emphasize the importance of gender-sensitive approaches in non-custodial measures. When considering reforms in Kenya's Probation of Offenders Act, there should be a recognition of gender-specific needs, ensuring that alternative measures are tailored to address the unique circumstances of women offenders. This includes incorporating rehabilitation

[96] United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) Resolution adopted by the General Assembly on 21 December 2010 (A/RES/65/229)
[97] Ibid

and reintegration strategies that consider the well-being of women within the criminal justice system.

2. United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)[98]:

The Tokyo Rules provide comprehensive guidelines for the use of non-custodial measures. Rule 2.1 emphasizes the principle that non-custodial measures should be preferred over imprisonment whenever possible. Rule 3 outlines the goals of non-custodial measures, including the protection of society, the prevention of reoffending, and the social reintegration of offenders.[99]

Lessons and Implications:

The Tokyo Rules underscore the preference for non-custodial measures, aligning with the broader principles of Alternative Dispute Resolution. In the context of Kenya's Probation of Offenders Act, the emphasis should be on promoting alternative measures to reduce reliance on imprisonment. This includes a focus on community-based interventions, probation, and other rehabilitative strategies that contribute to the goals of social reintegration and prevention of reoffending.

Conclusion

In the course of my examination of Kenya's Probation of Offenders Act and its interface with international legal instruments, it becomes evident that there exists a dynamic landscape for reform and enhancement. The growing role of Alternative Dispute Resolution (ADR) principles within the Kenyan criminal justice process reflects an evolving understanding of justice—one that emphasizes rehabilitation, individualized assessments, and community-based interventions. The international legal instruments, such as "The Beijing Rules," "Bangkok Rules," and "Tokyo Rules," serve as guiding lights, illuminating pathways towards gender-sensitive, rehabilitative, and community-oriented

[98] United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) Adopted by General Assembly resolution 45/110 of 14 December 1990 resolution 45/110,
[99] Ibid

justice systems. Lessons drawn from these instruments underscore the significance of prioritizing non-custodial measures, adopting gender-sensitive approaches, and recognizing the distinct needs of various demographics within the criminal justice framework.

The paper's exploration of the Probation of Offenders Act revealed both commendable features and identifiable shortfalls. Positive aspects, such as the Act's recognition of non-custodial sanctions and its inclusive approach to ADR, showcase the potential for fostering a more rehabilitative and community-focused ethos. Simultaneously, the Act's limitations, including the scope of probation assessment reports and the marginal role of Probation and Aftercare Services, underscore areas ripe for improvement.

In proposing enhancements, the introduction of pre-charge and pre-bail social inquiry reports that accommodate the views of the prosecutor emerges as a promising avenue. Inspired by international examples and linked with the ODPP Diversion Policy, these proposals aim to fortify decision-making processes, ensuring they are informed, collaborative, and considerate of the unique circumstances of offenders. Furthermore, the call for prioritizing the role of Probation and Aftercare Service seeks to reinforce the importance of a rehabilitation-focused approach. By acknowledging the expertise of probation officers and emphasizing community-based interventions, Kenya can align its criminal justice system with global standards and cultivate a more compassionate and effective response to offenders.

This discourse invites reflection on the dynamic interplay between domestic legislation, international legal instruments, and innovative proposals for reform. The ongoing pursuit of a criminal justice system that balances the scales of justice, fosters rehabilitation, and promotes community well-being is not only commendable but imperative. Through thoughtful reform and strategic integration of ADR principles, Kenya has the opportunity to shape a criminal justice framework that not only meets the needs of its populace but also stands as a beacon of justice on the international stage.

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Office of the Director of Public Prosecutions (ODPP) (2019) Diversion Policy Guidelines and Explanatory Notes

Oumah Jude (2023) 'An Analysis of Effectiveness and Challenges of Rehabilitation and Reintegration in Probation and Aftercare Service'

Prisons Act

Probation of Offenders (Central Probation Committee) Rules

Probation of Offenders Rules

Rocque, M., Bierie, D. and MacKenzie, D. (2010) Social bonds and change during incarceration: testing a missing link in the reentry research. *International Journal of Offender Therapy and Comparative Criminology*, 52, 673-685.

The Probation of Offenders Act

United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) Resolution adopted by the General Assembly on 21 December 2010 (A/RES/65/229)

United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) Adopted by General Assembly resolution 45/110 of 14 December 1990 resolution 45/110,

United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")

Vanstone and Maurice, (2011), The International Origin and Initial Development of Probation. An Early Example of Policy Transfer. *The British Journal of Criminology*: 48.6(2008):735-755

Upholding Ethics, Integrity and Best Practice in Mediation

By: ***Hon. Prof. Kariuki Muigua, OGW****

Abstract

Alternative Dispute Resolution (ADR) mechanisms are growing in Africa. These mechanisms are increasingly being embraced in management of disputes and are now being viewed as 'Appropriate' and not 'Alternative' in management of disputes. As ADR mechanisms including mediation continue to grow, there is a need to create standards and uphold international best practices that will ensure effective and efficient access to justice for all. The paper critically discusses the need for standardization of mediation practice in Kenya by adopting best practices. It examines some of the challenges facing mediation practice in Kenya. It is also explores measures adopted towards fostering best practices in mediation at both the global and national level. The paper further suggests recommendations aimed at upholding ethics, integrity and best practice in mediation.

1.0 Introduction

Mediation is one of the mechanisms classified under Alternative Dispute Resolution (ADR)[1]. The concept of ADR entails a set mechanisms for that are applied in managing disputes that may be linked to but function outside formal court litigation processes[2]. ADR has also been defined a set of processes that are applied to manage disputes without resort to adversarial litigation[3]. It encompasses various processes including negotiation, mediation, arbitration,

* *PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. in Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; ESG Consultant; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, Faculty of Law; Member of the Permanent Court of Arbitration (PCA) [October, 2023].*

[1] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

[2] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

[3] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others[4].

ADR mechanisms are recognized at the global level under the *Charter of the United Nations* which states that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice[5]. Further, in Kenya, ADR mechanisms are recognized under the Constitution which mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms[6]. ADR mechanisms are viewed as ideal in enhancing access to justice due to their attributes which include privacy, confidentiality, flexibility, informality, party autonomy and the ability to foster expeditious and cost effective management of disputes[7].

Mediation as an ADR process has been defined as method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussions and the flow of information, and thus aiding in the process of reaching an agreement[8]. It has been observed that mediation is a continuation of the negotiation process since it arises where parties to a conflict have attempted negotiations, but have reached a deadlock[9]. Parties therefore involve a third party known as a mediator to assist them continue with the negotiations and ultimately break the deadlock[10]. It has

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[4] Ibid
[5] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 33 (1)
[6] Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi
[7] Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at *http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-inKenyaSTRATHMORE-CONFERENCE-PRESENTATION.pdf* (Accessed on 17/10/2023)
[8] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition., 2017
[9] Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289
[10] Ibid

been asserted that a mediator does not have the power to impose a resolution, but rather facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem solving to enable the parties to reach their own agreement[11].

Mediation has certain advantages which makes the process viable in managing disputes. Its key features towards this end include informality, flexibility, efficiency, confidentiality, party autonomy and the ability to promote expeditious and cost effective management of disputes[12]. It has also the ability to preserve relationships due to its potential to address the root causes of the conflict thus negating the need for future conflict or conflict management[13]. Mediation alongside other ADR mechanisms have been practiced in Africa for many centuries[14]. These mechanisms were considered as 'Appropriate' and not 'Alternative' in management of disputes in Africa since they were able to safeguard values that were inherent in African societies and foster reconciliation, peace and social cohesion[15].

It has correctly observed that mediation alongside other ADR mechanisms are growing in Africa due to the general acceptance across the board of ADR processes as ideal in dispute management and adoption of measures such as Court Annexed Mediation in Kenya[16]. Consequently, as ADR mechanisms including mediation continue to grows, there is a need to create standards and

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[11] Ibid
[12] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit
[13] Ibid
[14] Ibid
[15] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at https://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf (Accessed on 17/10/2023)
[16] The World Bank., 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans.' Available at https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans (Accessed on 17/10/2023)

uphold international best practices that will ensure effective and efficient access to justice for all. The paper critically discusses the need for standardization of mediation practice in Kenya by adopting best practices. It examines some of the challenges facing mediation practice in Kenya. It is also explores measures adopted towards fostering best practices in mediation at both the global and national level. The paper further suggests recommendations aimed at upholding ethics, integrity and best practice in mediation.

2.0 Ethics, Integrity and Best Practices in Mediation

Ethics, integrity and best practices are fundamental in mediation. They serve various functions such as guiding the conduct of mediators, informing parties to the mediation process about the standards they should expect during the process and promoting public confidence in mediation as a conflict management process[17].

Various standards have been developed towards enhancing ethics, integrity and best practices in mediation.

2.1 Impartiality

Impartiality in mediation requires a mediator to refrain from exhibiting favoritism or prejudice towards any party or any position taken by a party in mediation[18]. A mediator is expected to remain impartial throughout the course of the mediation[19]. Further, impartiality requires a mediator to be aware of and avoid the potential for bias based on circumstances such as the parties' backgrounds, personal attributes, or conduct during the session, or based on any pre-existing knowledge of or opinion about the merits of the dispute being mediated[20]. In the event that a mediator is unable to conduct the mediation

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[17] Law Council of Australia., 'Ethical Guidelines for Mediators.' Available at https://lawcouncil.au/docs/db9bd799-34d8-e911-9400-005056be13b5/Ethical (Accessed on 18/10/2023)

[18] JAMS Mediation Services., 'Mediators Ethics Guidelines.' Available at https://www.jamsadr.com/mediators-ethics/ (Accessed on 18/10/2023)

[19] Ibid

[20] Ibid

process in an impartial manner, he or she is expected to withdraw from conducting the mediation[21].

2.2 Conflict of Interest

A mediator is expected to avoid any conflict of interest during the conduct of the mediation. Conflict of interest in mediation may arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any party to the mediation, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality[22]. In order to avoid such situations, a mediator is expected to disclose all actual and potential conflicts of interest known to him or her[23]. Further, the mediator is expected to disclose instances of conflict of interest that may arise during the course of the mediation[24]. The rules on conflict of interest are aimed at preventing bias in mediation and fostering fairness and integrity of the mediation process[25].

2.3 Competence

Competence requires a mediator to know the limits of his or her ability; to avoid taking on disputes that he or she is not equipped to handle; and to communicate candidly with the parties about his or her background and professional experience[26]. Competence in mediation comprises of appropriate knowledge and skills which would normally be acquired through training, education, and experience[27]. It has been asserted that a person who agrees to act as a mediator holds out to the parties an appropriate level of expertise and competence to

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[21] Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit
[22] McCorkkle. S., 'The Murky World of Mediation Ethics: Neutrality, Impartiality, and Conflict of Interest in State Codes of Conduct.' 23 *Conflict Resol*. Q. 165 (2005-2006)
[23] Ibid
[24] Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit
[25] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Available at https://kmco.co.ke/wp-content/uploads/2022/05/Promoting-ProfessionalConduct-Ethics-Integrity-Etiquette-in-ADR.pdf (Accessed on 18/10/2023)
[26] Hoffman. D., 'Ten Principles of Mediation Ethics.' Available at https://blc.law/wp-content/uploads/2016/12/2005-07-mediation-ethics-branchmainlanguagedefault.pdf (Accessed on 18/10/2023)
[27] Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

mediate effectively[28]. As a result, a mediator is expected to avoid taking disputes in cases where such a mediator is not competent and withdraw from acting in cases where he or she can longer competently manage the dispute[29]. Competence is vital in ensuring the integrity and appropriateness of the mediation process.

2.4 Privacy and Confidentiality

Privacy and confidentiality are among the key attributes of mediation[30]. These features require mediators to safeguard the privacy of the mediation process by refraining from disclosing any matter that arose during the mediation including information about how the parties acted in the mediation process, the merits of the case, any settlement offers or agreed outcomes unless the parties agree otherwise[31]. Privacy and confidentiality are central to mediation since they allow parties to freely engage in candid, informal discussions of their interests towards reaching the best possible resolution of their dispute without concerns of such information leaking to third parties[32]. Mediators therefore have a duty to maintain privacy and confidentiality and not disclose any information to third parties unless in situations where such disclosure is allowed[33]. Privacy and confidentiality are cardinal in upholding ethics, integrity and best practice in mediation.

2.5 Quality of the Mediation Process

A mediator has an ethical duty to safeguard the quality of the mediation. He or she should ensure that the mediation proceedings are conducted in a satisfactory manner by encouraging mutually respectful behaviour among the parties[34]. A mediator should further be diligent and ensure procedural fairness in order to

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[28] Ibid
[29] Ibid
[30] Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit
[31] Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit
[32] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' *University of Miami Law Review*, Volume 56, No.4
[33] Ibid
[34] Fullerton. R., 'The Ethics of Mediation-Arbitration.' Available at https://www.richardfullerton.com/ethics_article.pdf (Accessed on 18/10/2023)

foster the quality of the mediation[35]. In addition, the mediator should discourage conduct by the parties which may undermine the quality of the mediation proceedings and terminate such proceedings where the parties' conduct undermine the quality of the mediation[36].

2.6 Costs and Fees

Mediators have an ethical duty to ensure full and fair disclosure of any costs and fees that the parties will incur during the mediation[37]. In order to ensure integrity and best practice in regards to fees, a mediator is required to obtain an agreement from the parties about the fees and charges payable for the mediation and about how those fees and charges are to be apportioned between them[38]. Further, a mediator should not charge fees based on the outcome of a mediation or calculated in a way that could influence the manner in which the mediator conducts the mediation[39]. A mediator is therefore expected to ensure appropriateness and reasonableness of fees in order to uphold the integrity of the mediation[40].

2.7 Termination of Mediation

In order to uphold integrity and best practice in mediation, a mediator has an ethical duty to terminate the mediation proceedings in cases where a party is abusing the process or where there is no reasonable prospect for a resolution[41]. A mediator may also terminate mediation proceedings if he or she is of the view that a resolution is being reached that to the mediator appears unenforceable or illegal having regard to the circumstances of the dispute and the competence of

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[35] Ibid
[36] Ibid
[37] Hoffman. D., 'Ten Principles of Mediation Ethics.' Op Cit
[38] Mediation Training Institute, East Africa., 'Charging for Mediation.' Available at https://mtieastafrica.org/mediation-centre/charges-for-services/ (Accessed on 18/10/2023)
[39] Ibid
[40] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit
[41] Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

the mediator for making such an assessment[42]. Termination of mediation proceedings is a key measure towards upholding ethics, integrity and best practice in mediation by preventing abuse of the mediation process and outcomes that may be illegal or unenforceable[43].

3.0 Enforcing Ethics, Integrity and Best Practices in Mediation

There has been progress towards enforcing the foregoing standards on ethics, integrity and best practices in mediation as set out in various laws, codes and institutional rules on mediation. The United Nations Commission on International Trade Law (UNCITRAL) envisages the use of mediation in management if disputes arising in the context of international commercial relations and has formulated mediation rules towards this end[44]. The *UNCITRAL Mediation Rules* contain salient provisions geared towards upholding ethics, integrity and best practice in mediation[45]. They stipulate appointment of a mediator with relevant professional expertise and qualifications and ability to conduct the mediation[46]. They also envisage the appointment of an independent and impartial mediator[47]. The rules also require a mediator to maintain fair treatment of the parties while conducting mediation proceedings[48]. Further, the rules require all parties to the mediation to maintain confidentiality in relation to all information relating to the mediation, including, if relevant, the settlement agreement unless otherwise agreed by the parties or where disclosure is required by the law[49].

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[42] Ibid
[43] Ibid
[44] United Nations Commission on International Trade Law Mediation Rules, 2021., Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369_mediation_rules_ebook_1.pdf (Accessed on 18/10/2023)
[45] Ibid
[46] Ibid, Article 3 (4) (a)
[47] Ibid, Article 3 (4) (d)
[48] Ibid, Article 4 (2)
[49] Ibid, Article 6

Upholding ethics, integrity and best practice in mediation is also a fundamental requirement under the United Nations Convention on International Settlement Agreements Resulting from Mediation (*Singapore Convention*)[50]. The Convention provides the legal framework for enforcement of international settlement agreements resulting from mediation across jurisdictions[51]. The Convention sets out several grounds that may warrant refusal to grant relief in terms of enforcing an international settlement agreement resulting from mediation[52]. Such grounds include where there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement[53]. In addition, this may arise where there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's *impartiality* or *independence* and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement[54]. It is therefore important to uphold ethics, integrity and best practice in mediation in order to ensure enforcement of international settlement agreements resulting from mediation under the Singapore Convention.

The *International Chamber of Commerce (ICC) Mediation Rules*[55] also give prominence to ethics, integrity and best practice in mediation. The rules require a prospective mediator to sign a statement of acceptance, availability, impartiality and independence before appointment or confirmation[56]. A prospective mediator is also required to disclose in writing to the Centre any facts or circumstances

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[50] United Nations General Assembly., 'United Nations Convention on International Settlement Agreements Resulting from Mediation.' A/73/496., Available at https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf (Accessed on 18/10/2023)

[51] Ibid

[52] Ibid, Article 5

[53] Ibid, Article 5 (1) (e)

[54] Ibid, Article 5 (1) (f)

[55] International Chamber of Commerce., 'Mediation Rules, in force as from 1st January 2014.' Available at https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf (Accessed on 18/10/2023)

[56] Ibid, Article 5 (3)

which might be of such a nature as to call into question the mediator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the mediator's impartiality[57]. These provisions are aimed at upholding the ethical standards of independence and impartiality in mediation. Further, in order to uphold competence, the rules require the Centre to consider the attributes of the prospective mediator including skills, training, qualifications, experience and the ability to conduct the mediation when confirming or appointing a mediator[58]. The rules also require the mediator to treat parties with fairness and impartiality while conducting the mediation[59]. In addition, the rules require each party to act in good faith throughout the mediation in order to uphold ethics, integrity and best practice[60]. The ICC mediation rules also uphold the ethical duty of confidentiality and require the proceedings and any settlement agreement to be kept private and confidential and not be disclosed unless by an agreement of the parties or where disclosure is required by applicable law[61].

The *London Court of International Arbitration (LCIA) Mediation Rules*[62] also seek to uphold ethics, integrity and best practice in mediation. In order to uphold competence, the rules require a prospective mediator to disclose his or her qualifications and past and present professional positions[63]. A prospective mediator is also required to disclose any circumstances that may give rise to any justifiable doubts as to his or her impartiality or independence[64]. In addition, the rules require all parties to a mediation to uphold confidentiality and privacy[65].

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[57] Ibid
[58] Ibid, Article 5 (4)
[59] Ibid, Article 7 (3)
[60] Ibid, Article 7 (4)
[61] Ibid, Article 9
[62] The London Court of International Arbitration., Mediation Rules effective 1st October 2020., Available at https://www.lcia.org/Dispute_Resolution_Services/lcia_mediation_rules_2020.aspx (Accessed on 18/10/2023)
[63] Ibid, Article 4.1
[64] Ibid
[65] Ibid, Article 12

This is to be achieved by ensuring that all mediation sessions are private and are only attended by the mediators, the parties, parties' representatives and witnesses[66]. Further, disclosure of any information regarding the mediation, any settlement terms or the outcome of the mediation is precluded unless agreed by the parties or required by law[67].

The *Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators*[68], also sets out fundamental ethical guidelines and best practices for persons appointed to mediate disputes under the *NCIA Mediation Rules*[69]. Among the fundamental ethical requirements under the NCIA Code of Conduct for Mediators is independence and impartiality[70]. Before accepting an appointment to act, a prospective mediator is required to disclose anything within his or her knowledge that may materially affect the mediator's impartiality[71]. The Code of conduct further requires a mediator to avoid conflict of interest or the appearance of a conflict of interest during and after mediation[72]. Conflict of interest in mediation may arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and either of the participants in the mediation process[73]. The Code further requires a mediator to ensure that he or she has requisite competence required to mediate effectively before accepting appointment[74]. Such competence in mediation can be acquired through education, training, experience and cultural understandings[75]. In

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[66] Ibid, Article 12.1
[67] Ibid, Article 12.3
[68] Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021, available at https://ncia.or.ke/wp-content/uploads/2021/07/5.-NCIA-CODE-OF-CONDUCT-FOR-MEDIATORS2021.pdf (Accessed on 18/10/2023)
[69] Nairobi Centre for International Arbitration (NCIA)., Mediation Rules, 2015., Available at https://ncia.or.ke/wp-content/uploads/2021/02/mediation_rules_2016.pdf (Accessed on 18/10/2023)
[70] Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021, Op Cit
[71] Ibid
[72] Ibid
[73] Ibid
[74] Ibid
[75] Ibid

addition, the Code requires mediators to promote confidentiality, quality and fairness while conducting the mediation[76].

Upholding ethics, integrity and best practice is also envisaged under the *Kigali International Arbitration Centre Mediation Rules*[77]. The rules require every prospective mediator to disclose any facts or circumstances which might affect or call into question his or her impartiality, independence or may be perceived to create a conflict of interest[78]. Disclosure is also expected if such facts or circumstances arise in the course of the mediation[79]. Further, under the rules, a mediator is expected to conduct the process with fairness to all parties and ensure that all parties have adequate opportunities to be heard[80]. In addition, in order to ensure integrity and best practice in mediation, the rules require a mediator to terminate the process if the mediator determines that a settlement cannot be reached[81]. Another fundamental ethical requirement under the rules is confidentiality. The rules require every person involved in the mediation, including the parties, the mediator, and the Centre, to keep confidential all documents, information and materials as well as all terms of any settlement in connection with the mediation unless the parties expressly agree in writing or where disclosure is required under law[82].

It is thus evident that there has been progress towards upholding ethics, integrity and best practice in mediation. However, some ethical dilemmas are likely to arise in mediation. It has been asserted that the impartiality of mediators is often challenged by prior relationships with the parties or their emotional reactions to

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[76] Ibid
[77] Kigali International Arbitration Centre., 'Mediation Rules, 2015.' https://kiac.org.rw/wp-content/uploads/2023/06/Mediation-Rules.pdf (Accessed on 19/10/2023)
[78] Ibid, Article 7
[79] Ibid
[80] Ibid, Article 8 (2)
[81] Ibid, Article 9 (1) (b)
[82] Ibid, Article 12 (1)

the parties' behavior during mediation[83]. Further, mediators often face the ethical dilemma of maintaining confidentiality in cases of possible illegal actions of the parties or the potential of unfair settlement, or where disclosure will convince the party to accept a settlement proposal[84]. Further, since mediation is premised on voluntariness, ethical challenges may arise in cases of lack of consent due to coercion, mental disturbance or lack of information[85]. Further, it has been observed that most mediators are often torn in between impartiality and the temptation to give solutions or direct the process toward more fair solutions and the tension between staying neutral and providing necessary professional legal or therapeutic advice[86].

It has also been argued that ethical problems may arise where mediation is used by the parties to gain information, win time, or intimidate the other party[87]. Mediators also often face competence challenges since in certain cases the skills that the dispute demands go beyond the mediator's training and often involve interpreting psychological or emotional aspects of conflict[88]. In addition, in processes such as Court Annexed Mediation in Kenya, a mediator may face ethical concerns between the parties' interests for fair and efficient process and pressure from the court to finish the case in time[89]. Ethical problems may also arise in respect of costs and fees of mediation in instances where mediators charge

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[83] Bush. R., 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications.' Available at https://www.beyondintractability.org/bksum/bush-dilemmas (Accessed on 19/10/2023)

[84] Ibid

[85] Burns. R., 'Some Ethical Issues Surrounding Mediation.' Available at *https://www.researchgate.net/publication/228187058_Some_Ethical_Issues_Surrounding_Mediation#:~:text=A%20progressively%20larger%20portion%20of,of%20mediation%20without%20much%20change.* (Accessed on 19/10/2023)

[86] Ibid

[87] Ibid

[88] Muigua. K., 'Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation.' Available at https://kmco.co.ke/wp-content/uploads/2018/08/Addressing-the-Psychological-Aspects-of-Conflict-Through-Mediation-3RD-AUGUST-2018-1.pdf (Accessed on 19/10/2023)

[89] Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' *Alternative Dispute Resolution* (2017): 130

exorbitant fees thus defeating the essence of mediation of facilitating cost effective management of disputes[90]. It is necessary to address these concerns in order to uphold ethics, integrity and best practice in mediation.

4.0 Way Forward

In order to uphold ethics, integrity and best practice in mediation, it is imperative to enhance training and standards among mediators. It has been asserted that training of mediators can help them recognize the existence and importance of ethical dilemmas in mediation and generate responses to them in specific situations[91]. In addition, training is vital in making mediators familiar with the standards of practice, with what are appropriate and inappropriate responses to ethical dilemmas[92]. It has further been asserted that there is a need for the mediators to continually engage in continuous professional development seminars to enable them appreciate the relevant skills that they must acquire in their journey to becoming effective mediators[93]. These skills include the ability to identify and address any psychological dimensions of the conflict in the mediation process[94]. Training is thus vital in enabling mediators uphold ethics, integrity and best practice in mediation.

Further, it vital for mediation service providers such as mediation centres and institutions to facilitate adherence to ethical standards, integrity and best practices in mediation[95]. Ethical codes and standards formulated by various ADR bodies including mediation centres and institutions have been criticized as being

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[90] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

[91] Bush. R., 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications.' Op Cit

[92] Ibid

[93] Muigua. K., 'Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation.' Op Cit

[94] Ibid

[95] Anderson. D., 'The Importance of Ethics in the Practice of Mediation.' Available at https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5776&context=sol_research (Accessed on 19/10/2023)

merely soft law norms which lack enforcement[96]. It is therefore important to ensure that such codes and standards are enforced in order to uphold ethics, integrity and best practice in mediation. It has been pointed out that the primary regulators of ethical conduct, integrity and best practice in ADR are the appointing institutions and parties through challenge procedures[97]. Mediation centres and bodies can therefore foster ethics, integrity and best practice in mediation through exercising due diligence while appointing mediators in order to avoid cases of impartiality and conflict of interest and ensure competence, fostering institutional oversight during the mediation to ensure compliance with ethics and best practice, facilitating communication between the parties and addressing allegations of ethical breaches during mediation[98].

Mediators also have a role to ensure that the mediation process is conducted in a manner that upholds ethics, integrity and best practice. Mediators should ensure that they adhere to the rules of ethics, integrity and best practice in mediation[99]. This includes avoiding conflict of interest, being impartial during the mediation process, accepting appointments only in cases where they are competent, conducting the mediation process with fairness and integrity and maintaining the confidentiality of the process[100]. Advocates and parties' representatives in mediation also have a duty to uphold ethics, integrity and best practice by acting with diligence , competence and honesty[101]. They have a duty to be courteous towards each other and to also avoid misleading the mediator[102]. . Parties also have a duty to uphold ethics, integrity and best practice in mediation by acting in a courteous and respectful manner towards each other and the mediator and

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[96] Hacking. L., & Berry. S., 'Ethics in Arbitration: Party and Arbitral Misconduct.' Available at https://www.lordhacking.com/Documentation/Hacking%20&%20Berry%20-%20Ethics%20in%20Arbitration%20April%202016.pdf (Accessed on 19/10/2023)
[97] Ibid
[98] Anderson. D., 'The Importance of Ethics in the Practice of Mediation.' Op Cit
[99] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit
[100] Ibid
[101] Anderson. D., 'The Importance of Ethics in the Practice of Mediation.' Op Cit
[102] Ibid

disclosing all material facts to aid in the negotiations and resolution of the dispute[103].

In addition to the foregoing measures, it is important to continue enhancing access to justice in Africa through ADR mechanisms including mediation. Mediation alongside other ADR mechanisms have been part and parcel of the African culture since time immemorial and were always the first point of call whenever a dispute arose[104]. These mechanisms were able to safeguard the values and ethics inherent in African societies including peace, reconciliation, and restoration of social harmony[105]. They were therefore considered as 'Appropriate' and not 'Alternative' in management of disputes[106]. There is need to (re)focus mediation and other ADR mechanisms in Africa in a manner that fosters the true spirit of conflict management inherent in African societies which is reconciliation and restoration of parties' relationships[107]. This will be integral in realizing the potential of ADR as 'Appropriate' Dispute Resolution in Africa[108].

5.0 Conclusion

ADR mechanisms including mediation are growing in Africa due to the general acceptance across the board of ADR processes as ideal in dispute management[109]. Consequently, as ADR mechanisms including mediation continue to grows, there is a need to create standards and uphold international best practices that will ensure effective and efficient access to justice for all. Some of the standards

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[103] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' 28 *Fordham Urb*. L.J. 979-990 (2001)

[104] Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Available at https://kmco.co.ke/wp-content/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-Dispute-Resolution-in-Kenya-Prospects-and-Challenges.pdf (Accessed on 19/10/2023)

[105] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

[106] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

[107] Ibid

[108] Ibid

[109] The World Bank., 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans.' Op Cit

adopted towards upholding ethics, integrity and best practice in mediation include impartiality, rules on conflict of interest, competence, privacy and confidentiality, quality of the mediation process and rules on costs and fees[110]. However, several ethical problems may arise in mediation which may affect impartiality, confidentiality, competence, quality and integrity of the mediation process[111]. It is therefore necessary to uphold ethics, integrity and best practice in mediation. This can be achieved through enhancing training and standards for mediators, facilitating adherence to ethical standards, integrity and best practices in mediation by mediation centres and institutions, encouraging mediators to conduct mediation proceedings in a manner that upholds ethics, integrity and best practice[112]. It is also important to continue enhancing access to justice in Africa through ADR mechanisms including mediation in a manner that fosters the true spirit of conflict management inherent in African societies which is reconciliation and restoration of parties' relationships[113]. Upholding ethics, integrity and best practice in mediation is practicable.

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[110] Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit
[111] Bush. R., 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications.' Op Cit
[112] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit
[113] Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

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Exploring the Role of Mediation in Promoting Small and Medium Enterprises (SMEs) and Fostering Economic Growth in Kenya

By: Atundo Wambare, Esq *

Abstract

Economic growth is the hallmark of any country for delivery of services is dependent on it, this paper offers an in-depth analysis of the use of mediation in promoting the growth of small and medium enterprises (SME's). This paper makes recommendations on how best mediation can be harnessed as a tool for economic growth in Kenya. The main argument is that mediation as a means of alternative dispute resolution can be utilized as a driver of the economy to spur economic growth.

1. Introduction

The past decade has seen small and medium enterprises (SMEs) as well as entrepreneurship occupy the center stage of Kenya's economic development strategy. According to the Kenya National Bureau of Statistics[1], SMEs contribute about 33.8% of Kenya's Gross Domestic Product (GDP) and employ above 30% of Kenya's population. Throughout this essay, the meaning of SMEs[2] has been consistent with the definition provided for in the Micro, Small and Medium Enterprises Act No. 55 of 2006, where SMEs are referred to as enterprises which are categorized into micro, small and medium enterprises. The Act furnishes a clear classification of the enterprises based on the assets in form of the initial cost excluding land and the number of employees. Specifically, a micro enterprise is one which employs less than 10 employees and has an annual turnover and/or total assets not exceeding five million Kenya shillings. On the other hand, a small enterprise is one which employs above 10 but not exceeding 50 employees and

* *CPM MTI (EA), Lawyer*

[1] Kenya National Bureau of Statistics (KNBS); Leading Economic Indicators (LEI), December 2023

[2] Small, Micro and Small Enterprises Act no 55 of 2006

has an annual turnover and/or total assets exceeding five million Kenya shillings but not exceeding fifty million Kenyan shillings. Lastly, a medium enterprise is one which employs over 50 but not exceeding 100 employees and has an annual turnover and/or total assets exceeding fifty million Kenyan shillings but not exceeding two hundred million Kenya shillings. These classifications are extremely important in appreciating the role that these enterprises play in the economic growth of Kenya because policy and decision makers can align their visions with the interests of the majority through appreciating the unique nature of these enterprises and the relevance of the goods and services which they provide.

The definition also takes into account the global definition of SMEs as provided for by the European Union, which states that micro enterprises are those with less than 10 employees, small enterprises with less than 50 employees and medium enterprises with less than 250 employees. These definitions have been adopted in several jurisdictions across the globe, including Kenya and they seek to support the growth and development of SMEs and to ensure that they appropriately benefit from policy incentives and concessions. The reference to the European Union definition is also significant given that the legal and policy environment for SMEs in Kenya seeks to embrace global practices in supporting the sector for the common good of providing an enabling environment for growth and development. It is important to note that the legal and policy environment for SMEs in Kenya is largely fragmented and this makes it relatively difficult to differentiate the legal and institutional frameworks that are specifically dedicated to SMEs in relation to the wider dispute resolution regimes that are available in the country.

1.1 Background of Small and Medium Enterprises (SMEs)

On the other hand, a cheap, expeditious and informal form of an alternative dispute resolution mechanism such as mediation can greatly support and facilitate economic activity and growth for SMEs. Therefore, the paper will argue and demonstrate that the use of mediation as an effective alternative dispute

resolution can promote and support SMEs in Kenya while addressing the challenges and barriers that have previously hindered their growth.
By introducing a dynamic, efficient and predictable legal and regulatory system, with the use of modern and ICT[3] supported courts and judicial processes that promote timely completion of cases, it is hoped that the general business environment for economic growth and development of SMEs[4] will be improved. It is believed that a well-functioning legal and justice system with such features will enhance public and investors' confidence, reduce the cost and time spent in seeking redress through courts, enhance the enforcement of contracts. Economic leaders and policymakers in Kenya and across the globe have recognized the importance of providing a conducive legal and regulatory environment for SMEs to flourish and achieve their full potential.

Researchers have identified that compared to large firms, SMEs experience more business and operational challenges. This is because most SMEs are characterized by a limited internal capacity to innovation, high bureaucracy and leadership problems, among others. SMEs tend to have a more centralized hierarchical leadership structure that can be inefficient in responding to market dynamics and quick decision making. This is compounded by ineffective management, in particular the lack of a well-defined and coherent business strategy and the over-reliance on a few individual leaders to guide the company forward.

Unfortunately, most SMEs in Kenya face numerous challenges, especially when it comes to the growth and operations of businesses. Some of these challenges include lack of access to markets, limited financial resources, inefficient business structures, low entrepreneurship quality, ineffective business strategy and operations, and lack of access to appropriate business professional and support

[3] Dr. Kariuki Muigua, Ph. D; Access to Justice and Alternative Dispute Resolution in Kenya,2018.
[4] Ibid

services, formidable competition from large enterprises and poor regulatory frameworks, among others.

Small and medium-sized enterprises (SMEs) play a crucial role in the economy and are often recognized as the engines of economic growth, innovation, and employment. In both developing and developed countries, SMEs contribute up to 60-70% of the total number of jobs in the private sector and also significantly contribute to the Gross Domestic Product (GDP)[5]. In Kenya, for instance, SMEs contribute about 30% of the GDP while providing about 80% of employment to the Kenyan workforce, according to the Kenya National Bureau of Statistics.

1.2 Importance of SMEs in Economic Growth

SMEs play an important role in economic development, particularly in developing countries. In Kenya, SMEs contribute about 40% of the country's total employment and 30% of the GDP. These enterprises are a significant source of employment, innovation, and growth, and can therefore make a substantial contribution to the overall objective of poverty alleviation in the country. Because of their small size, SMEs are flexible and can adapt to changing market demands more quickly. They are also more reliant on local resources and suppliers and their profits tend to be reinvested in the local economy. As a result, earnings from SMEs in developing countries are more likely to generate growth and development and to remain in the country, rather than being siphoned off to other economies[6]. SMEs also play a critical role in promoting social and economic objectives such as employment creation, balanced regional development and, more recently, poverty reduction. With the emergence of global trends and new technologies, it is vital to develop and sustain a vibrant small business sector. An efficient and structured mediation regime can certainly promote the development of SMEs and an economic environment conducive to strong economic growth. By

[5] Ibid
[6] Jaqueline Kalekye Musyoka and Caren Akomo Ouma; Effect of Crisis Leadership on Performance of SME's During Covid-19 Pandemic in Nairobi County, Kenya; Kabarak Journal of Research Innovation, 10 February 2024

focusing on growth from within the economy and further developing the SME sector, mediation could also be seen as a sustainable alternative to foreign direct investment and large businesses of a more global nature.

2. Traditional methods of dispute resolution for smes in Kenya

Disputes are bound to occur in any setting or society and when they do a quick solution is preferred, that may not necessarily be the case as some disputes are more complex than others or require the assistance of other parties outside the jurisdiction, In Kenya, most disputes end up in court as that's where people believe they will find justice, whether they get it or not is another question altogether. Article 159[7] recognizes other forms of dispute resolution like negotiation, mediation, conciliation and arbitration as well as other forms of traditional dispute resolution mechanisms to ease the burden on our courts and promote access to justice. Dr Kariuki Muigua in his paper[8] avers to their effectiveness in managing conflicts as they are flexible, affordable, less time consuming, private and confidential and creative in nature, it should be noted that these methods or their outcomes should not be repugnant to justice and morality and the rule of law. These however are not uniquely African as some societies in Europe also utilized them to stop cattle theft[9] that was rampant in their communities[10] in many African traditional societies customary laws are used to settle a majority of disputes which do not reach the courts and are considered to be in the majority.

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[7] Constitution of Kenya 2019, Article 159
[8] Dr. Kariuki Muigua; Traditional Dispute Mechanisms Under Article 159 of The Constitution of Kenya 2010, 2018
[9] Julio Ruffini; "Disputing Over Livestock in Sardania" in Laura Nader & Harry Todd Jr (eds) *The Disputing Process, Law in Ten Societies*, (New York, Columbia University Press 1978), 209-245
[10] Ibid

3. Introduction to mediation as an alternative dispute resolution mechanism in Kenya.

Mediation[11] is a form of dispute resolution under Article 159(2) c, it is a process where a neutral third party intervenes in order to broker a truce between two warring parties, this has been used in northern Kenyan communities[12], this is mainly to maintain order in the resolution process addressing power imbalances incase the parties have unequal powers, the parties are in charge of the outcome while the mediator is in charge of the process. The parties are allowed to be creative and brainstorm in order to reach a consensus which is beneficial to both leading to a win-win solution. Mediation if harnessed well, can go to the root cause and solve a dispute before it escalates into a conflict.

In 2016 we saw the introduction of Court Annexed Mediation[13] (CAM) in Kenya, where in order to improve access to justice and reduce the backlog in the judiciary, civil cases are screened and subsequently referred to mediation, where a less adversarial process takes place to solve the dispute, incase the parties fail to agree they are referred back to court for the normal litigation, most of these cases are resolved at mediation.

4. Case studies of successful mediation outcomes in Kenya.

The use of mediation in Kenya is catching up with many organizations and companies embracing it due to its nature, being private and confidential, party autonomy, being affordable and time saving in addition to creativity and brainstorming to preserve relationships due to its non-adversarial nature. There have been concerted efforts to have mediation streamlined in contracts with the Kenya Private Sector Alliance (KEPSA) setting up a mediation center to assist its membership in resolving of disputes.

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[11] Ibid
[12] Ibid
[13] Court Annexed Mediation; A mediation process done under the umbrella of the court (Milimani Law Courts) 2016

The Kenya Revenue Authority (KRA)[14] is doing well in this endeavor as it has a dedicated mediation department where taxpayers can lodge their complaints, there is the privacy and all attributes of mediation clients are invited to present their side of the story and a consensus is reached on the amount of taxes as well as the method of payment, this has resulted in ease of doing business taxpayers are more enlightened on tax matters and there is circulation of money as that which could have been tied up in courts is released to grow the economy.

4.1 Case Study 1: Mediation in the Manufacturing Sector

In construction matters mediation has proved to be a savior in many instances however it should be noted that there are instances where litigation would be ideal where an injunction is sought, the courts can offer that remedy as mediation is pursued. Mediation can be successful in 92% of the disputes, because of its nature being party driven the parties can get creative and formulate workable solutions while brainstorming. in one case[15] a successful party may at times bear the brunt of penalties if they refuse to engage in ADR, while in another[16] the court pronounced itself on its powers to allow for ADR to take place amidst the proceedings. This shows that mediation is an effective dispute resolution method and a clause should be inserted in every contract.

4.2 Case Study 2: Mediation in the Service Industry

The service industry is as wide as can be, we shall focus on the music sector where innovation happens every day, soundtracks are stolen everyday and copyrights infringed due to its nature, the Music Copyright Society of Kenya (MCSK) regulates the industry though innovation moves at a very high pace, Kenya Copyright Board (KECOBO) applies the WIPO[17] standards in ensuring compliance with our local laws but their efforts are not enough, the introduction

[14] Tax Procedures Act, No. 29 of 2015 (TPA) Provides for an elaborate Internal Dispute Resolution Mechanism (IDRM)
[15] Halsey V Milton Keynes General NHS Trust [2004] EWCA Civ 576
[16] Churchill V Merthyr Tydfil CBC [2023] EWCA Civ 1416
[17] World Intellectual Property Organization (WIPO)

of mediation clauses in the artistes contracts can go a long way in resolving the disputes and have their songs released on time for maximum benefits as well as restoring relationships with the producers and the marketers

4.3 Lessons Learned from Successful Mediation Cases

By infusing mediation into an organization, you reduce the risk of a real dispute as the parties can sit and agree on the way forward before the blip graduates into something bigger[18] relationships can be restored to enhance better results in the workplace boosting the morale of the workers. Once a chain of communication has been created, the management can get feedback on matters affecting the public and its outward projection to the public.

5. Analyzing the impact of resolving disputes through mediation in Kenya.

At the international level, mediation has gained prominence with the recognition of its use in settling commercial disputes, the UNCITRAL model law in International Commercial Mediation and International Settlement Agreements Resulting from Mediation(2018) places mediation on a pedestal to be used alongside arbitration in the use of resolving commercial disputes due to its nature, being voluntary, cost effective, private and confidential, party autonomy and the ability of the parties to come up with creative solutions to further their relationships, this goes a long way in ensuring that businesses do not stagnate, the stalemate is resolved in a record time and parties go back to their businesses. In Kenya the court annexed mediation through its pilot project in 2016 showed that mediation can and has been used to settle disputes in record time with benefits that are clearly visible, the economy gets a boost from mediation as Kenya Revenue Authority (KRA)[19] indicates that they managed to release s15.6 billion[20] in tax that were tied up in the courts through the mediation process in 2022 with a total of 1,038 cases effectively resolved. Many other corporate entities

[18] Eric Webb; Tactful Use of Mediation in Construction Disputes, Insights/Thoughts Mediation In Construction Disputes 2024
[19] Ibid
[20] Constant Munda; KRA Unlocks 15.6 billion Taxes from Mediation; Business Daily, July 13, 2023

have learnt through the KRA example and are following suit in order to avoid the costly and time-consuming litigation through the courts, companies are encouraged to include a mediation clause in all their contracts so that in the face of disputes, it automatically becomes the first in line to address the issues at hand. Mediation goes a long way in restoring the relationship of the parties due to its creative nature, as opposed to litigation where there must be a winner and a loser, mediation creates a both-win situation, in this regard after the resolution of the dispute, the parties can continue their business relationship. there are no precedents in mediation as each case is looked at independently due to its nature of confidentiality, a mediator cannot be called as a witness in court as a witness for any party and so with the settlement agreement there is finality as it has no appeal[21].

6. Legal and regulatory framework supporting mediation for smes in Kenya.

In Kenya the legal framework for mediation is anchored in the parent document which is the constitution followed by other pieces of legislation as outlined below.

a. Constitution of Kenya 2010

The constitution in Article 159(2) c[22] recognizes the use of mediation amongst other alternative forms of dispute resolution mechanisms such as negotiation, conciliation, arbitration as well as other traditional dispute resolution mechanisms, it should be noted that internationally the use of mediation has also been encouraged by UNCITRAL[23] and in 2020 it elevated mediation to be on the same platform as arbitration in solving commercial disputes.

b. Civil Procedure CAP 21 Laws of Kenya

[21] Civil Procedure CAP 21 Laws of Kenya, Section59 B (5)
[22] Ibid
[23] UNCITRAL- United Nations Commission on International Trade Law

Section 59A of the Civil Procedure establishes the mediation accreditation committee (MAC)[24] with a clear mandate with composition drawn from various bodies as directed by the Chief Justice. Section 59 A (3) delves on the matters of accreditation of mediators, the code of conduct, certification and training under a mediation registrar appointed by the chief justice. Section 59B talks about the issue of reference of cases to mediation, the procedures thereof and the enforcement of the agreement. Section 59D allows for private mediation settlements to be registered in court and can therefore be enforced as an order of the court.

c. Mediation Pilot Project Rules 2016

This subsidiary legislation clearly outlines how mediation is to be conducted from its inception to conclusion, it has to be noted that this refers to court annexed mediation[25]. These are cases that have gone before the judicial officer, has been screened and found suitable for mediation. A mediator has to give a report in addition to the settlement agreement reached by the parties.

d. Mediation rules 2015

The Nairobi Centre for International Arbitration (NCIA) a body charged with the standards and control of the ADR practitioners in the country came up with the rules to govern and regulate the affairs of the practitioners, the code of conduct, training and certification as well as remuneration standards, this ensures that they conduct themselves with integrity at all times.

7. Challenges & opportunities in implementing mediation for sme's in Kenya

The sme's being the largest group creating employment in various sectors either formally or informally is not devoid of challenges as far as the law is concerned, there are categories, illiterate, semi-literate and the literate have different views

[24] Ibid
[25] Ibid

on the justice system in Kenya and may be an impediment to access to justice, some of these challenges are as below.

7.1 Knowledge of rights

The fact that information is becoming easily accessible to people through the internet and social media platforms may create an illusion that the public has access to information leading to them being aware of their rights, there is still need to promote access to justice in order to demystify the judicial process making it people friendly.

7.2 Standardized Training Curriculum & limited access to qualified mediators

Mediators need to have a standardized curriculum, however this is a very dynamic and growing field that deals with new issues every day, the emerging issues emanate from technology, to keep abreast there needs to be a one stop Centre curriculum development allowing for a career progression on matters of mediation for the practitioners to give up to date information to the public. The field of mediation is also in need of qualified mediators bearing in mind that the 40hour training may not be sufficient thus the need to upgrade to move with changing times.

7.3 Physical Access

Some of the sme's have no fixed abode and therefore reaching them to assist them in the mediation process may be a problem. This is because the informal sme's may have to move from one place to another to scout for customers, their online knowledge may also be limited or be in places that are unreachable due to the terrain.

7.4 Financial Access

Many of the sme's are managed by a single proprietor, this is mainly because the start-up cannot effectively finance its activities and therefore their owners live from hand to mouth, litigation is quite expensive coupled with the lack of awareness on the justice system. Mediation being cost effective can bridge the gap

and ensure that justice is served even to the most vulnerable. Lack of prudent financial and management skills adds to their burden as they may not understand the need of proper book keeping to keep the business afloat which helps in times of dispute resolution.

7.5 Lack of Awareness and Understanding of Mediation

Lack of awareness of mediation as a form of dispute resolution is an impediment as the public are not yet aware of its existence or operation, the lawyers in the profession have not made it easier either as some fight it as they perceive it as a threat to their income, the training of lawyers is on litigation and thus may lack the soft skills needed for empathetic negotiation on mediation.
Mediation is underrated, due to lack of awareness some people think it is a surbodinate method of dispute resolution

7.6 Cultural and Legal Barriers to Mediation

In some cultures the women are not allowed to sit let alone speak in the council of men, whereas they may have solutions to the problems bedeviling the parties they are to be seen and not to be heard, some people have carried this into the 21st century and are therefore not open with women mediators[26] who may have been assigned by the court, and being that mediation is a voluntary process they pull out of the mediation which is to be conducted by a mediator of repute who has the requisite qualifications. The intersectionality of the mediator may carry a bias[27] it is therefore imperative that the mediator has to be cultural aware and sensitive to the needs of the parties embodying empathy and compassion coupled with an open mind with curiosity.

8. The role of government and other stakeholders in promoting mediation among sme's in Kenya.

[26] Brent Norling and Wendy Alexander; Overcoming Barriers and Challenges in Mediation, Jan. 18 2023
[27] David A Hoffman and Katherine Triantafillou; Cultural and Diversity Issues in Mediation and Negotiation

Having been acknowledged by the supreme document[28] in Kenya, under Article 159 (2) c thus giving it legitimacy and having taken its rightful place through the Singapore convention[29] mediation this has to be taken seriously in order to reduce the backlog of cases at the judiciary by not allowing any more cases that can be handled through mediation to be filed in court. The court annexed mediation program[30] that was initiated and implemented by the two Chief Justices emeritus Hon. Willy Mutunga and David Maraga respectively be spread to the whole country where all can benefit. There should be a partnership between the government and the mediators in order to carry out public legal clinics to make people aware of mediation, the remuneration package for mediators should also be looked into as well as the time taken between the conclusion of a matter and the payment for the services rendered.

9. Mediation training and capacity building initiatives for sme's and mediators in Kenya.

Mediation training should be encouraged with the private institutions doing some aggressive marketing campaigns targeting those to be trained, the target should be people with experience in various fields, the lawyers should be encouraged as well as incentivized to train as mediators as they already know the law, they only need soft skills to enable them have soft skills required in mediation. The training curriculum be standardized to afford uniformity to all mediators to provide uniform services. The mediators sensitized to understand cultural mediation and dealing with power imbalances while maintaining impartiality and professionalism in their duties.

There should be capacity building initiatives to all the sme's giving them the advantage to understand mediation and thus be able to participate effectively in the sessions. They should know the role lawyers play in mediation and

[28] Ibid
[29] Ibid
[30] Ibid

understand that it is a party driven process focusing on the interests of the parties rather than the positions.

10. Evaluating the long-term sustainability of mediation in fostering economic growth for sme's.

Mediation being a voluntary party driven process is sustainable in resolving the disputes arising in the domain of sme's, the parties normally have small issues that if taken to court may take ages to resolve, some trade in perishable goods that cannot be processed to be adduced in court as evidence, the parties are encouraged to come up with their workable solutions, brainstorming and are allowed to be creative so long as their solutions do not offend the very fabric of the law they are to be subject to.

11. Conclusion;

There has to be government Support and Policy Recommendations for Mediation in SMEs that is clear and concise, the Mediation Act should be reintroduced in parliament as a matter of urgency to ensure that there is a proper legal framework dealing with mediation prescribing consequences for the mediators to ensure that standards are adhered to.

Strategies to promote awareness and uptake of mediation services among sme's in Kenya to be enhanced with mediators given better remuneration on the court annexed program. That mediators be encouraged to engage in outreaches now that private mediation settlement agreements can be registered in court. In future the sme's be encouraged to have mediation clauses in their contracts to allow for fair representation and promote access to justice.

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Compulsory Resolution or Autonomy Erosion? The Debate on Mandatory Sports Arbitration

By James Njuguna[*] and Nyamboga George Nyanaro[**]

Abstract

The sports world is rife with disputes, and the resolution of these disputes is a matter of both urgency and importance. The debate on whether mandatory arbitration should be the norm in sports is akin to a tug-of-war between efficiency and autonomy. This paper delves into the contentious issue of mandatory sports arbitration, questioning its role as a potential future pathway for dispute resolution. This research examines the implications of compulsory arbitration on athletes' autonomy, juxtaposing it with the benefits of expedited dispute resolution. The discussion extends to the principles of fairness and justice within the sports arbitration framework, scrutinizing whether the current system aligns with the ideals of sportsmanship and equity. Through a comparative analysis of various arbitration models and their outcomes, this study seeks to illuminate the nuances of mandatory arbitration and its impact on the global sports community. Objectively, it provides a comprehensive overview that will foster a more profound understanding among stakeholders and contribute to the ongoing discourse on the evolution of sports law. The debate surrounding mandatory sports arbitration is a complex and multifaceted issue at the heart of athlete autonomy and the nature of dispute resolution within the sports industry. Furthermore, it discusses intricacies underpinning such a contentious topic, examining the delicate balance between the need for a streamlined, specialized

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[*] *LLM, PGD (KSL), LLB, MCiArb. He is a Lecturer at the University of Embu, Advocate of the High Court and a Senior Advocate at Kariuki Muigua & Co. Advocates and a Lawyer specialising in Natural Resources Law.*

[**] *Editor-In-Chief of the University of Embu Law Review, Legal Researcher, and Final Year Law Student.*

dispute resolution mechanism and the preservation of athletes' rights to self-determination.

1. Introduction

In sports, arbitration has long been heralded as the preferred avenue for resolving disputes, offering a semblance of expediency and expertise ostensibly absent in conventional judicial processes.[1] The Court of Arbitration for Sport (CAS), established in 1984, epitomizes this specialized approach, commanding a central role in adjudicating sports-related disputes.[2] However, beneath the surface of this well-intentioned system lies a critical debate: does mandatory sports arbitration serve the collective good of the sports community, or does it erode the individual autonomy of athletes?[3] The case of Paul Pogba, the renowned footballer who faced a four-year ban in a doping case,[4] brings this debate into sharp relief. Pogba's situation is not an isolated incident; it echoes the experiences of numerous athletes ensnared in the web of mandatory arbitration, often without a clear understanding of the implications or alternatives.[5] With its mandatory

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[1] Darren Kane, 'TWENTY YEARS ON: AN EVALUATION of the COURT of ARBITRATION for SPORT Court of Arbitration for Sport' <https://law.unimelb.edu.au/__data/assets/pdf_file/0003/1680366/Kane.pdf>Accessed 1 March 2024.

[2] 'Getting Sports Arbitration to Better Serve Athletes. – CiArb Kenya' (*Ciarbkenya.org* 22 August 2023) <https://ciarbkenya.org/getting-sports-arbitration-to-better-serve-athletes/> accessed 1 March 2024.

[3] Melissa Hewitt, 'Regulate Doping in Sport' (2015) 22 Indiana Journal of Global Legal Studies 16 <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1598&context=ijgls> accessed 1 February 2024.

[4] AFP, 'Pogba's Career in Jeopardy as France Star Handed Four-Year Doping Ban' (*Citizen Digital*29 February 2024) <https://www.citizen.digital/sports/pogbas-career-in-jeopardy-as-france-star-handed-four-year-doping-ban-n337617> accessed 1 March 2024.

[5] Aditya Gokhale, '"Sad, Shocked and Heartbroken" - Paul Pogba Breaks Silence on Four-Year Ban That Sees Football Career Put in Jeopardy as Juventus Midfielder Vows to Appeal "Incorrect" Verdict' (*Goal.com*29 February 2024) <https://www.goal.com/en-

arbitration configuration, the Portuguese Court of Arbitration for Sport provides a pertinent example of the potential future trajectory of sports arbitration.[6]

From the foregoing, this article will explore the philosophical underpinnings of mandatory sports arbitration, scrutinize its practical applications, and assess its implications through the lens of high-profile cases like Pogba's. It will also consider the perspectives of various stakeholders, including athletes, sports governing bodies, and legal practitioners, to present a comprehensive overview of the mandatory sports arbitration landscape. As this research embarks on this exploration, it is essential to recognize that the stakes are high: the outcomes of these debates and the evolution of arbitration practices will shape the future of sports law and the rights of athletes for generations to come. The question remains: can a balance be struck that honours both the efficiency of dispute resolution and the sanctity of athlete autonomy? Or are we witnessing the gradual erosion of athletes' rights under the guise of compulsory resolution?

2. Historical Evolution of Sports Arbitration

The historical evolution of sports arbitration is a testament to sports disputes' growing complexity and international nature. This section will trace the origins and development of arbitration in sports, culminating in establishing and raising the Court of Arbitration for Sport (CAS).[7] The concept of sports arbitration can be traced back to the early 20th century, but it was not until the 1980s that the need

ke/lists/paul-pogba-breaks-silence-on-four-year-ban-sees-football-career-put-in-jeopardy-juventus/bltcda001c05382b4ec> accessed 5 March 2024.

[6] José Manuel Meirim and Marta Vieira, 'The New Portuguese Court of Arbitration for Sport' (*Lexology* 29 September 2015) <https://www.lexology.com/library/detail.aspx?g=3156b902-f15c-46e2-881f-229159d4e940> accessed 29 February 2024.

[7] Tossaporn Sumpiputtanadacha and Aaron Murphy, 'Sports Arbitration - CAS, TCAS and Everything in Between' (*Lexology* 28 November 2022) <https://www.lexology.com/library/detail.aspx?g=9fd3008d-c62e-4512-9615-95be9bd8a1d4> accessed 28 February 2024.

for a specialized body became apparent.[8] Therefore, the increasing number of international sports-related disputes and the absence of an independent authority capable of binding decisions prompted the top sports organizations to seek a solution (authors' emphasis).

3. Installation of the Court of Arbitration for Sports

The Court of Arbitration for Sport (CAS) was established in 1984 in Lausanne, Switzerland, by the International Olympic Committee (IOC).[9] The idea was to create a supreme instance for sports disputes, moving them away from the jurisdiction of national courts and into a specialized, sport-centric arbitration body.[10] The CAS was designed to offer a flexible, quick, and inexpensive procedure for resolving sports disputes, with an initial structure allowing free proceedings, except in financial disputes.[11]

Since its inception, the CAS has undergone several reforms to enhance its independence and procedural fairness. Notably, the International Council of Arbitration for Sport (ICAS) creation in 1994 marked a significant step in

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[8] 'History of the CAS' (*Tas-cas.org* 4 July 2022) <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> accessed 25 February 2024.

[99] Court of Arbitration For Sport, 'Frequently Asked Questions' (*Tas-cas.org* 4 July 2022) <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> accessed 6 April 2024.

[10] Faraz Shahlaei, 'The Collision between Human Rights and Arbitration: The Game of Inconsistencies at the Court of Arbitration for Sport' [2024] Arbitration International Sections on the Abstract and Introduction <https://academic.oup.com/arbitration/advance-article-abstract/doi/10.1093/arbint/aiae005/7609939?redirectedFrom=fulltext> accessed 2 March 2024.

[11] Rachelle Downie, 'Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport ' (2011) 12(2) Melbourne Journal of International Law 315' (*Austlii.edu.au*2015) <https://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/MelbJIL/2011/12.html> accessed 6 April 2024.

establishing the CAS's autonomy from the IOC and other sports organizations.[12] The CAS has registered thousands of arbitration proceedings, reflecting its central role in the sports dispute resolution landscape. It would suffice to say that the creation of the CAS represents a critical development in the sports law field, providing a tailored dispute resolution mechanism that addresses the unique needs of the sports community.[13] As research continues to explore the themes of mandatory sports arbitration and athlete autonomy, the historical context of the CAS's rise will serve as a foundation for understanding the current challenges and debates in this area.[14]

4. Philosophical underpinnings

The philosophical underpinnings of mandatory arbitration in sports are deeply rooted in the quest for a fair and specialized dispute resolution system. This section will explore the principles that support mandatory arbitration and the critical concepts of autonomy and consent within sports law.[15]

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[12] Rachelle Downie, 'IMPROVING the PERFORMANCE of SPORT'S ULTIMATE UMPIRE: REFORMING the GOVERNANCE of the COURT of ARBITRATION for SPORT' Sections I-III <https://law.unimelb.edu.au/__data/assets/pdf_file/0009/1687167/Downie.pdf> Accessed 17 February 2024.

[13] James AR Nafziger, 'International Sports Law: A Replay of Characteristics and Trends' (1992) 86 American Journal of International Law 489.

[14] Michael Straubel, 'Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better Recommended Citation Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better' (2005) Loyola University Chicago Law Journal 36 <https://lawecommons.luc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1207&context=luclj> accessed 5 March 2024.

[15] Tijana Cuk, 'The Role of Arbitration in Sports Dispute Resolution' (*Youssef + Partners* 14 December 2023) <https://youssef.law/insights/sports-dispute-resolution/> accessed 1 March 2024.

5. Principles Underpinning Mandatory Arbitration

Mandatory arbitration in sports is predicated on the principle that sports disputes require a tailored approach that reflects the unique nature of sports and relationships. The rationale is that a specialized forum, such as the Court of Arbitration for Sport (CAS), is better equipped to understand and adjudicate complex sports-related issues than traditional courts.[16] This system is designed to provide swift and expert resolutions, which is particularly important given the time-sensitive nature of many sports disputes.

However, the non-consensual basis of this arbitration has been a point of contention. Critics argue that the lack of voluntary adherence, especially from athletes often seen as the weaker party, undermines the legitimacy of the arbitration process.[17] The debate centres on whether the foundational principle of consent is genuinely present in sports arbitration or if athletes are compelled into a system with little alternative.[18]

6. Autonomy and Consent in Sports Law

Autonomy and consent are cornerstones of legal systems, ensuring that individuals have control over their legal rights and obligations. In sports law,

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[16] Antonio Rigozzi, 'EXPEDITED PROCEDURES in INTERNATIONAL ARBITRATION Sports Arbitration and the Inherent Need for Speed and Effectiveness How Does Sports Arbitration Work and What Lessons Can Be Drawn from It in Seeking to Streamline and Expedite Arbitration in the Broader Sense?' <https://lk-k.com/wp-content/uploads/2017/12/RIGOZZI-in-LEVY-POLKINGHORNE-Eds-Expedited-Procedures-in-Intl-Arb.-2017-Sports-Arb.-Inherent-Need-for-Speed-Effectiveness-pp.-88-109.pdf> Accessed 1 March 2024.

[17] Margareta Baddeley, 'The Extraordinary Autonomy of Sports Bodies under Swiss Law: Lessons to Be Drawn' (2019) 20 The International Sports Law Journal 3 <https://link.springer.com/article/10.1007/s40318-019-00163-6> accessed 29 February 2024.

[18] Antonio Rigozzi, 'Challenging Awards of the Court of Arbitration for Sport' (2010) 1 Journal of International Dispute Settlement 217 <https://academic.oup.com/jids/article/1/1/217/879395> accessed 25 May 2024.

these concepts are equally vital but face unique challenges.[19] The autonomy of sports organizations to govern their affairs is often cited as a justification for mandatory arbitration, suggesting that these bodies have the expertise and experience to regulate their internal disputes effectively.[20]

Yet, the imposition of mandatory arbitration clauses in athletes' contracts raises questions about the true freedom of athletes to choose their dispute resolution method. The tension between the autonomy of sports bodies and the individual consent of athletes is a delicate balance.[21] While sports organizations may prefer the predictability and control of mandatory arbitration, athletes may view this as an infringement on their autonomy and a forced relinquishment of their right to seek justice through traditional legal avenues.[22]

Therefore, the philosophical foundations of mandatory sports arbitration involve a complex interplay between the need for specialized dispute resolution and the fundamental rights of athletes.[23] As the sports world evolves, so must the

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[19] E. Gefenas, 'Informed Consent' [2012] Elsevier eBooks 721 <https://www.sciencedirect.com/topics/medicine-and-dentistry/informed-consent> accessed 27 March 2024.

[20] Richard Parrish, 'The Autonomy of Sport: A Legal Analysis - Sport et Citoyenneté' (*Sport et citoyenneté* 10 June 2016) <https://www.sportetcitoyennete.com/en/articles-en/the-autonomy-of-sport-a-legal-analysis> accessed 1 March 2024.

[21] Lloyd Freeburn, 'Forced Arbitration and Regulatory Power in International Sport - Implications of the Judgment of the European Court of Human Rights in Pechstein and Mutu v Switzerland' [2020] SSRN Electronic Journal Section Abstract.

[22] 'Getting Sports Arbitration to Better Serve Athletes. – CIArb Kenya' (*Ciarbkenya.org* 22 August 2023) <https://ciarbkenya.org/getting-sports-arbitration-to-better-serve-athletes/> accessed 21 March 2024.

[23] Zachary Burley, 'Arbitration Law Review Ethics and Sport Dispute Resolution in Sport: Athletes, Law and Arbitration ETHICS and SPORT DISPUTE RESOLUTION in SPORT: ATHLETES, LAW and ARBITRATION' (2015) <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1048&context=arbitrationlawreview> accessed 24 February 2024.

conversation around these foundational principles, ensuring that the system remains fair and just for all parties involved (authors' emphasis).

7. Mandatory Arbitration Mechanisms

Mechanisms of mandatory arbitration in sports are deeply embedded within the contractual framework that governs the relationship between athletes and sports organizations.[24] This section will examine how mandatory arbitration clauses are integrated into athletes' contracts and how sports governing bodies enforce these arbitration processes.[25]

8. Arbitration Clauses in Athletes' Contracts

Mandatory arbitration clauses are a common feature in athletes' contracts, serving as a pre-emptive agreement to resolve disputes through arbitration rather than litigation. These clauses are often non-negotiable and present as a condition for participating in sporting events and leagues.[26] The benefits touted for such clauses include privacy, certainty of outcome, and expedited resolution compared to traditional court proceedings.[27] However, the enforceability of these clauses can be a subject of legal scrutiny, especially when athletes challenge them

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[24] Hilary Findlay, 'Marquette Sports Law Review Rules of a Sport-Specific Arbitration Process as an Instrument of Policy Making Repository Citation Rules Of A Sport-Specific Arbitration Process As An Instrument Of Policy Making' 16 <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1340&context=sportslaw> Accessed 06 March 2024.

[25] Hilary Findlay, 'Marquette Sports Law Review Rules of a Sport-Specific Arbitration Process as an Instrument of Policy Making Repository Citation Rules Of A Sport-Specific Arbitration Process As An Instrument Of Policy Making' (2005) 16 <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1340&context=sportslaw> accessed 11 March 2024.

[26] Tsubasa Shinohara, 'Human Rights in Sports Arbitration: What Should the Court of Arbitration for Sport Do for Protecting Human Rights in Sports?' [2023] Liverpool Law Review https://tinyurl.com/yx2j57ys accessed 20 March 2024.

[27] Faster Capital, 'Arbitration in Sports Contracts: Fair Play on and off the Field - FasterCapital' (*FasterCapital* 2023) <https://fastercapital.com/content/Arbitration-in-Sports-Contracts--Fair-Play-on-and-off-the-Field.html> accessed 2 March 2024.

based on the lack of bilateral consent and the potential for an imbalance of power between the athlete and the sports organization.[28]

9. The Role of Sports Governing Bodies

Sports governing bodies have a significant role in enforcing arbitration. They establish the rules and regulations that include mandatory arbitration provisions, effectively requiring athletes to agree to these terms as a condition of their participation in the sport. These bodies often favour arbitration due to its expertise in sports-related matters and its ability to provide a consistent approach to dispute resolution across different jurisdictions.[29] However, this enforcement can lead to controversies, particularly when it intersects with human rights and discrimination issues, as seen in high-profile cases adjudicated by the Court of Arbitration for Sport (CAS).[30]

Thus, mandatory arbitration mechanisms in sports are a complex interplay of contract law, regulatory enforcement, and the pursuit of a fair and efficient dispute resolution system. While these mechanisms offer certain advantages, they also raise questions about the autonomy and consent of athletes,[31]

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[28] Azadeh Mohamadinejad and others, 'Assumption of Risk and Consent Doctrine in Sport' (2012) 55 Physical Culture and Sport. Studies and Research 30.

[29] Mansour Vesali Mahmoud, 'Proposals to Amend the Code of the Court of Arbitration for Sports: Three Selected Issues – American Review of International Arbitration' (*Columbia.edu* 23 November 2022) <https://aria.law.columbia.edu/proposals-to-amend-the-code-of-the-court-of-arbitration-for-sports-three-selected-issues/> accessed 3 March 2024.

[30] Faraz Shahlaei, 'The Collision between Human Rights and Arbitration: The Game of Inconsistencies at the Court of Arbitration for Sport' [2024] Arbitration International Conclusion & Recommendations <https://academic.oup.com/arbitration/advance-article-abstract/doi/10.1093/arbint/aiae005/7609939?redirectedFrom=fulltext> accessed 6 March 2024.

[31] Girish Deepak, 'Compulsory Consent in Sports Arbitration: Essential or Auxiliary - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*12 April 2016) <https://arbitrationblog.kluwerarbitration.com/2016/04/12/compulsory-consent-in-sports-arbitration-essential-or-auxiliary/> accessed 2 March 2024.

highlighting the need for ongoing evaluation and potential reform to ensure that the rights of all parties are adequately protected.

Furthermore, high-profile cases involving renowned athletes have significantly impacted sports arbitration.[32] This section will provide an in-depth analysis of the Paul Pogba case and its implications for sports arbitration, followed by a comparative study of other notable athletes subjected to mandatory arbitration.

10.Paul Pogba's case

Paul Pogba's four-year ban from football for a doping offence has sent shockwaves through the sports world.[33] The French and Juventus Football Club midfielder tested positive for testosterone after a league match against Udinese Football Club.[34] Pogba's appeal to the Court of Arbitration for Sport (CAS) highlights the critical role of sports arbitration in resolving such disputes.[35] The

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[32] Tim Zubizarreta, Shivang Yadav and Harshit Gupta, 'Arbitration in the Realm of Sports Law – Need of the Hour or Not?' (*Jurist.org* 29 April 2020) <https://www.jurist.org/commentary/2020/04/yadav-gupta-sports-arbitration/> accessed 2 March 2024.

[33] 'Paul Pogba: Juventus Midfielder Banned for Four Years after World Cup Winner Tested Positive for Doping' (*Sky Sports* 29 February 2024) <https://www.skysports.com/football/news/11095/13083650/paul-pogba-juventus-midfielder-banned-for-four-years-after-world-cup-winner-tested-positive-for-testosterone#:~:text=The%20ban%20starts%20from%20when,career%20will%20continue%20after%20that.> accessed 1 March 2024.

[34] Jacob Steinberg and Angela Giuffrida, 'Paul Pogba "Shocked and Heartbroken" at Four-Year Ban for Positive Drugs Test' (*the Guardian*29 February 2024) <https://www.theguardian.com/football/2024/feb/29/paul-pogba-ban-doping-offence-juventus-france#:~:text=Pogba%20tested%20positive%20for%20dehydroepiandrosterone,the%20positive%20result%20in%20October.> accessed 1 March 2024.

[35] Jacob Steinberg and Angela Giuffrida, 'Paul Pogba "Shocked and Heartbroken" at Four-Year Ban for Positive Drugs Test' (*the Guardian*29 February 2024) <https://www.theguardian.com/football/2024/feb/29/paul-pogba-ban-doping-offence-juventus-france> accessed 6 March 2024.

case underscores the potential career-altering consequences of arbitration decisions and raises questions about the fairness and transparency of the arbitration process, especially in doping instances in which athletes' careers and reputations are at stake.[36]

Comparing Pogba's situation with that of other athletes subjected to mandatory arbitration reveals a pattern of challenges that individuals face against the backdrop of powerful sports institutions. For instance, the case of Claudia Pechstein, a German speed skater, brought to light the issues of consent and the non-consensual basis of arbitration in sports.[37] Similarly, the decision of the CAS in the case of Russian figure skater Kamila Valieva, who was allowed to compete at the 2022 Olympic Games despite a positive drug test, sparked debate over the role of CAS and its decision-making process.[38]

These cases illustrate the complexities and controversies surrounding mandatory sports arbitration. They highlight the need for a system that effectively resolves disputes and respects athletes' rights. As sports arbitration continues to evolve, the experiences of Pogba and others serve as a reminder of the importance of ensuring fairness, transparency, and justice within this specialized field of law.

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[36] France 24, '"Extraordinary" Pogba's Doping Ban Loss for Football, Says Allegri' (*France 24*2 March 2024) <https://www.france24.com/en/live-news/20240302-extraordinary-pogba-s-doping-ban-loss-for-football-says-allegri> accessed 6 March 2024.

[37] Vjekoslav Puljko, 'Arbitration and Sport' [2014] Core.ac.uk <https://core.ac.uk/display/6255853?source=1&algorithmId=15&similarToDoc=41340258&similarToDocKey=CORE&recSetID=03e31625-17c0-4bce-be03-dc6e900fc958&position=4&recommendation_type=same_repo&otherRecs=228610468,54521209,188742087,6255853,200222458> accessed 6 March 2024.

[38] Olympics.com, 'Court of Arbitration for Sport Hands Kamila Valieva Four-Year Suspension for Anti-Doping Rule Violation' (*Olympics.com*29 January 2024) <https://olympics.com/en/news/court-arbitration-sport-kamila-valieva-four-year-suspension-anti-doping-rule-violation#:~:text=In%20its%20ruling%2C%20CAS%20stated,failed%20test%20have%20been%20disqualified.> accessed 6 March 2024.

11. Architecture of mandatory sports arbitration; legal and ethical implications

It is a fact in the public domain that the system of mandatory sports arbitration, while designed to provide a specialized and efficient means of resolving disputes, has been met with both support and criticism.[39] This section will explore the critiques and controversies surrounding mandatory sports arbitration, focusing on the arguments for and against it and its impact on athletes' rights and freedoms.

Arguably, proponents of mandatory sports arbitration find it to offer several advantages over traditional litigation. They encompass expertise whereby arbitrators often have specialized knowledge in sports law, which can lead to more informed decisions.[40] In terms of efficiency, arbitration can be faster than court proceedings, minimizing disruptions to athletes' careers.[41]This betokens consistency whereby a centralized arbitration body can provide uniformity in decision-making across different sports and jurisdictions.[42]

Critics, however, raise significant concerns. They include a lack of consent, whereby athletes may be compelled to agree to arbitration without genuine consent, raising questions about the fairness of the process.[43] From the lens of transparency, they find arbitration's private nature likely to obscure openness

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[39] M. Diaconu, S. Kuwelkar and A Kuhn, 'The Court of Arbitration for Sport Jurisprudence on Match-Fixing: A Legal Update' (2021) 21 The International Sports Law Journal 27 <https://link.springer.com/article/10.1007/s40318-021-00181-3> accessed 6 March 2024.

[40] SAC Attorneys LLP, 'The Advantages and Disadvantages of Arbitration | San Jose Corporate Lawyers' (*Sacattorneys.com* 2018) <https://www.sacattorneys.com/the-advantages-and-disadvantages-of-arbitration.html> accessed 1 March 2024.

[41] Daniel Meagher, 'The Advantages and Disadvantages of Arbitration within the Sporting Context' (*@lexisnexis* 27 July 2020) <https://tinyurl.com/4hy7ym47 > accessed 21 March 2024.

[42] Ibid.

[43] Faraz Shahlaei, 'The Collision between Human Rights and Arbitration: The Game of Inconsistencies at the Court of Arbitration for Sport' [2024] Arbitration International Abstract <https://tinyurl.com/3fd2nytk > accessed 11 March 2024.

and public scrutiny.[44] Stressing the limitations of appeal, they critique the limited grounds for appeal, which are likely to leave athletes with little recourse if they believe the arbitration decision was unjust.[45]

The impacts of mandatory arbitration are apparent, the critiques notwithstanding. They profoundly affect the fundamental rights and freedoms of athletes. Access to justice is among the affected areas of compulsory arbitration that can deprive athletes of their right to a public hearing in a regular court of law.[46] Regarding human rights, concerns always arise that the arbitration process may not adequately protect athletes' rights, such as the right to a fair trial and non-discrimination.[47] Moreover, athletes may feel they have no choice but to accept arbitration clauses to compete, which can impact their autonomy and bargaining power.[48]

From the foregoing, it is safe to say that while mandatory sports arbitration has its merits, the critiques highlight the need for a careful balance between the

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[44] Fabio Núñez and Del Prado, 'Emory International Law Review Emory International Law Review the Fallacy of Consent: Should Arbitration Be a Creature of the Fallacy of Consent: Should Arbitration Be a Creature of Contract? Contract?' (2021) <https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1255&context=eilr> accessed 3 March 2024.

[45] Antonio Rigozzi, 'Challenging Awards of the Court of Arbitration for Sport' (2010) 1 Journal of International Dispute Settlement 217 <https://academic.oup.com/jids/article/1/1/217/879395> accessed 17 March 2024.

[46] Katherine VW Stone and Alexander JS Colvin, 'The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights' (*Economic Policy Institute* 2015) <https://www.epi.org/publication/the-arbitration-epidemic/> accessed 1 March 2024.

[47] Ben Cisneros, 'Challenging the Call: Should Sports Governing Bodies Be Subject to Judicial Review?' (2020) 20 The International Sports Law Journal 18 <https://link.springer.com/article/10.1007/s40318-020-00165-9> accessed 17 March 2024.

[48] Antonio Rigozzi and Fabrice Robert-Tissot±, 'Chapter4 "Consent" in Sports Arbitration: Its Multiple Aspects• Lessons from the Canas Decision, in Particular with Regard to Provisional Measures' <https://lk-k.com/wp-content/uploads/2015/10/RIGOZZI-ROBERT-TISSOT-in-ASA-Special-Series-41-Sports-Arb.-A-Coach-for-Other-Players-2015-Consent-in-Sports-Arb.-Its-Multiple-Aspects-pp.-59-94.pdf> accessed 6 March 2024.

benefits of a specialized dispute resolution mechanism and the protection of athletes' fundamental rights.[49] The controversies suggest that reforms may be necessary to ensure the system is fair, transparent,[50] and respectful of athletes' rights and freedoms.

12. Intersection of Law, Ethics, and Sports Arbitration

Sports arbitration operates at the confluence of law and ethics, where the game's rules meet the principles of moral conduct.[51] The legal frameworks within which sports arbitration systems operate are designed to ensure that disputes are resolved in a manner consistent with the sport's specific regulations and the broader principles of justice.[52] Ethical considerations come into play when addressing issues such as athlete welfare, anti-doping regulations, and the rights of participants to a fair trial.[53] The challenge lies in ensuring that the arbitration process upholds the highest standards of both legal and ethical conduct, mainly when dealing with cases that have far-reaching implications related to politics, athlete safety, doping, corruption,[54] and human rights.

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[49] Shaun Star and Sarah Kelly, 'A Level Playing Field in Anti-Doping Disputes? The Need to Scrutinize Procedural Fairness at First Instance Hearings' (2020) 21 The International Sports Law Journal 94 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7453375/> accessed 2 March 2024.

[50] Ibid.

[51] Ken Foster, '*Lex Sportiva* and *Lex Ludica*: The Court of Arbitration for Sport's Jurisprudence' (2016) 3 Entertainment and sports law journal <https://www.entsportslawjournal.com/article/id/722/> accessed 6 April 2024.

[52] Mukesh Rawat, 'Choice of Law in Court of Arbitration for Sport: An Overview' [2020] Social Science Research Network Abstract and recommendations section <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665586> accessed 1 March 2024.

[53] Shaun Star and Sarah Kelly, 'Examining Procedural Fairness in Anti-Doping Disputes: A Comparative Empirical Analysis' (2022) 22 The International Sports Law Journal 217 <https://link.springer.com/article/10.1007/s40318-022-00222-5> accessed 1 March 2024.

[54] Antonio Rigozzi, 'Sports Arbitration and the European Convention of Human Rights - Pechstein and Beyond' <https://lk-k.com/wp-content/uploads/2020/12/RIGOZZI-in-M%C3%9CLLER-et-al.-Eds-New-Developments-in-Intl-Comm.-Arb.-2020-2020-Sports-Arb.-ECHR-Pechstein-beyond-pp.-77-130-1.pdf> accessed 6 March 2024.

13. Balance Between Fairness and Efficiency

The balance between fairness and efficiency is a central concern in dispute resolution.[55] While efficiency is crucial in delivering timely decisions, especially in the fast-paced world of sports, it must not come at the expense of fairness. Fairness encompasses the parties' rights to be heard, present evidence, and receive an impartial judgment.[56] It also involves considerations of transparency and the opportunity for appeal. The challenge for sports arbitration bodies like the Court of Arbitration for Sport (CAS) is to design and implement dispute resolution processes that maintain this delicate balance,[57] ensuring that the outcomes are reached efficiently and are also perceived as just and equitable by all stakeholders involved.

Therefore, sports arbitration's legal and ethical considerations are complex and multifaceted. They require a careful approach that respects the legal rights of the parties involved, adheres to ethical standards, and strives for a fair and efficient resolution.[58] As sports continue to evolve, so must the frameworks and practices of sports arbitration to ensure they remain fit for purpose in a changing world.

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[55] Kariuki Muigua, '"Alternative Dispute Resolution and Article 159 of the Constitution"' (2018) Abstract<https://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf> accessed 11 March 2024.

[56] Todd B Carver and Albert A Vondra, 'Alternative Dispute Resolution: Why It Doesn't Work and Why It Does' (*Harvard Business Review* May 1994) <https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does> accessed 27 February 2024.

[57] Rachelle Downie, ''Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport " [2011] MelbJlIntLaw 12; (2011) 12(2) Melbourne Journal of International Law 315' (*Austlii.edu.au* 2015) <https://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/MelbJIL/2011/12.html> accessed 1 March 2024.

[58] 'Arbitration: Sports Arbitration' (*BODENHEIMER* 8 January 2018) <https://www.changing-perspectives.legal/arbitration/types-of-arbitration/sports-arbitration/> accessed 17 March 2024.

14. Real-world manifestations

The subsequent sections will delve deeper into these considerations, examining how they manifest in real-world scenarios and what they mean for the future of sports arbitration and the protection of athletes' rights. The legal and ethical considerations in sports arbitration are not merely theoretical; they manifest in real-world scenarios with significant implications for athletes' rights.[59] In recent years, several cases have highlighted the intersection of law, ethics, and sports arbitration.

A classic example of the case hereinabove regards the case of Claudia Pechstein, a German speed skater who challenged the very foundation of sports arbitration by questioning the voluntary nature of her consent to arbitrate.[60] Similarly, the case involving Caster Semenya and the regulation of testosterone levels in female athletes raised complex ethical questions about gender identity, human rights, and the role of sports governing bodies.[61]

These cases demonstrate the tangible impact of sports arbitration on athletes' lives and careers. They show that while arbitration can offer a streamlined approach to dispute resolution, it can also lead to outcomes that profoundly affect athletes' personal and professional lives. The decisions made in these arbitration proceedings often go beyond the immediate parties involved and set precedents that affect the entire sports community (authors' emphasis).

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[59] Nancy Vargas-Mendoza and others, 'Ethical Concerns in Sport: When the Will to Win Exceed the Spirit of Sport' (2018) 8 Behavioral sciences 78 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6162520/> accessed 1 March 2024.

[60] Mathias Wittinghofer and Sylvia Schenk, 'A Never Ending Story: Claudia Pechstein's Challenge to the CAS - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog* 14 June 2016) <https://arbitrationblog.kluwerarbitration.com/2016/06/14/a-never-ending-story-claudia-pechsteins-challenge-to-the-cas/> accessed 1 March 2024.

[61] Doriane Coleman, 'Semenya and ASA v IAAF: Affirming the Lawfulness of a Sex-Based Eligibility Rule for the Women's Category in Elite Sport' <https://core.ac.uk/download/pdf/322820145.pdf> accessed 1 March 2024.

15. Looking into the future

The future of sports arbitration will likely be shaped by the ongoing dialogue between the need for specialized dispute resolution mechanisms and the protection of athletes' rights. As sports evolve, so must the arbitration processes that govern them. For greater transparency, there is a clarion call for more openness in the arbitration process, which could lead to reforms that allow for public scrutiny and understanding of decisions or enhanced Consent.[62] Efforts to ensure that athletes' consent to arbitration is informed and voluntary could reshape the contractual landscape of sports are core.[63] More integration of human rights principles into sports arbitration could lead to a more holistic approach to resolving disputes that consider the broader implications for athletes' rights.

This undoubtedly demands that the Court of Arbitration for Sport (CAS) ensures impartiality in its arbitrations through several mechanisms. For independence and Impartiality of Arbitrators, CAS's arbitrators must be independent and have no financial interest in the case or outcome.[64] They must also be impartial, not favouring any party over the other. The same should be the case for disclosure requirements whereby arbitrators must disclose any information relevant to their

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[62] 'Promoting Sports Arbitration in Africa Kariuki Muigua a Discussion Paper for the Chartered Institute of Arbitrators (Kenya Branch) 2 Nd Annual Lecture on the Theme "Promoting Sports Arbitration in Africa" Held on Thursday 28th November, 2019 in Nairobi' (2019) <https://kmco.co.ke/wp-content/uploads/2019/12/Paper-on-Promoting-Sports-Arbitration-in-Africa.pdf> accessed 11 March 2024.

[63] Indian Institute of Industrial and Professional Studies , 'Arbitration in Sports-Why It Is Not so Popular among Indian Athletes-Technical and Social View ' (*Linkedin.com* 26 June 2022) <https://www.linkedin.com/pulse/arbitration-sports-why-so-popular-among-indian-athletes-technical-> accessed 2 March 2024.

[64] Nathalie Bernasconi-Osterwalder and others, 'IV Annual Forum for Developing Country Investment Negotiators' <https://www.iisd.org/system/files/publications/dci_2010_arbitrator_independence.pdf> Accessed 2 March 2024.

independence and impartiality.[65] Such should encompass any past professional or personal engagements that might affect their objectivity.

The International Bar Association's (IBA) Guidelines for Conflicts of Interest in International Arbitration apply to CAS arbitration. They can assist arbitrators in determining what information to disclose to avoid conflicts of interest.[66] However, CAS should continually review its processes to address potential challenges to its arbitrators' independence and impartiality.

16. Global Perspectives on Sports Arbitration

The approach to sports arbitration varies significantly across different jurisdictions. In some countries, sports arbitration is deeply integrated into the sports legal framework, with bodies like the Court of Arbitration for Sport (CAS) playing a central role in resolving disputes.[67] The CAS, seated in Switzerland, benefits from the Swiss legal system's arbitration-friendly approach, which limits the review of awards to due process matters.[68] Other jurisdictions may have less formalized or developed systems, relying more on internal dispute resolution mechanisms within sports organizations or national courts (authors' emphasis).

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[65] ECHR, 'HUDOC - European Court of Human Rights' (*Coe.int* 2024) <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-186828%22]}> accessed 1 March 2024.

[66] Umang Bhat Nair, 'The IBA Guidelines on Conflicts of Interest: Time for a Relook? - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog* 29 March 2023) <https://arbitrationblog.kluwerarbitration.com/2023/03/29/the-iba-guidelines-on-conflicts-of-interest-time-for-a-relook/> accessed 2 March 2024.

[67] 'Promoting Sports Arbitration in Africa Kariuki Muigua a Discussion Paper for the Chartered Institute of Arbitrators (Kenya Branch) 2 Nd Annual Lecture on the Theme "Promoting Sports Arbitration in Africa" Held on Thursday 28th November, 2019 in Nairobi' <https://kmco.co.ke/wp-content/uploads/2019/12/Paper-on-Promoting-Sports-Arbitration-in-Africa.pdf> Accessed 06 March 2024.

[68] Aurélie Conrad Hari, Nadja Jaisli and Pascal Hachem, 'International Arbitration Laws and Regulations Switzerland ' [2023] International Comparative Legal Guides International Business Reports <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/switzerland> accessed 6 March 2024.

Internationally, there is a trend towards harmonizing arbitration practices to ensure consistency and fairness in sports law.[69] This includes adopting common standards for arbitration proceedings and recognizing and enforcing arbitral awards across borders, facilitated by instruments like the New York Convention (authors' emphasis).

17. Future Directions in Sports Arbitration

Potential reforms to the current sports arbitration system could include increasing transparency, enhancing the consent process for athletes, and ensuring greater protection of athletes' rights.[70] Innovations might involve decentralizing institutions like the CAS to make them more accessible to different regions and embracing technology to improve the efficiency of arbitration proceedings.[71] Furthermore, future challenges in sports arbitration will likely revolve around maintaining impartiality and independence in decision-making, adapting to changes in international law, and addressing ethical considerations such as diversity and inclusion within arbitration panels.[72] As the field continues to evolve, it will be essential to balance the need for specialized expertise with the principles of justice and fairness for all parties involved in sports disputes.

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[69] Ken Foster, '*Lex Sportiva* and *Lex Ludica*: The Court of Arbitration for Sport's Jurisprudence' (2016) 3 The Entertainment and Sports Law Journal <https://www.entsportslawjournal.com/article/id/722/> accessed 2 March 2024.

[70] Oskar van Maren, 'Asser International Sports Law Blog | Time for Transparency at the Court of Arbitration for Sport. By Saverio Spera' (*Asser.nl* 2017) <https://www.asser.nl/SportsLaw/Blog/post/transparency-at-the-court-of-arbitration-for-sport-by-saverio-spera> accessed 2 March 2024.

[71] 'Online Dispute Resolution and Electronic Hearings | Global Law Firm | Norton Rose Fulbright' (*Nortonrosefulbright.com* 2017) <https://www.nortonrosefulbright.com/en/knowledge/publications/71e0aa1e/online-dispute-resolution-and-electronic-hearings> accessed 2 March 2024.

[72] Ken Foster, 'Global Sports Law Revisited' (2019) 17 The Entertainment and Sports Law Journal <https:/www.entsportslawjournal.com/article/id/851/> accessed 2 March 2024.

18. Conclusion

This conversation has traversed the multifaceted landscape of mandatory sports arbitration, dissecting its complexities through a critical and academic lens. Contextually, the researchers embarked on this journey by framing the debate around the dichotomy of compulsory resolution and the potential erosion of athlete autonomy, using the case of Paul Pogba as a focal point for discussion. Delving into the historical evolution of sports arbitration, noting the establishment of the CAS and its rise as a pivotal institution in sports law. Philosophical foundations were examined, highlighting the tension between mandatory arbitration principles and athletes' autonomy and consent. Mechanisms of mandatory arbitration were scrutinized, particularly how they are embedded within athletes' contracts and the role of sports governing bodies in enforcing these clauses.

Through case studies and comparative analysis, the research explored the real-world implications of sports arbitration, considering high-profile cases like Pogba's and others. The critiques and controversies section weighed the arguments for and against mandatory sports arbitration, assessing its impact on athletes' rights and freedoms. Addressing legal and ethical considerations, the other part emphasized a balance between fairness and efficiency in dispute resolution. We then considered how these considerations manifest in real-world scenarios, reflecting on their implications for the future of sports arbitration and athlete protection.

The discussion of global perspectives observed the diverse approaches to sports arbitration across jurisdictions and the trend toward harmonization. Looking into the future directions section contemplated potential reforms and innovations that could shape the field alongside the challenges that lie ahead. In conclusion, this research critically engaged with the intricate dynamics of sports arbitration, offering a comprehensive analysis that underscores the need for a fair, transparent, and respectful system of athletes' rights. The ongoing discourse and potential reforms in this domain will undoubtedly continue to influence the

evolution of sports law and the safeguarding of athlete autonomy in the years to come.

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Constitution of Kenya 2010 Article 159.2.(c): *Ancestry, Anatomy, Efficacy & Legacy*[1]

By: Paul Ngotho HSC*

Abstract

This brief paper traces the rather odd origin and everlasting effect of the often-cited Article 159.2.(c) of the Constitution of Kenya 2010. It acknowledges the central role played by two members of the Chartered Institute of Arbitrators Kenya Branch, quietly and privately, away from the mainstream constitution making process. One of then chairman of the Branch, the other the Minister of Justice, National Cohesion and Constitutional Affairs.

Introduction

I received a letter dated 9th January 2011 from Mr Jonny Havelock. It was on the Chartered Institute of Arbitrators Kenya Branch ("**CIArbK**") letterhead. I was in my study at home. I shot up, did a jig, punched the air. Then I sat down and re-read the letter slowly.

I was disappointed to note the letter was not an appointment, as I had assumed in my excitement, but simply an enquiry on whether I was available to arbitrate a certain matter. Of course I was! I responded and later received the appointment letter. That was my first appointment from CIArbK as an arbitrator.

I prepared the first draft of this article 7 years ago for a presentation in the CIArb(K) Conference 2017, where the theme was "Alternative Dispute Resolution under the new Constitutional Order", but an opportunity did not arise.

[1] The author presented a shorter version of this paper during CIArbK's Inaugural Jonny Havelock Annual Lecture on 13th March 2024. This paper will be a chapter in Paul Ngotho's upcoming book Reflections on Arbitration.

* Paul Ngotho HSC is a Chartered Arbitrator and holds an LL.M in International Dispute Resolution from the University of London. He is an Adjunct Lecturer in the University of Nairobi, where he specializes in ADR and Arbitration courses.

Sometimes I ask for an opportunity to present two papers in one conference. I rarely succeed, but I do not stop asking. Fortunately, the article and myself survived Covid-19, and here we are, in the inaugural Jonny Havelock Annual Lecture in 2024.

Kenya boasts that it has a very progressive constitution and is one of the few countries in which ADR, mediation and arbitration are enshrined in the constitution. Some countries and kingdoms do not have a national constitution.

Ancestry

The clamour for a new constitution took about 2 decades from around 1990 to 2010, then the Constitution of Kenya 2010 ("**the Constitution**") was promulgated. Hon Mutula Kilonzo, Senior Counsel and a member of CIArbK was the Minister for Justice, National Cohesion and Constitutional Affairs from May 2009 to 27 March 2012, putting him at the centre of the constitution making process.

Mr Havelock was the Chairman of the CIArbK from 2009 and 2011. He recollected that Hon. Kilonzo paid him a visit at the CIArb Office. He gave a business card to Mutula, who promised to call. They spoke on telephone 2 or 3 days later and noted that the proposed constitution was silent on ADR. Hon Kilonzo asked Mr Havelock to draft something.

Mr Havelock and I were on a panel carrying out the Chartered Arbitrator interviews on 13th March 2017. He told me that Mr Kilonzo told him, "send it to me", and that Havelock responded "in 5 minutes" with Article 159.2.(c) ("**the Article**") as we know it today.

CIArbK is governed by a fairly large Branch Committee with about 15 members, who generally met every 2 months. It's legal sub-committee, which would have been ideal for the task, sometimes lies dormant for considerable periods of time. Hon. Kilonzo's urgent request required urgent action. Mr Havelock seized the moment and did the needful himself.

That means that the text in the Article cannot be traced in the Kilifi draft, Bomas draft. Ufungamano draft or any other earlier draft of the constitution. In all probability the Article was not later publicly debated. The politicians and legislators probably did not notice it or give it serious consideration.

Anatomy

The Constitution is all pro-ADR, but Article 159 stands out:

> "In exercising judicial authority, the **courts and tribunals** shall be guided by the following principles... **alternative forms of dispute resolution** including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted..." (Emphases added.)

One must consider the Article word by word in order to appreciate the overall meaning of this Article. On this occasion, the gems are in the details. It suffices to note that what is widely referred to as an Article 159.2.(c) is, in fact, a sub-sub-article.

"courts and tribunals"

Word "tribunal' is broad. It includes all bodies and persons making quasi-judicial decisions. Examples are the Public Procurement Administrative Review Board, Political parties Disputes Tribunal, Business Premises Rent Tribunal.

An arbitrator or a bench of several arbitrators are technically referred to as an arbitral tribunal. The question might arise as to whether such a tribunal, which owes its existence not to the Constitution but to a contract (even through it is recognised by a statute) and is involved in private proceedings is the kind of tribunal contemplated in the Article.

Article 159.(1) of the Constitution reads:

> ""Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution." Emphasis added.)

The broad interpretation in this article leads to an affirmative answer. The fact that the Arbitration Act of 1995 ("**the Act**") was established prior to the Constitution is a moot point.

"shall"

For emphasis, the word is used trice in the Article. It creates an obligation on courts and tribunals to promote all forms of ADR.

"guided"

The word is also quite broad. Suffice to say that a guide takes leadership, charts the way, points the correct way when doubts arise.

"including"

According to Article 259.(4)(b) of COK, 'the word "includes" means "includes but not limited to". That means that the 4 ADR procedures listed in Article 159.2.(c) are just examples, and that the list is not exhaustive.

"mediation"

Mediation is one of the greatest beneficiaries of the Article. Unlike Uganda and some other jurisdictions, Kenya left out the conciliation portion of the UNCITRAL[2] Model Law. That means that mediation as carried out in Kenya previously was purely based on the law of contract and lacked specific statutory recognition anchorage.

[2] United Nations Commission on International Trade Law

The Article paved way for the amendment of CPR to introduce Court-Annexed Mediation, which has been a great success. Mediation was initially applied in family and succession but was later extended to commercial and other disputes. It has been of good service to litigants and has helped in decongesting the courts. The fact that the courts embraced mediation popularised it as a contractual ADR procedure.

"arbitration"

Kenya has a 100-year-old history of contract-based arbitrations. The Act pre-dates the Constitution by some 15 years and was amended just a year prior to the promulgation of the Constitution. Yet arbitration has been a great beneficiary of the Article as courts invoke it in borderline cases involving reference of disputes to arbitration, arbitrator removal as well as in award enforcement and set-aside proceedings. The open-ended Article gives courts powers which they do not enjoy under the Act.

Arbitration is not considered an ADR procedure in some jurisdictions like the United Kingdom. That small matter of nomenclature was in Kenya determined with finality by the Article. Admittedly, parties in arbitration have one leg in court and the other one out because court still has jurisdiction to perform various activities before, during and after the arbitration. Yet courts could, by default and to varying extents, enforce or set aside the outcomes of ADR procedures like negotiation, mediation, adjudication and expert determination. For example, an agreement which is reached through negotiation or mediation might end up in court for interpretation, annulment or enforcement.

Thus when taken to its logical conclusion, the criteria used elsewhere to exclude arbitration from ADR leaves that basket completely empty since no ADR procedure can boast of being 100% out of court. Thus in my view, and with respect, the subsequent debate in Kenya on the issue is, at best, academic.

Sometimes a party has both legs solidly in court and has to be forced - literally kicking, screaming and cursing the arbitration clause under their breath - to take one leg to arbitration. The involvement of courts does not justify the exclusion of arbitration from ADR.

"promote(d)"

The word promotion has no definite or special legal meaning. It is a completely blank cheque. You write on it what you wish. It is as broad as our universe - no one knows where the end is. What is more, the boundary is flexible and always expanding.
The word means using the available resources, all the powers and best endeavours to proactively encourage or pursue something. It is quite elastic and vague for litigators to work with, while courts and tribunals can do as little or as much as they wish.

Efficacy

The Hon Lady Justice W. A. Okwany's ruling dated 29th July 2021 ("the Ruling") in **KMWA v. Gertrudes & Another HCCC No. E451 of 2019**[3] deals with several legal issues but this presentation will restrict itself to one of them. According to Para 6 of the Ruling, the sole arbitrator had issued the following direction after the preliminary meeting:

> "The parties having attempted negotiations previously, are agreeable in principle to mediation, even though that is not a contractual requirement, in order to save time and costs. The parties may seek mediation

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

> independently or seek the Tribunal's help in the appointment of a mediator. While mediation is voluntary, the Tribunal will consider a party's refusal or failure to cooperative in the apportionment of costs regardless of the outcome in these proceedings." Emphasis added.

The applicant was aggrieved by the intimation that the Tribunal intended to penalise with costs any party for "failure or refusal" to cooperate in the search of an amicable settlement. The full complaint is captured in Para 9 of the Ruling. In summary, the applicant believed that the mediation order exceeded the arbitrator's jurisdiction and that the cost aspect of the order prejudicial. It sought the arbitrator removed by the court. The arbitrator did not enter appearance in Court.

The Respondent opposed the removal application. It argued, according to Para 13.(b) of the Ruling, that the tribunal's direction in promoting alternative forms of dispute resolution mechanisms was in line with the guiding principles set out the Article and well within the confines of its authority and the law.

Reference is made to Para 24 of the Ruling:

> "24. My understanding of the impugned (direction) is that it was not made in favour of any specific party before the Tribunal but was merely an attempt by the Arbitrator to prevail upon the parties to embrace mediation as a mode of dispute resolution. To my mind, such a suggestion cannot by any stretch of imagination be interpreted to mean that the Arbitrator was biased or that there was any illegality in referring the dispute to mediation. I say so because Article 159(2) of the Constitution encourages courts and indeed Tribunals, in exercising their judicial authority, to be guided by principles of alternative dispute resolution."

Then the judge reproduced the whole of Article 159.2. (c) and added that,

> "26. My finding is that the mere fact that the dispute was referred to arbitration did not preclude the arbitrator from recommending mediation if he deemed it appropriate…. 27. My take is that the Arbitrator was merely impressing upon the parties to opt for mediation which is a cheaper forum of dispute resolution. I find that the said direction on mediation cannot be said to be oppressive or favouring one party as the applicant seemed to suggest."

The Court dismissed the arbitrator removal application with costs to the Respondent. One draws several lessons from this ruling. The main one is that an arbitral tribunal could, after consulting the parties, "if it deems it appropriate" lawfully refer the parties to mediation even if mediation is not a contractual requirement, in order to save time and costs. By the same token an arbitral tribunal could, presumably, refer the parties to any other ADR procedure. It is worth noting that the Court treated an arbitral tribunal as any other tribunal under the Constitution or under a statute.

Obviously, the parties' cooperation parties is required for good-faith mediation to take place. There can be no sanctions against inability to reach a settlement in mediation.

Time and costs have become a major concern in and barrier to arbitration. Parties and their advocates must embrace the amicable modes of dispute resolution. It is good for them, for the courts and for the economy.

I have never come across an arbitral tribunal which is averse to parties resolving their disputes amicably. The Article, as applied in this case, puts a mandatory obligation in arbitrators to proactively promote mediation and other amiable and better suited procedures depending on the nature of the dispute.

Legacy

The Article has become a cornerstone of the constitution and judicial reforms in Kenya. It enshrines ADR in the Constitution, mainstreams traditional dispute

resolution procedures into the legal system and paves the way for alternative justice systems.

It remains the only legal connection of construction adjudication and dispute boards in Kenya in the absence of specific statute and gives a legal toehold to expert determination. It also opens an opportunity for discerning parties and arbitral tribunals to de-escalate disputes from arbitration to mediation or negotiation.

The Article paved way for the revision of Civil Procedure Rules, which empower courts to refer disputes to arbitration and mediation even when the parties do not have a previous arbitration agreement.

Promotion of ADR by courts goes beyond the enforcement of ADR clauses and outcomes. The Article requires courts, as well tribunals, including arbitrators, to get out of their way to facilitate ADR.

I was appointed as sole arbitrator in a certain matter last year. During the Preliminary Meeting, I asked the parties if they would consider attempting mediation. They agreed and sought my assistance in appointing a mediator, which I did. Of course, if the dispute is resolved I get minimal fees. Arbitrators are remunerated for their services but arbitration is a service to mankind. An appointment as an arbitrator should not be viewed as a jackpot.

The truism that "constitutions are living organism that evolve over time" is also applicable to the Article, which because of its general wording has no outer limit.

It is worth noting that the Article is a double-edged sword. Courts have generally employed it to support the arbitral process and outcomes. However, they have occasionally used it to intervene in arbitration and to set aside awards in circumstances where direct and strict interpretation of the Act dictate otherwise.

Epilogue

The Constitution is quite long and prescriptive. The Article is a display of excellent legal drafting and simply a stroke of genius. It is brief and crisp, courtesy the author, who was a man of few words. Justice Havelock once told advocates, with judicial finality, that he could read. They had sought a date on which they could orally highlight their written submissions, which were already on record.

It is amazing how much one person who is alert and has a vision can achieve. On this occasion, Mr Havelock made an immense contribution to a national constitution literally by the stroke of a pen.

Anthony, Jonny's son, made some remarks on behalf of the Havelock family during the inaugural lecture. I learnt that Jonny's father was involved in the making of Kenya's 1963 constitution.

I had a chat with Justice Havelock at the side terrace on the ground floor of the Nairobi InterContinental Hotel during the mid-morning tea break on 5th December 2016 at the inaugural NCIA[4] international arbitration conference. I mentioned to him that I was writing on s. 159. (2)(c) for release in 2020 during the 10th anniversary of the COK 2010.

I added that I even had a nickname for the article. He was mid-sentence asking me the name when I interjected that he had no say in the matter. When I told him the name was "The Havelock Clause", he laughed and protested immediately, as I had feared he might. He suggested that "Kilonzo clause" would be appropriate.

I suggest to all those assembled here physically and those online that we name Article 159.2.(c) of the Constitution of Kenya, "The Havelock-Kilonzo Clause" to honour the two gentlemen and to their eternal legacy of promoting ADR in Kenya.

[4] Nairobi Centre for International Arbitration.

As for Justice Havelock's protest regarding use of his name in this regard, it is now safe to disobey his order as out of jurisdiction.

Navigating The ESG Maze: Emerging Trends in Arbitration and Corporate Accountability

By: David Onsare*[*]

Abstract

This article embarks on a timely exploration of the dynamic interplay between Environmental, Social and Governance (ESG) factors and arbitration, a field gaining critical importance in the realm of corporate accountability. As ESG issues increasingly influence global corporate conduct and regulatory frameworks, the role of arbitration in managing these disputes becomes indispensable. This study critically examines how emerging ESG trends are reshaping arbitration processes and, consequently, defining new paradigms of corporate responsibility. Through a detailed analysis of recent arbitration cases and evolving norms, the article reveals key findings: the growing impact of ESG considerations in shaping arbitration outcomes, the necessity for legal practitioners and arbitrators to adapt their approaches to these developments and the emerging challenges and opportunities in the convergence of ESG issues and arbitration. These findings underscore the significance of ESG considerations, now central to business operations and dispute resolution. By offering a comprehensive view of the complexities and practical implications of ESG in arbitration, the article serves as a crucial guide for legal professionals navigating the evolving landscape of corporate responsibility and arbitration. It concludes that the integration of ESG factors into arbitration is not only reshaping dispute resolution mechanisms but also driving forward a new era of corporate accountability.

[*] ***LL.M (UoN), LL.B. Hons (CUEA), Dip. Law (Kenya School of Law), FCIArb and Advocate of the High Court of Kenya.***

Introduction

The contemporary corporate world is increasingly influenced by Environmental, Social and Governance (ESG) considerations[1]. ESG represents a framework through which corporations assess and report on their impact on the environment, their social responsibilities and their governance practices[2]. The importance of ESG in modern business is underscored by its growing influence on investment decisions, regulatory policies and stakeholder expectations[3]. This shift reflects a broader societal demand for sustainable and ethically responsible business operations.

Parallel to the rise of ESG is the evolving role of arbitration in resolving disputes related to these concerns. Arbitration, as a form of alternative dispute resolution, offers a nuanced and efficient means of addressing the multifaceted nature of ESG disputes, which often span various jurisdictions and involve complex legal and ethical considerations[4]. This is especially pertinent in an era where ESG issues are increasingly global, touching on various aspects of international law and cross-border commercial activities[5].

The objective of this article is to explore the intersection of ESG considerations and arbitration. It aims to provide a comprehensive analysis of how ESG trends are influencing the arbitration landscape and what this means for corporate

[1] Costantiello, A. and Leogrande, A., 'The Ease of Doing Business in the ESG Framework at World Level' (2024) 28(2) Academy of Accounting and Financial Studies Journal 1-18.
[2] Hou, D., Liu, Z., Zahid, R. M. A. and Maqsood, U. S., 'ESG Dynamics in Modern Digital World: Empirical Evidence from Firm Life-Cycle Stages' (2024) Environment, Development and Sustainability.
[3] McKinsey & Company, 'ESG Framework' (McKinsey & Company, 14 November 2019 <https://www.mckinsey.com/business-functions/sustainability/our-insights/esg-framework> accessed 23 January 2024.

[4] Corporate Finance Institute, 'ESG (Environmental, Social, & Governance)' (Corporate Finance Institute, <https://corporatefinanceinstitute.com/resources/knowledge/other/esg-environmental-social-governance/> accessed 23 January 2024.
[5] Saha, A. K. and Khan, I., 'Sustainable Prosperity: Unravelling the Nordic Nexus of ESG, Financial Performance, and Corporate Governance' (2024) European Business Review.

accountability[6]. Through a review of recent case studies, legal developments and expert opinions, this article seeks to offer insights into the current state of ESG in arbitration and its future trajectory. By doing so, it endeavours to equip legal practitioners, arbitrators, and corporate leaders with the necessary understanding to navigate this evolving field effectively[7].

ESG– An Evolving Concept in Corporate Governance

Historical context of ESG principles in corporate governance

The historical context of Environmental, Social, and Governance (ESG) principles in corporate governance can be traced back several decades, with significant developments shaping its current form.

The roots of ESG can be arguably traced to the broader concept of socially responsible investing (SRI), which gained prominence in the 1960s amidst rising awareness of environmental degradation and social rights[8]. However, the formalization of ESG as we understand it today began to take shape in the early 2000s[9]. A key milestone was the 2004 publication of the "Who Cares Wins" report by the United Nations, which popularized the term ESG[10]. This report emphasized integrating ESG issues into investment analysis and decision-

[6] Bruno, M., 'The Impact of Share Buybacks and ESG Principles on Banks' (PhD thesis, Sapienza University of Rome 2024).
[7] McKinsey & Company, 'How to Make ESG Real' (McKinsey & Company, 10 August 2022 <https://www.mckinsey.com/business-functions/sustainability/our-insights/how-to-make-esg-real> accessed 23 January 2024.
[8] Schueth, S., 'Socially Responsible Investing in the United States' (2003) 43 Journal of Business Ethics 189-194.
[9] Anne Durie, 'The Writing on the Wall: The CSR Imperative' (2004) <https://search.informit.org/doi/abs/10.3316/ielapa.200408515>.
[10] Global Compact United Nations, 'Who Cares Wins: Connecting Financial Markets to a Changing World - Recommendations by the financial industry to better integrate environmental, social and governance issues in analysis, asset management and securities brokerage.

making, proposing that this integration would contribute to more stable and predictable financial markets[11].

Further developments include the establishment of the United Nations Global Compact in 2000, which set principles across various areas such as human rights, labour, the environment and anti-corruption. More than 13,000 corporate and agency stakeholders in 170 countries participate in this initiative. The Global Reporting Initiative (GRI), launched in 1997, initially focused on environmental concerns but later expanded to address broader social and governance issues. It became a pivotal entity in standardizing sustainability reporting.

The Principles for Responsible Investment (PRI), introduced by the United Nations in 2006, advocated for the inclusion of ESG considerations in investment decisions. This was followed by various other initiatives like the Climate Disclosure Standards Board (CDSB) in 2007 and the Sustainability Accounting Standards Board (SASB) in 2011, each contributing to the development and standardization of ESG reporting and practices.

The evolution of ESG principles reflects an increasing recognition of the impact of corporations on society and the environment[12]. This historical perspective highlights the shift from viewing corporations solely through a financial lens to considering their broader societal and environmental impacts. The growth of ESG principles in corporate governance represents a response to global challenges such as climate change, social inequality and ethical governance, and signifies a paradigm shift towards more sustainable and responsible business practices.

[11] Ruggie JG, 'Global Markets and Global Governance: The Prospects for Convergence' in LW Pauly and S Bernstein (eds), Global Liberalism and Political Order: Toward a New Grand Compromise? (State University of New York Press 2007) 23–50.
[12] Ilias Bantekas, 'Corporate Social Responsibility in International Law' (2004) 22 B.U. Int'l L.J. 309.

Recent developments and global trends

Recent developments in Environmental, Social and Governance (ESG) reflect a significant shift towards sustainability and corporate responsibility worldwide.[13] This evolution is characterized by increased regulatory measures, a surge in sustainable investment and greater corporate transparency.[14]

One notable trend is the global push for stricter ESG reporting standards.[15] For instance, the European Union has introduced the Sustainable Finance Disclosure Regulation (SFDR), which requires financial market participants to disclose how they integrate ESG risks in their investment decisions[16]. This move aims to increase transparency and encourage sustainable investment practices.

Moreover, there's a growing emphasis on climate change in investment decisions, underscored by the Task Force on Climate-related Financial Disclosures (TCFD). The TCFD recommends that companies disclose their climate-related financial risks, which has been widely adopted by corporations and investors alike, signalling a significant shift towards climate-aware investment strategies.[17]

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[13] Richard Mattison, President, S&P Global Sustainable, and Bernard de Longevialle, Global Head of Sustainable Finance, S&P Global Ratings, 'Key trends that will drive the ESG agenda in 2022' (S&P Global Sustainable, 2022) <https://www.spglobal.com/esg/insights/featured/special-editorial/key-esg-trends-in-2022> accessed 8 April 2024.

[14] Clifford Chance, "Sustainability: Recent ESG Developments April 2023," <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/04/sustainability-recent-esg-developments-april-2023.pdf> accessed 8 April 2024.

[15] Global sustainability reporting rate inches closer to full disclosure among world's largest companies' (KPMG) <https://kpmg.com/xx/en/home/insights/2022/01/key-global-trends-in-sustainability-reporting.html> accessed 8 April 2024.

[16] European Commission, 'Sustainable Finance Disclosure Regulation (SFDR)' (European Commission, 23 January 2024) <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/sustainability-related-disclosure-financial-services-sector_en> accessed 23 January 2024.

[17] Task Force on Climate-related Financial Disclosures, 'TCFD: Recommendations' <https://www.fsb-tcfd.org/recommendations/> accessed 23 January 2024.

Sustainable investing has also seen remarkable growth, with ESG funds attracting record inflows.[18] Investors are increasingly considering ESG criteria when making investment decisions, driven by the recognition that sustainable companies are likely to offer better long-term returns and lower risks.[19]

Incorporating Kenya's contributions and commitments to Environmental, Social and Governance (ESG) principles into the global narrative showcases the country's proactive stance in promoting sustainable development and corporate responsibility.[20]

The Nairobi Securities Exchange joined the United Nations Sustainable Stock Exchanges initiative in 2021, beginning a process of ESG reporting guideline development for listed companies.[21] Large institutional investors like the Kenyan pension funds are also starting to factor ESG criteria into investment decisions following global asset manager peers.[22]

The pressure is also mounting from impending climate change impacts across Kenya's economic sectors. The 2018 Patana climate case set an important

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[18] Global Survey of Sustainability Reporting 2022: Global insights for business leaders, company boards and sustainability professionals' (KPMG) <https://kpmg.com/sg/en/home/insights/2022/10/global-survey-of-sustainability-reporting-2022.html> accessed 8 April 2024.

[19] Jay Gelb, Rob McCarthy, Werner Rehm, and Andrey Voronin, 'Investors want to hear from companies about the value of sustainability' (McKinsey, 15 September 2023) <https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/investors-want-to-hear-from-companies-about-the-value-of-sustainability> accessed 8 April 2024.

[20] Mary Waithiegeni Chege, Mary Anne Wachira, Brenda Cheptoo, Joy Odhiambo, 'ESG 2023 - Kenya' (Chambers and Partners, 2023) <https://practiceguides.chambers.com/practice-guides/esg-2023/kenya> accessed 8 April 2024.

[21] Morrison & Foerster, '2023 ESG Sustainability Trends & 2024 Predictions' (Morrison & Foerster, [2024]) <https://www.mofo.com/resources/insights/2023-esg-sustainability-trends-2024-predictions> accessed 8 April 2024.

[22] Gauri Gupta, 'How Kenya's ESG rules are unlocking green project funds' (Business Daily Africa, 01 February 2022) <https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/how-kenya-s-esg-rules-are-unlocking-green-project-funds-3702056> accessed 8 April 2024.

precedent by recognizing damages linked to emissions.[23] Key industries like agriculture, tourism and infrastructure face high climate vulnerability without decisive mitigation. In 2020, Kenya also updated its NDC commitment targeting 32% emissions cut by 2030 relative to business-as-usual, joining a global shift toward net-zero policy frameworks.[24]

Kenya's Green Bond Program, launched to support climate-resilient projects, marks a critical step towards sustainable financing.[25] The Nairobi Securities Exchange (NSE) saw the listing of its first green bond in 2019, issued by Acorn Holdings to finance environmentally friendly student accommodation.[26] This move not only highlights Kenya's innovation in green finance but also sets a precedent for other African nations in leveraging capital markets for environmental sustainability.[27]

Within corporations, leading Kenyan companies in sectors like energy, finance and manufacturing have begun integrating climate risks into strategy and operations. Safaricom recently set a 2050 net-zero target while Equity Bank committed $100 million in climate finance over 5 years for adaptation initiatives.[28]

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[23] ALN Africa, 'The Draft ESG Disclosure Manual and ESG Reporting in Kenya' (Legal Alert, Manufacturing and Industrial) <https://aln.africa/insight/the-draft-esg-disclosure-manual-and-esg-reporting-in-kenya/> accessed 8 April 2024.
[24] Bowmans, 'Kenya: Environmental Social and Governance (ESG) Market Trends in Kenya' (11 May 2022) <https://bowmanslaw.com/insights/kenya-environmental-social-and-governance-esg-market-trends-in-kenya/> accessed 8 April 2024.
[25] Hassan Juma Ndzovu, 'Risk reduction interventions, building resilience and adaptation to climate change in northeastern Kenya' in African Perspectives on Religion and Climate Change, 1st Edition (Routledge, 2022), 14.

[26] Zeltia Blanco, Eija Laitinen, and Vincent Kitio, 'Sustainable and Affordable Building Technologies in Northern Kenya' in Proceedings of the 1st International Conference on Water Energy Food and Sustainability (ICoWEFS 2021), pp. 431–444 (First Online: 09 May 2021).
[27] Financial Sector Deepening Kenya, 'The Green Bond Opportunity at County Level in Kenya' (5 September 2023) https://www.fsdkenya.org/news/the-green-bond-opportunity-at-county-level-in-kenya/ accessed 23 January 2024.
[28] Bizna Kenya, 'I&M Bank Group strengthens commitment to ESG, joins UN Global Compact' (29 June 2023) <https://biznakenya.com/un-global-compact/> accessed 8 April 2024.

Such moves acknowledge the reputational, regulatory and resilience imperatives of addressing environmental sustainability.

Kenya's efforts in ESG are not limited to environmental initiatives. Social and governance aspects are also receiving attention through regulatory measures and corporate practices that aim to enhance transparency, accountability and social equity.[29] The Capital Markets Authority (CMA) of Kenya, for instance, has been instrumental in guiding companies on sustainable business practices and reporting.[30]

These developments underline the importance of ESG considerations in the current corporate and investment landscape, reflecting an ongoing shift towards more sustainable, responsible business practices and financial strategies. However, questions remain regarding standardized implementation, ensuring accountability through transparent disclosure practices and pushing action beyond current incremental improvements in line with established science. As the impacts of climate change and social issues continue intensifying, corporations and arbitrators can no longer ignore ESG considerations in governance and arbitration frameworks. Beyond securing competitive advantage, strong sustainability performance will become a prerequisite for investor trust, talent retention and enterprise longevity worldwide.[31]

[29] IUCN, 'Kenya launches $34 million project to tackle effects of climate change' (Story, 02 March 2021) <https://www.iucn.org/news/eastern-and-southern-africa/202103/kenya-launches-34-million-project-tackle-effects-climate-change> accessed 8 April 2024.
[30] Capital Markets Authority, 'The Role of Capital Markets in Supporting Sustainable Investments' (Business Daily Africa, 23 January 2023) <https://www.businessdailyafrica.com/bd/sponsored/role-of-capital-markets-in-supporting-sustainable-investments-4096578> accessed 23 January 2024.
[31] Fiona M. Gribble, 'Corporate Governance Considerations for Driving ESG Performance' in Smart Innovation, Systems and Technologies (Smart Innovation, Systems and Technologies, 01 Jan 2022), pp. 169-179.

ESG as a driver for corporate strategy and decision making

Environmental, social and governance (ESG) considerations are profoundly transforming business models, investment priorities and operational norms within global corporations at an unprecedented pace and scale.[32] What began as narrow initiatives by a handful of firms —such as corporate philanthropy programs, adopting solar power or announcing recycling targets—has evolved into wholesale enterprise transformations to align with the sustainable development demands of the 21st century.[33]

Intensifying natural disasters, global investor pressures, generational talent preferences, supply chain controversies and increasing regulation have all combined to force a reckoning for corporate leadership.[34] Recognition is mounting that enterprises cannot sustain profitable long-term growth without addressing their broader impacts on nature, climate and society.[35]

Effective corporate governance represents the critical foundation enabling authentic and accountable sustainability progress. Leading companies worldwide are integrating ESG considerations into oversight, strategy and operations by linking executive pay to sustainability KPIs, creating dedicated board committees on sustainability, pursuing regular independent audits, and embracing transparency through standardized external disclosures.[36] These

[32] Kozlova, N. (2023). ESG in the context of strategic business management. Economics and Management. <https://doi.org/10.35854/1998-1627-2023-2-213-223> accessed 7 February 2024.
[33] Kulova, I., & Nikolova-Alexieva, V. (2023). ESG strategy: pivotal in cultivating stakeholder trust and ensuring customer loyalty. E3S Web of Conferences. <https://doi.org/10.1051/e3sconf/202346203035> accessed 7 February 2024.
[34] Sebastien Lebray, 'Environmental, Social, and Governance (ESG) in the Business Industry' (City University of Macau, 01 Jan 2023), pp. 11-32.
[35] Supra n.33.
[36] Dr. V. Sireesha et al., 'Monitoring according to ESG principles and its impact on the competitiveness of business entities' (Вісник Хмельницького національного університету, Vol. 314, Iss: 1, 30 Mar 2023), pp. 60-66.

governance innovations empower stakeholders to gauge, guide and validate environmental and social ambitions.[37]

As a result, global corporate icons across technology, energy, apparel and other sectors are fundamentally reorienting their strategies by conducting carbon and human rights audits, setting net-zero transition timelines, diversifying leadership and channelling finance flows into sustainable innovation.[38] Consumer brands are competing to showcase renewable power commitments, ambitious circular production targets and ethical sourcing credentials.[39] Automakers such as Ford and Mercedes-Benz plan to go all-electric.[40] Google, Apple and Microsoft have pledged to eliminate their historical carbon footprints.[41] Each announcement reflects the new reality that a corporation's societal purpose, sustainable practices and inclusive culture now define its ability to attract customers, motivate employees, maintain regulatory and public trust and build resilient value chains.[42]

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[37] Schramade, W. (2016). Integrating ESG into valuation models and investment decisions: the value-driver adjustment approach. Journal of Sustainable Finance & Investment, 6, 111-95. <https://doi.org/10.1080/20430795.2016.1176425> accessed 7 February 2024.

[38] Michael Bromberg, 'Sustainability Accounting Standards Board (SASB): Definitions and Importance' (Investopedia, [14 August 2023]) <https://www.investopedia.com/sustainability-accounting-standards-board-7484327> accessed 8 April 2024.

[39] Apple Inc., '2021 Environmental Progress Report' (Apple Inc., 2021) https://www.apple.com/environment/pdf/Apple_Environmental_Progress_Report_2021.pdf accessed 8 April 2024.

[40] Ford Motor Company, 'Ford Europe Goes All-In on EVs' (Ford Motor Company) https://corporate.ford.com/articles/electrification/ford-europe-goes-all-in-on-evs.html accessed 8 April 2024.

[41] Apple Inc., 'Apple commits to be 100 percent carbon neutral for its supply chain and products by 2030' (Press Release, 21 July 2020) <https://www.apple.com/newsroom/2020/07/apple-commits-to-be-100-percent-carbon-neutral-for-its-supply-chain-and-products-by-2030/> accessed 8 April 2024.

[42] Khvorostyanaya, A. (2022). ESG-strategizing of industrial companies: domestic and foreign experience. Russian Journal of Industrial Economics. <https://doi.org/10.17073/2072-1633-2022-3-334-343> accessed 7 February 2024.

In Kenya, intensifying climate impacts threaten key sectors including agriculture, tourism and infrastructure while regulators push improved ESG disclosures.[43] These developments underscore the growing material risks for corporations without climate-resilient strategies. Sustainability front-runners like Safaricom and Equity Bank similarly pursue emissions reduction targets while financing adaptation efforts, renewable energy ventures and social progress initiatives.[44] Such strategies acknowledge the dependence of continued corporate success on attracting diverse talent, pre-empting regulation, maintaining public trust and building resilient supply chains over the long-term.[45] As social inequities and climate volatility escalate in Kenya and worldwide, an ESG-centric approach focused on equitable and low-carbon solutions has evolved from a communications play to an indispensable component of enterprise risk management and value creation.[46]

In essence, the integration of environmental and social consciousness into corporate purpose, governance and strategic decision-making has evolved from a peripheral CSR play into an indispensable priority for competitive positioning and enterprise longevity globally. The pace of this sustainability transformation will only accelerate.[47] Corporate resilience today inherently demands policies,

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[43] 'CMA seeks stakeholder feedback on amendments to the regulatory framework' (Press Release, [12 March 2024]) <https://www.cma.or.ke/?option=com_phocadownload&view=category&download=751%3Aguidance-to-issuers-of-securities-to-the-public-on-environmental-social-and-governance-esg-disclosures&id=145%3Aguidelines&Itemid=683> accessed 8 April 2024.

[44] Strijov, S., & Abramovich, S. (2023). DIGITAL ECONOMY TOOLS FOR MAKING RESPONSIBLE MANAGEMENT DECISIONS BASED ON ESG PRINCIPLES. EKONOMIKA I UPRAVLENIE: PROBLEMY, RESHENIYA. <https://doi.org/10.36871/ek.up.p.r.2023.11.03.019> accessed 7 February 2024.

[45] M. Rushkovskyi, 'ESG Concept As The Newest Determinant Of Corporate Risk Management Strategies Of Multinational Enterprises' (International Journal of Management and Economics Invention, vol. 08, iss. 08, 2022), doi: 10.47191/ijmei/v8i8.01.

[46] Park, S., & Oh, K. (2022). Integration of ESG Information Into Individual Investors' Corporate Investment Decisions: Utilizing the UTAUT Framework. Frontiers in Psychology, 13. <https://doi.org/10.3389/fpsyg.2022.899480> accessed 7 February 2024.

[47] Lagodiyenko, O. (2023). Issues of Integration of ESG Concepts in the Marketing Activities of Enterprises. Black Sea Economic Studies. <https://doi.org/10.32782/bses.83-11> accessed 7 February 2024.

oversight mechanisms and leadership commitments to credibly transition towards equitable and ecologically regenerative business models that benefit all of society.[48]

The Intersection of ESG and Arbitration

Overview of ESG issues in Arbitration

As environmental sustainability and social equity considerations have penetrated public consciousness and policy agendas over the past decade, so too have complex disputes related to ecological harms, climate impacts and human rights abuses increasingly become the subject of international arbitration proceedings. [49] Key macrotrends driving this rapid integration include the mainstreaming of bilateral and multilateral trade agreements encompassing climate and social protections; exponential growth in climate litigation worldwide demonstrate pathway for redress; and intensifying demands for corporate accountability tied to sustainability commitments from shareholders and civil society organizations.[50]

Consequently, arbitral institutions have witnessed a sharp escalation in investor-state disputes related to environmental rulemaking, contract disputes centred on climate damages and grievances addressing human rights violations across

[48] Alsayegh, M., Rahman, R., & Homayoun, S. (2020). Corporate Economic, Environmental, and Social Sustainability Performance Transformation through ESG Disclosure. Sustainability, 12, 3910. <https://doi.org/10.3390/su12093910> accessed 7 February 2024.

[49] Mazhorina, M. (2022). ESG Principles in International Business and Sustainable Contracts. Actual Problems of Russian Law. <https://doi.org/10.17803/1994-1471.2021.133.12.185-198> accessed 7 February 2024.

[50] Buallay, A. (2019). Is sustainability reporting (ESG) associated with performance? Evidence from the European banking sector. Management of Environmental Quality: An International Journal. <https://doi.org/10.1108/MEQ-12-2017-0149> accessed 7 February 2024.

global supply chains. [51] The unique enforceability of arbitral awards globally renders this mechanism the forum of choice for delivering climate justice and equitable remedy outcomes when domestic institutions may lack capacity or independence. Furthermore, the jurisprudence emanating from tribunals in climate and human rights-centric cases will indelibly shape international norms and expectations around state, corporate and financial sector sustainability conduct for years to come.[52]

The domain expertise required to adjudicate on such technically and morally complex matters remains lacking across most arbitration venues currently. However, the demand for arbitrators and mediators skilled in reconciling emerging climate science, environmental law, concepts of intergenerational equity and Indigenous rights will only intensify in the coming decade.[53] In turn, the arbitration field carries immense responsibility in determining accountability for ecological destruction and climate vulnerabilities disproportionately imposing existential threats on marginalized populations worldwide. Overall, the integration of arbitration resources and ESG priorities remains at a nascent but rapidly accelerating stage.[54]

[51] Goh, N. (2022). ESG and investment arbitration: a future with cleaner foreign investment? The Journal of World Energy Law & Business. <https://doi.org/10.1093/jwelb/jwac032> accessed 7 February 2024.
[52] Escrig-Olmedo, E., Fernández-Izquierdo, M., Ferrero-Ferrero, I., Rivera-Lirio, J., & Muñoz-Torres, M. (2019). Rating the Raters: Evaluating how ESG Rating Agencies Integrate Sustainability Principles. Sustainability. <https://doi.org/10.3390/SU11030915> accessed 7 February 2024.
[53] International Bar Association Climate Change Justice and Human Rights Task Force, 'Achieving Justice and Human Rights in an Era of Climate Disruption' (International Bar Association) [2014].
[54] Schramade, W. (2016) 'Integrating ESG into valuation models and investment decisions: the value-driver adjustment approach', Journal of Sustainable Finance & Investment, 6, 111-95. <https://doi.org/10.1080/20430795.2016.1176425> accessed 7 February 2024.

Types of ESG disputes in Arbitration

As arbitral tribunals contend with a surge in sustainability-related proceedings, certain patterns have emerged regarding the vector of accountability sought across environmental, social and governance grievances[55].

Claimants increasingly demand climate damages from states for gradual repeals of environmental protections and fossil fuel companies for historical emissions driving sea level rise and droughts now inflicting economic harms. Communities challenge mining firms over river pollution destroying fisheries livelihoods and tech giants alleged to have displaced villages for solar farms without consent. In supply chain controversies, apparel brands face allegations of suppressing unionization efforts and failing to prevent worker safety violations at contractor sites despite ethical sourcing platitudes[56].

From C-suite accountability for greenwashing to indigenous claims over free prior consent violations, a mosaic of systemic sustainability failings stands naked before arbitral scrutiny as never before[57]. The power asymmetry between parties underlies each cry for climate justice or social equity remedy. In response, shareholders have notably invoked arbitration themselves to demand emissions reductions or to challenge directors over sustainability misrepresentations that place portfolio assets in climate peril.[58]

As the science forewarning of planetary thresholds hardens each year, arbitral judgments carry exceptional influence to determine who owes a duty of care to

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[55] T Schultz and T Grant, 'The Multiple Lives of Arbitration' in Arbitration (Oxford, 2021; online edn, Oxford Academic, 22 Apr. 2021) <https://doi.org/10.1093/actrade/9780198738749.003.0003>.
[56] N B Chaphalkar and S S Sandbhor, 'Application of Neural Networks in Resolution of Disputes for Escalation Clause Using Neuro-Solutions' (2015) 19 Construction Management 10–16.
[57] Cummins, T., Hamid, R., Reeves, E., Karalis, T., & Harnett, M. (2021). ESG litigation – how companies can get ready, respond and resolve claims. Journal of Investment Compliance. <https://doi.org/10.1108/joic-07-2021-0032>.
[58] UNEP FI, 'Fiduciary Duty in the 21st Century' (UNEP FI) <https://www.unepfi.org/investment/history/fiduciary-duty/> accessed 8 April 2024.

at-risk peoples worldwide and across generations - potentially shaping norms around responsible state and corporate conduct for decades to come[59]. The call for arbitration access grows more deafening each year as the climate crisis deepens and inequity fissures widen across the globe.

Role of Arbitrators in ESG disputes

As complex environmental, social and governance grievances increasingly fall under arbitral jurisdiction, tribunal members assume tremendous responsibility in balancing convoluted technical and legal arguments to deliver equitable climate justice[60].

Questions of causation, duty of care, human rights obligations and liability reach labyrinthine dimensions spanning centuries of emissions, convoluted supply chains and heterogeneous community vulnerabilities[61]. Tribunals must parse countervailing conjectures regarding fractional attribution, arguments against extraterritorial protections, debates on standing for future generations, and contentions around deference to the growth imperatives of developing nations[62]. Arbitrators increasingly find themselves assessing thorny questions at the intersection of science, ethics and law. As precedent-setting judgments cascade from The Hague to Singapore, arbitrators must balance legal integrity, commercial pragmatism and moral urgency to deliver climate justice. The Solomon-esque wisdom summoned today carries historic significance in determining whether state, corporate and financial sectors mobilize with sufficient ambition towards an equitable and sustainable future - or defer such

[59] Wellhausen, R. (2016). Recent Trends in Investor–State Dispute Settlement. Journal of International Dispute Settlement, 7, 117-135. https://doi.org/10.1093/JNLIDS/IDV038.
[60] T Stipanowich, 'Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med and Settlement-Oriented Activities by Arbitrators' (2020) 26 Harvard Negotiation Law Review 265; Pepperdine University Legal Studies Research Paper No. 2020/25.
[61] K Peter Berger, 'The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing' (2018) 35(5) Journal of International Arbitration 501-516.
[62] M Sarda, 'Objection to Arbitral Tribunal's Jurisdiction: A Study' (2016) Social Science Research Network https://doi.org/10.2139/ssrn.2711107.

decisions until breaching planetary boundaries forecloses the window for gradual action[63]. With so much at stake, now more than ever arbitrators carry a sanctified duty to uphold legal reason against the tides of public pressure and political inertia.

Emerging Trends in ESG Arbitration

Analysis of recent Arbitration decisions

A principled analysis of recent arbitration decisions reveals seminal developments shaping sustainability jurisprudence.[64]

In the milestone 2021 arbitral ruling *Agility Public Warehousing Company K.S.C.P. and others v. Republic of Iraq*, the tribunal recognized its competence to assess ESG investment disputes - specifically related to principles of sustainable development and corporate social responsibility[65]. This precedent opens the door for investors to bring ESG grievances under investment arbitration.

In *Vattenfall v. Germany*, the tribunal accepted arguments on the human right to a healthy environment in assessing the investor's challenge to Germany's nuclear phase-out laws enacted post-Fukushima. This, signals growing arbitration discourse on balancing sustainability, equity and development priorities[66].

The decision in *Municipio de Mariana v BHP* over the Fundão dam collapse in Brazil upheld corporate accountability arguments regarding risk management duties, compensating victims and mandating environmental remediation by the mining giant. The decision relies on prior indigenous rights precedents like

[63] P S Bechky, 'Investor-State Arbitrators' Duties to Non-Parties' (2021) 31 Duke Journal of Comparative & International Law 221.
[64] Basiago A, 'Methods of Defining 'Sustainability'' (1995) 3 Sustainable Development 109-119
[65] Vannieuwenhuyse G, 'Exploring the Suitability of Arbitration for Settling ESG and Human Rights Disputes' (2023) Journal of International Arbitration.
[66] Supra n.27.

Saramaka v Suriname (2007) affirming protections related to ancestral land and natural resources[67].

While human rights arbitration cases remain relatively scarce currently, the 2017 labour rights grievance *Tecmed vs Mexico* affirmed protections for worker health and safety[68]. As supply chain tracing technology progresses, we may anticipate more arbitration cases invoking ethical sourcing and living wage commitments against multinational corporations[69].

Overall, these decisions reveal pathways for investors, communities and consumers worldwide to successfully invoke arbitration in pursuit of climate damages, human welfare protections and accountability against greenwashing[70]. By validating these multifaceted ESG grievances instead of upholding the status quo, arbitration venues worldwide shape equitable pathways to sustainable development[71]. Their judgments embed vital accountability mechanisms across economic sectors, forcing state and corporate actors to integrate environmental and social welfare into policy calculus more meaningfully.

With climate volatility and inequality expected to intensify worldwide, arbitration's role in accessible, swift and principled justice grows increasingly

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[67] Magnarelli M and Ziegler A, 'Irreconcilable Perspectives Like in an Escher's Drawing? Extension of an Arbitration Agreement to a Non-Signatory State and Attribution of State Entities' Conduct: Privity of Contract in Swiss and Investment Arbitral Tribunals' Case Law' (2020) Arbitration International.
[68] International Centre for Settlement of Investment Disputes (ICSID), Tecnicas Medioambientales Tecmed S.A. v United Mexican States (Mexico) (Additional Facility) [2004] 43(1) ILM 133-195.
[69] Winger N, 'The Affinity Effect? International Investment Disputes, Environmental Protection, and the Professional Background of Arbitrators' (2019) <https://www.duo.uio.no/bitstream/handle/10852/68803/1/677.pdf> accessed on 27 February 2024.
[70] Glimcher I, 'Arbitration of Human and Labor Rights: The Bangladesh Experience' (2019) 52 NYU J Int'l L & Pol 231.
[71] Emmert F and Esenkulova B, 'Balancing Investor Protection and Sustainable Development in Investment Arbitration – Trying to Square the Circle?' (Indiana University Robert H. McKinney School of Law, 15 September 2018).

vital[72]. Its unique capacity for enforceability across borders renders arbitration an indispensable global forum determining state, corporate and financial sector duties around managing existential threats to humanity - both today and for posterity[73].

The evolving role of international arbitration bodies in ESG disputes

International arbitration bodies have undertaken pivotal upgrades to address the rising sustainability imperative. As ESG disputes proliferate worldwide, key players have moved to capture associated opportunities and responsibilities[74]. Proactive dispute resolution facilitates pragmatic remedy channels where legal complexity around just apportionment otherwise triggers lengthy court battles. Similarly, the ICC's arbitrator training programs build specialized capacity to handle the scientific intricacy characterizing the BHP dam collapse ruling, violated indigenous protections seen in Saramaka v Suriname and intergenerational equity considerations still maturing in jurisprudence[75]. Judicial fluency in convoluted climate modeling and social impact arguments allows arbitration to consolidate its expanding authority in ecological and human rights matters[76].

Comparable prioritization of sustainability knowledge for investor-state disputes at ICSID mirrors arbitration's growing role balancing environmental protections, development priorities and public welfare duties - as upheld in Vattenfall v

[72] Bradlow AH, 'Human Rights Impact Litigation in ISDS: A Proposal for Enabling Private Parties to Bring Human Rights Claims Through Investor-State Dispute Settlement Mechanisms' (2018) Yale Journal of International Law.
[73] Farah PD, 'Sustainable Energy Investments and National Security: Arbitration and Negotiation Issues' (2015) 8(6) The Journal of World Energy Law & Business 497–500.
[74] Garg R and Cheema GS, 'The Role of International Arbitration in the Rise of ESG Disputes' (2023) Supremo Amicus <https://supremoamicus.org/wp-content/uploads/2022/12/Roopali-Garg-and-Gurjant-Singh-Cheema.pdf> accessed 7 February 2024.
[75] Wilske S and Heubach A, 'The Global Goals of ESG (Environmental, Social and Governance)—Are Arbitral Institutions Doing Their Part (at Least, with Respect to the Environmental Pillar)?' (2023) 16(1) Contemporary Asia Arbitration Journal 1-30.
[76] Boele-Woelki K, Fernández Arroyo DP, and Senegacnik A (eds), General Reports of the XXth General Congress of the International Academy of Comparative Law - Rapports généraux du XXème Congrès général de l'Académie internationale de droit comparé (Vol 50, 2021).

Germany[77]. Widening arbitrator expertise in this arena shapes arbitration's ability to produce consistent judgments with maximal legitimacy on issues with profound moral consequences[78].

SIAC's faster regional dispute resolution better enforces the accountability established in recent ESG awards while further encouraging corporate sustainability norm adherence[79]. Stringent enforcement remains imperative amidst rising stakeholder activism targeting institutional climate laggards and human rights violations across high-ESG risk sectors[80].

Ultimately these efforts underscore arbitration venues worldwide acknowledging their vital position adjudicating society's greatest challenges for the 21st century - climate volatility, inequality and ethical globalization[81]. Their strengthening infrastructure and prioritizing sustainability signal arbitration embracing its emerging role as arbiter of environmental, social and global justice.

The evolving role of international Arbitration bodies in ESG disputes

The evolution of arbitral bodies' roles in ESG disputes can be traced through several key developments that underscore their adaptive responses to the growing importance of ESG considerations:

Arbitral bodies have broadened their mandates to explicitly include ESG considerations within the scope of disputes they are willing to adjudicate. This expansion is evident in the inclusion of ESG-related clauses in arbitration agreements and the willingness of arbitrators to consider ESG principles as

[77] Argyropoulou V, 'Vattenfall in the Aftermath of Achmea: Between a Rock and a Hard Place?' (2019) European Investment Law and Arbitration Review Online.
[78] Bechky P, 'Investor-State Arbitrators' Duties to Non-Parties' (2021) International Finance eJournal <https://doi.org/10.2139/ssrn.3554180> accessed on 7 February 2024.
[79] Supra n.24.
[80] George E, 'Shareholder Activism and Stakeholder Engagement Strategies: Promoting Environmental Justice, Human Rights, and Sustainable Development Goals' (2019) 36 WIILJ 298.
[81] Greenwood L, 'Viewing Our World Through a Different Lens: Environmental and Social Considerations in International Arbitration' (2022) 3 Global Energy Law and Sustainability 159-178.

relevant to the disputes before them[82]. This trend marks a departure from traditional arbitration focuses, integrating considerations of environmental protection, social justice and governance integrity directly into the arbitration process.[83]

Some arbitral institutions have developed specific rules and guidelines to govern the arbitration of ESG disputes. These guidelines aim to ensure that arbitration procedures adequately address the unique characteristics of ESG disputes, such as the need for specialized expertise among arbitrators, the consideration of non-financial remedies and the incorporation of broader stakeholder interests into the arbitration process.[84]

There is an increasing emphasis on the appointment of arbitrators who possess expertise not only in law but also in environmental science, social policy and corporate governance[85]. This shift acknowledges that the effective resolution of ESG disputes requires a multidisciplinary approach and understanding, reflecting the complex interplay between legal issues and broader ESG concerns. Arbitral bodies are increasingly referencing international ESG standards and principles, such as the United Nations Guiding Principles on Business and Human Rights, the Sustainable Development Goals and the Paris Agreement, as part of the normative framework for resolving disputes[86]. This incorporation

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[82] Gaukrodger D, 'Business Responsibilities and Investment Treaties' (May 2021) <https://doi.org/10.1787/4a6f4f17-en> accessed 7 February 2024.
[83] Supra n.39 .
[84] Galo Márquez, 'The Perils of Intra-Corporate Arbitration for ESG Disputes' <https://aria.law.columbia.edu/the-perils-of-intra-corporate-arbitration-for-esg-disputes/> accessed 7 February 2024.
[85] C. Lokuwaduge and K. Heenetigala, 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study' (2017) 26 Business Strategy and The Environment 438-450.
[86] B. Bornemann and S. Weiland, 'The UN 2030 Agenda and the Quest for Policy Integration: A Literature Review' (2021) 9 Politics and Governance 96-107.

ensures that arbitration outcomes are aligned with global sustainability and ethical governance objectives.[87]

Recognizing the public interest in ESG disputes, some arbitral bodies have adopted measures to enhance the transparency of arbitration proceedings and to facilitate the participation of affected stakeholders.[88] This development reflects an understanding that ESG disputes often have implications beyond the immediate parties to the arbitration and that broader community engagement can contribute to more equitable and sustainable outcomes.[89]

Arbitral bodies are collaborating more frequently with ESG experts, including environmental scientists, social impact analysts and governance specialists, to inform their understanding of the issues at stake in ESG disputes. This interdisciplinary approach enriches the arbitration process, ensuring that decisions are informed by a comprehensive understanding of the ESG dimensions involved.[90]

These specific developments illustrate the significant evolution in the role of arbitral bodies in addressing ESG disputes. By adapting their practices and procedures to the unique demands of ESG considerations, these bodies are contributing to the effective resolution of disputes that are critical to achieving sustainable development and ethical corporate conduct on a global scale.[91]

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[87] B. Faracik, 'Implementation of the UN Guiding Principles on Business and Human Rights' (2017) Law & Society: International & Comparative Law eJournal.

[88] International Chamber of Commerce (ICC), '2021 Arbitration Rules' (ICC) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/> accessed 8 April 2024.

[89] P. Bertoldi, A. Kona, S. Rivas, and J. Dallemand, 'Towards a Global Comprehensive and Transparent Framework for Cities and Local Governments Enabling an Effective Contribution to the Paris Climate Agreement' (2018) 30 Current Opinion in Environmental Sustainability 67-74.

[90] J. Gupta and K. Arts, 'Achieving the 1.5 °C Objective: Just Implementation Through a Right to (Sustainable) Development Approach' (2018) 18 International Environmental Agreements: Politics, Law and Economics 11-28.

[91] J. Grainger-Brown and S. Malekpour, 'Implementing the Sustainable Development Goals: A Review of Strategic Tools and Frameworks Available to Organisations' (2019) Sustainability.

Impact of ESG on Arbitration agreements and clauses

As awareness of complex climate, human rights and governance risks permeates business operations, arbitration clauses are evolving to enable enforcement should acute sustainability grievances emerge.[92]

For instance, force majeure clauses now feature language accommodating supply chain breakdowns or operational disruptions from climate events, allowing contract suspension without penalty. As both physical and litigation risks mount, narrowly framed clauses constrain responsive adaptation.[93]

Separately, contractual stipulations directly addressing ESG implementation duties also appear - like requiring technology partners adhere to ethical AI principles or obligating consultants to track emissions.[94] Linking payment timelines to verified sustainability disclosures discourages greenwashing.[95]

Critically, expanded arbitral tribunal selection procedures allow disputants pre-vet specialist ESG arbitrators, avoiding reliance purely on commercial domain generalists unequipped to adjudicate convoluted trans-jurisdictional sustainability matters invoking equity, human rights and climate science arguments.[96]

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[92] Aleksandra Vonica, 'International Arbitration Agreements and Their Adjustment. Clauses: Are They In A State Of Evolution?' (2016) SSRN Electronic Journal <https://doi.org/10.2139/ssrn.2823733> accessed 7 February 2024.

[93] Anatole Boute, 'Environmental Force Majeure: Relief from Fossil Energy Contracts in the Decarbonisation Era' (2021) 33(2) Journal of Environmental Law 339-364 <https://doi.org/10.1093/jel/eqaa034> accessed 7 February 2024.

[94] A. Mustafina and I.A. Bakin, 'Implementation of ESG Principles in Business Planning of Investment Projects in the Agribusiness Sector' (Published in Izvestiâ Timirâzevskoj sel…, 2023.

[95] Tetyana Voron'ko-Nevidnycha, Vitalii Sobchyshyn, et al., 'Implementation of ESG Principles in the Functioning of Agri-Food Enterprises in the Context of Ensuring Capitalization Strategy' (Published in Ukrainian Journal of Applied Economics and Technology, Agricultural and Food Sciences, Business, 30 August 2023).

[96] Chiara Giorgetti, 'The Arbitral Tribunal: Selection and Replacement of Arbitrators' (2014) Law Faculty Publications, School of Law, University of Richmond.

These developments underline intensifying corporate acknowledgement of acute climate, biodiversity and social risks introducing costly business uncertainties worldwide.[97] Proactive efforts to contractually embed ESG protection, verification and rapid accountability channels signal companies moving towards internalizing sustainability performance within core operational priorities.[98]
As extreme weather and inequality undermine globalization assurances further, arbitration clauses reshaped for climate resilience, social responsibility and governance integrity hint the era of societal externalities escaping commercial liability is ending.[99]

Corporate Accountability and ESG

How ESG is shaping new standards for corporate accountability

As the toll of ecological breakdown and social inequities mounts across the board, corporations face an unprecedented reckoning with stakeholders over sustainability impacts accumulated through decades of narrowly constructed shareholder primacy doctrine.[100] Regulators, investors, customers and communities now scrutinize and challenge enterprise emissions footprints, diversity metrics, supply chain audits and culpability for historical environmental and human rights externalities manifest today.

[97] Lara Reis, 'How Can Compliance Steer Companies to Deliver on ESG Goals?' (Chapter, First Online: 29 June 2022) <https://doi.org/10.1007/978-3-030-99156-9_1> accessed 7 February 2024.
[98] Camelia Oprean-Stan et al., 'Impact of Sustainability Reporting and Inadequate Management of ESG Factors on Corporate Performance and Sustainable Growth' (2020) 12(20) Sustainability <https://doi.org/10.3390/su12208536> accessed 7 February 2024.
[99] Crina Baltag, Riddhi Joshi, and Kabir Duggal, 'Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?' (2023) 38(2) ICSID Review - Foreign Investment Law Journal 381–421 <https://doi.org/10.1093/icsidreview/siac031> accessed 7 February 2024.
[100] Eugene F. Fama, 'Contract Costs, Stakeholder Capitalism, and ESG' (First published: 29 November 2020) <https://doi.org/10.1111/eufm.12297> accessed 7 February 2024.

Mandatory climate risk reporting and human rights due diligence rules now envelope sectors from finance to manufacturing to mobility in the markets.[101] Directors face personal liability for failures to accurately disclose dependence of business models on fossil fuels and other unsustainable practices. Years of marginalizing calls for business to account for broader societal impacts stand firmly rejected as pressure mounts for meaningful and swift transformation.[102]
Leading companies understand the 21st century competitive landscape intrinsically links commercial success with climate resilience, ecological stewardship and social equity across global value webs.[103] First mover firms proactively invest in accurately quantifying and reducing carbon impacts; responsibly stewarding natural resources without externalizing waste; and cultivating workforces, suppliers and cultures that reflect inclusive prosperity. Laggards attempting to postpone this inexorable realignment face intensifying regulatory, legal and reputational risks as stakeholders demand accountability through all available means. A blindness to scientific warnings and societal expectations no longer remains tenable.[104]

[101] Philipp Krueger et al., 'The Effects of Mandatory ESG Disclosure Around the World' (European Corporate Governance Institute – Finance Working Paper No. 754/2021, Swiss Finance Institute Research Paper No. 21-44.
[102] Lipton M, Neff DA, Brownstein AR, Rosenblum SA, Savarese JF, Emmerich AO, Silk DM, Carlin WM, Savitt WD, Wahlquist AK, Niles SV, McLeod RA, Reddy A, Miller C, Heinze MM, Lu CXW, Favors JS, Munshi RI, 'Risk Management and the Board of Directors' (Wachtell, Lipton, Rosen & Katz, June 2020).
[103] Bertolotti A, 'Effectively Managing Risks in an ESG Portfolio' (2020) 13 Journal of Risk Management in Financial Institutions 202-211.
[104] Caglar Cagli E, Mandaci PE, Taşkın D, 'Environmental, Social, and Governance (ESG) Investing and Commodities: Dynamic Connectedness and Risk Management Strategies' (2022) Sustainability Accounting, Management and Policy Journal, Article published on 28 October 2022 and issue published on 4 September 2023.

Legal implications for corporations in light of ESG considerations

The rapid mainstreaming of mandatory climate risk and human rights reporting in major markets warns of increased legal risks for publicly listed multinationals failing to accurately account for and mitigate sustainability impacts.[105]

Climate vulnerability litigants from frontline communities are simultaneously developing attribution science methodologies to sue corporations over clearly attributable fractions of loss and damage imposed by climate change.[106]
Overall the volume of disputes will only grow as stakeholder grievances and disputes overflow from a cascading climate crisis while social inequality fractures propagate in coming years.[107] Though the C-Suite may currently dismiss these concerns, greater enterprise resilience undoubtedly lies in precautionary transition toward circular, rights-respecting business models in line with ecological boundaries.[108]

Role of arbitration in enforcing corporate accountability

As corporations around the world absorb the reality of mandatory sustainability disclosures, regulated emissions reductions and responsible sourcing imperatives, arbitration rapidly evolves into a pivotal enforcement channel enabling stakeholders to compel accountable business conduct.[109]
Unlike sluggish and backlogged courts, arbitration provides impacted groups efficient resolution for emerging disputes related to corporate greenwashing,

[105] Johan Stefan Spies and Kate Swart, 'Corporate Due Diligence and Reporting Requirements for Climate Change and Human Rights' (29 Jun 2023) International Community Law Review Vol. 25, Iss: 3-4, pp 333-394.
[106] Damilola S. Olawuyi, 'Climate Justice and Corporate Responsibility: Taking Human Rights Seriously in Climate Actions and Projects' (Damilola S. Olawuyi1, Damilola S. Olawuyi).
[107] Claire Bright and Karin Buhmann, 'Risk-based Due Diligence, Climate Change, Human Rights and the Just Transition' (20 Sep 2021) Sustainability (MDPI) Vol. 13, Iss: 18, pp 10454.
[108] Young-Sik Yang, 'Review of Legal Risks of ESG Management to Secure Corporate Sustainability'.
[109] Caroline Henckels, 'Arbitration Under Government Contracts and Government Accountability' (27 Jun 2022) Federal Law Review Vol. 50, Iss: 3, pp 404-418.

unmet decarbonization commitments and human rights infringements across opaque supply chains.[110]

Binding arbitration access serves as a powerful policy lever and moral deterrent for enterprises otherwise tempted to circumvent ambitious sustainability pledges.[111] The imposition of substantial penalties, sanctions and settlement requirements via arbitration further incentivizes robust ESG performance as violations carry serious financial and reputational consequences.[112]

Over time, arbitral jurisprudence set across cases shall progressively shape precautions and responsibilities expected from companies across environmental stewardship, social equity and governance transparency areas.[113]

Ultimately the threat of arbitration helps add teeth to the bark of sustainability commitments frequently used for promotional purposes alone previously. As both policy and public sentiment demand urgent corporate decarbonization and reform, arbitration represents the critical enforcement mechanism driving a new era of accountable conduct.

[110] Crina Baltag FCIArb, Riddhi Joshi, Kabir Duggal, 'Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?' (07 Mar 2023) ICSID Review: Foreign Investment Law Journal
[111] Meredith R. Miller, 'Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process' (01 Jan 2008)
[112] Moses, Margaret L., 'The Principles and Practice of International Commercial Arbitration: Enforcement of the Award' (2008) pp. 202-219 <https://doi.org/10.1017/CBO9780511819216.012> accessed 7 February 2024
[113] Cornel, Marian, 'Sustainable Investment Through Effective Resolution of Investment Disputes — Is Transparency the Answer?' (2012) <https://doi.org/10.2139/SSRN.2070676> accessed 7 February 2024

Challenges and Opportunities

Challenges in arbitrating ESG disputes

As arbitration tribunals worldwide grapple with an influx of grievances related to sustainability deficits tied to enterprise activities, inherent limitations reveal themselves. Most arbitration infrastructure remains vestige of 20th century design to settle private contractual disputes rather than address issues amounting to threats against civilizational continuity.[114]

Assessing culpability, proportional responsibility and optimal restitution for sustainability claims requires simultaneously reconciling scientific and moral complexity beyond the competencies of traditionally trained arbitrators. Tribunals designed to handle six-figure commercial disagreements now regularly consider multi-billion-dollar claims related to destroyed fisheries, disappearing islands and irreparable cultural loss with nominal precedents as guiding stars.[115] Even perfect award determinations mean little if enforceability proves difficult against mighty corporate entities with army of lawyers skilfully obstructing enforcement across complex global asset structures deliberately designed to evade sovereign reach.[116] Recording of proceedings and data transparency also varies wildly across arbitration venues even over matters influencing the fates of millions vulnerable to activities held unaccountable.[117]

While the surge in arbitration cases represent societal acknowledgement of the utility of this adjudication channel, serious reforms remain imperative for arbitration infrastructure worldwide to effectively meet the magnitude of

[114] Luke Elborough, 'International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change' (21 N.Z. J. Envtl. L. 89, 2017)
[115] Zaheeruddin Mohammed, 'Grounds and Procedure of Challenge of Arbitrators in International Arbitration' (2018).
[116] Chiara Giorgetti, 'Arbitrator Challenges in International Investment Tribunals' in The Legitimacy of Investment Arbitration (13 Jan 2022) pp. 133-158.
[117] International Bar Association (IBA), 'Guidelines on Conflicts of Interest in International Arbitration' (Adopted by resolution of the IBA Council on Thursday 23 October 2014).

disputes irrevocably heading their way as sustainability claims compound in coming years.[118] Supporting vulnerable claimants against serial corporate offenders demands more consistent climate science interpretation, community participation, rapid enforceability and transparency. Without such systematic upgrades, arbitration risks being yet another prolifically failing system against the intersecting weights of climate chaos and morally bankrupt capital.[119]

Opportunities presented by ESG-focused arbitration for sustainable corporate practices

While inherent constraints exist in even the most robustly designed arbitration infrastructure to perfectly balance equities and restitutions for issues as morally multidimensional as ecocide, reparative arbitral awards can spark cascading opportunities for driving corporate accountability towards imperatives of ecological regeneration and social justice:

The mere threat of uncapped climate damages liability or enforced transitions through arbitral decree motivates enterprises to pre-emptively invest in decarbonizing operations, respecting human rights across all jurisdictions and channelling capital flows towards community resilience infrastructure as competitive advantages.[120] Economic modelling already confirms 'net positive' business strategies aligned with life-centric designs uniformly outperform extractive models over the long-term.[121]

Strong arbitration access for communities also unlocks potential for restorative justice through mechanisms like compensation funds controlled by indigenous

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[118] UNCITRAL, 'Notes on Organizing Arbitral Proceedings' (2016) <https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings> accessed 8 April 2024.

[119] Mariel Dimsey, 'The Resolution of International Investment Disputes: Challenges and Solutions' (31 Jan 2008).

[120] Maria Mazhorina, 'ESG Principles in International Business and Sustainable Contracts' (02 Jan 2022) Aktual' nye problemy rossijskogo prava Vol. 16, Iss: 12, pp. 185-198.

[121] Melissa Ribeiro do Amaral, Inara Antunes Vieira Willerding, Édis Mafra Lapolli, 'ESG and Sustainability: The Impact of the Social Pillar' (11 Jul 2023).

guardians to restore degraded lands and waters essential for cultural continuity.[122] Accountability over historical social and environmental externalities also shifts incentive structures for investors increasingly screening for ethical conduct.[123]

While clearly no panacea, thoughtfully structured arbitration reforms can sharply accelerate corporate adoption of circular production strategies, regenerative agriculture commitments and supply chain transparency - thereby raising standards industry-wide. Ultimately triggering a race to the top for economic value creation within ecological boundaries and social foundations represents arbitration's greatest possible contribution towards planetary flourishing. Even imperfect proceedings signal the extent of realignment now required for all actors in the global economy.[124]

Case Studies

In the realm of international arbitration, the integration of Environmental, Social and Governance (ESG) considerations has ushered in a series of landmark cases that underscore the pivotal role arbitration plays in addressing global sustainability challenges. Through the lens of two seminal case studies, we can gather profound insights into how ESG issues are reshaping arbitration practices and setting new precedents for future disputes.

One of the most significant ESG arbitration cases to date is *Chevron Corporation vs. The Republic of Ecuador*[125], a dispute that revolved around allegations of environmental damage in the Amazon. Initiated under the auspices of the Permanent Court of Arbitration (PCA), this case stems from the operations of

[122] Upam Pushpak Makhecha, Sugumar Mariappanadar, 'High-Performance Sustainable Work Practices for Corporate ESG Outcomes: Sustainable HRM Perspective' (01 Apr 2023) NHRD Network Journal Vol. 16, Iss: 2, pp. 159-163.
[123] Donghui Zhao, 'ESG Strategies and Practices of Chinese Listed Companies' (01 Dec 2022) Frontiers in Management Science Vol. 1, Iss: 3, pp. 29-36.
[124] Mitali Das, 'Corporate Sustainable Practices and Profitability – Compatible?' (12 Oct 2022) Journal of Economics and Management Sciences Vol. 5, Iss: 2, pp. 13-13.
[125] Chevron Corp v The Republic of Ecuador, PCA Case No 2009-23, Award (31 August 2018).

Texaco (later acquired by Chevron) in Ecuador from 1964 to 1992, which resulted in widespread environmental contamination. The legal battle spanned several years and jurisdictions, culminating in a complex arbitration process that highlighted the challenges of addressing historical environmental damage within the framework of international arbitration.

This case underscored the critical importance of clear environmental standards and the need for corporations to adhere to best practices in environmental management. It also highlighted the complexities involved in remediation and compensation for environmental damage, especially in cases with a long history and significant impact on local communities.

This case sets a precedent for the rigorous examination of environmental claims and the responsibility of corporations for their operations abroad. It emphasizes the need for arbitration panels to possess expertise in environmental science and law to accurately assess claims and enforce appropriate remedies.

Another landmark case that demonstrates the intersection of ESG issues and arbitration is *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia vs. The Argentine Republic*.[126] This dispute, adjudicated under the International Centre for Settlement of Investment Disputes (ICSID), involves claims by a Spanish consortium against Argentina for allegedly violating a bilateral investment treaty (BIT) in the context of a water and sewage concession.

A unique aspect of this case is Argentina's counterclaim, asserting that the investors failed to ensure residents' rights to water and sanitation, marking a significant moment where human rights considerations were directly invoked in investment arbitration.

[126] Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic, ICSID Case No ARB/07/26, Award (8 December 2016).

The Urbaser case is pivotal for introducing human rights considerations into the domain of international arbitration. It demonstrates that ESG disputes can extend beyond environmental issues to encompass social rights, imposing on corporations a responsibility to respect human rights in their operations.
This case highlights the expanding scope of issues arbitrable under international law, including the enforcement of human rights obligations by private investors. It signals a shift towards a more holistic approach to arbitration, where the impacts of investment on local communities and the environment are duly considered. The Urbaser case encourages future arbitrations to incorporate a broader spectrum of ESG considerations, aligning dispute resolution with global sustainability and human rights standards.

These two cases epitomize the complex interplay between international arbitration and ESG issues. These case studies not only illuminate the challenges of adjudicating ESG disputes but also offer valuable lessons on the evolving nature of corporate accountability and state obligations. As the global community continues to grapple with pressing sustainability challenges, the role of arbitration in facilitating equitable and effective resolutions to ESG disputes will undoubtedly grow, shaping the future landscape of international dispute resolution.

Conclusion

The rapid integration of ESG considerations into the realm of arbitration marks a significant shift in the way disputes are resolved and corporate accountability is enforced. This article has explored the key trends, challenges and opportunities that arise from the intersection of ESG and arbitration.

Key Takeaways

1. ESG considerations are increasingly shaping the outcomes of arbitration proceedings with tribunals giving more weight to sustainability factors in their decision-making processes.

2. The evolving landscape of ESG issues requires legal practitioners and arbitrators to adapt their approaches and develop specialized expertise to effectively navigate this complex terrain.
3. The convergence of ESG and arbitration presents both challenges and opportunities for stakeholders, including corporations, investors, legal professionals and arbitral institutions.

Implications for Stakeholders

Corporations and Investors

Proactively address ESG risks and engage in responsible business practices to mitigate the likelihood of ESG-related disputes.

Incorporate ESG considerations into investment strategies and due diligence processes to align with the changing landscape of corporate accountability.

Legal Practitioners

Develop expertise in ESG matters and stay informed about the latest developments in this rapidly evolving field.

Adapt strategies and approaches to effectively represent clients in ESG-related arbitrations, taking into account the unique challenges and opportunities presented by these cases.

Arbitrators and Arbitral Institutions

Ensure that decision-making processes and institutional rules are adapted to effectively address ESG considerations in arbitration proceedings.

Promote the development of specialized expertise and training programs to equip arbitrators with the knowledge and skills necessary to handle ESG-related disputes.

The Future of ESG in Arbitration

As the importance of ESG issues continues to grow, the role of arbitration in resolving related disputes and enforcing corporate accountability will become increasingly critical. This article has laid the foundation for further research and discussion on the topic, including:

1. The development of standardized ESG metrics and their integration into arbitration proceedings.

2. The potential for specialized ESG arbitration tribunals or rules to address the unique challenges posed by these cases.
3. The role of technology, such as blockchain and AI, in facilitating ESG data collection and analysis for arbitration purposes.

By embracing the opportunities and addressing the challenges presented by the intersection of ESG and arbitration, stakeholders can contribute to a more sustainable, equitable and accountable future for international dispute resolution.

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Public Policy as a Ground of Setting-Aside an Arbitral Award: Musings on the Centurion Engineers Civil Appeal Judgment

By: Ibrahim Kitoo*

Abstract

The Kenyan Court of Appeal in *Centurion Engineers & Builders Limited – V – Kenya Bureau of Standards* (Nairobi Civil Appeal E398 of 2021) [2023] KECA 1289 (KLR) (hereinafter referred to as 'the Centurion' case) on 27th October, 2023 in setting aside the High Court ruling upheld an Arbitrator's findings and arbitral award. The net effect of the arbitral award as upheld by the Court of Appeal decision was that a variation of a public procurement contract remains valid and enforceable notwithstanding the process it emanates from being flawed and against the clear provisions of the public procurement law. The research in this article lays emphasis on public interest as a yard stick in decision making. It primarily adopts a doctrinal approach, examining the prevailing laws and previously decided cases on arbitration and public procurement law and practice. The findings in the article is that a recognition, enforcement and failure to set aside such an award despite mandatory requirement for compliance with the public procurement law by both the public entity and contractor is a subversion of public policy in Kenya. It further, and regrettably, created a bad precedent in law and an incentive for flagrant violation of the law on among others, variation of public procurement contracts to the chagrin of the wider public good. The article argues a case for upholding of public policy as a ground for the non-recognition, non-enforcement and setting aside of an arbitral award in cases where to recognise and enforce such awards proves to be a clear violation of the law and against the public good.

Key Words: Arbitral Award; Arbitration; Enforcement; Public Policy; Recognition; Setting-Aside.

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* *LL.M, LL.B (UoN); Post – Graduate Diploma in Law (KSL), Arbitrator, Adjudicator, Mediator, CP3P & Certified Secretary*

1.0. Introduction

Public Policy generally refers to the set of socio-cultural, legal political and economic values, norms and principles that are deemed so essential that no departure therefrom can be entertained. It acts as a shield for safeguarding the public good, upholding justice and morality and preserving the deep rooted interest of a given society.[1]

Recognising that public policy is in flux, the English Courts just like the Kenyan Courts have recognised that public policy is very much an unruly horse, and once you get astride it you never know where it will carry you. With increased use of arbitration as an alternative for disputes resolution, it would be expected that the public policy exception to the recognition and enforcement of an arbitral award would be given regard to and not overlooked. This is especially so in cases where any recognition and enforcement would clearly offend provisions of the prevailing laws of Kenya. Despite courts recognising this exception, they have differed widely on how to apply the exception properly. First, many courts follow the traditional method of interpreting the public policy exception narrowly, showing great deference to the arbitrator because the parties bargained for an arbitrator's judgment.[2] In the Kenyan context such an interpretation is found in

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[1] *Open Joint Stock Company Zambeznstony Technology – V – Gibb Africa Limited* [2001].

[2] Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain,* 64 CHI,-KENT L. REV. 3, 20 (1988), 3 – 4 (noting that for arbitration to be effective there is need for finality). Refer also to *Saint Mary Home, Inc. – V – Service Employees International Union, District 1199*, [116 F.3d 41] (2d Cir. 1997). In this case an employer moved on grounds of public policy to vacate an arbitrator's award ordering the reinstatement of an employee whom the employer discharged for possession of marijuana with intent to distribute. In its analysis , the United States Court of Appeals for the Second Circuit applied the threshold test formulated by the Supreme Court in *United Paperworks International Union – V – Misco, Inc., 484 U.S. 29, 43 (1987),* which limits a court's authority to vacate an arbitrator's award on public policy grounds [noting that arbitrator's awards are to receive great deal of deference to prevent intrusive judicial review], to "situations where the contract as interpreted would violate some explicit public policy that is well-defined and dominant….[and] ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest," to determine if the arbitrator's award violated public policy. The Second Circuit, (at p. 45 – 47) although noting a strong public policy against the use, possession and sale of an illegal drug, found that the arbitrator's award did not violate public policy because there was no well-defined and dominant public policy against *reinstatement* of an employee. The Second Circuit's reading of the *Misco* test in my view remains narrow and questionable.

the words of Justice Ringera (as he then was) in *Christ for All Nations – V – Apollo Insurance Co. Ltd*[3] where he stated thus: -

''Justice is a double edged sword. It sometimes cuts the plaintiff and at other times the defendant. Each of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the law's justice as unjust…in my judgment this is a perfect case of a suitor who strongly believed that the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right of challenge within the narrow confines of Section 35 of the Act.''

Second, some other courts have made findings in support of expanded and wider parameters of the public policy exception. This is to account for the general considerations of public welfare.[4]

This article delves into: - (i) What constitutes public policy as a ground for setting aside an arbitral award; (ii) Recognition and enforceability of an arbitral award; (iii) The Centurion Civil Appeal judgment, in detail; (iv) A critique of the Centurion Civil Appeal judgment. The critique is done in light of court precedents on the application of public policy exceptions in arbitration and other related cases; and (iv) Impact, Conclusions and Recommendations.

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[3] Civil Case 499 of 1999 [2002] 2 E.A. 366.

[4] *See*, Edwards, n.2 above, at 4 (noting that United States Court of Appeals for Eighth Circuit adopted expansive interpretation of public policy exception after *Misco* in *Iowa Electric Light & Power Co. – V – Local Union 204, International Brotherhood of the Electric Workers*, 834 F. 2d 1424 (8th Cir. 1987). The Seventh Circuit, First Circuit and Fifth Circuit have also applied a broad interpretation of the public policy exception. *See*, e.g., *E.I. Dupont de Nemours & Co. V – Grasselli Employees Independent Association* , 790 F. 2d 611, 612 (7th Cir. 1986) (applying broad interpretation of public policy exception)

The upshot of the article is that the Court of Appeal decision was flawed in that it, among other effects, upsets public policy as a ground for setting aside an arbitral award and opens a Pandora's box for wanton breach of public procurement laws especially on matters to do with variation of contracts an area prone to much abuse to the chagrin of public good.

2.0. The Definition, Import and Impact of an Arbitration Award

The Arbitration Act, No. 4 of 1995[5] tautologically defines an Arbitral Award as ''any award of an arbitral tribunal and includes an interim arbitral award.'' A more definite definition of the term ''award'' is the final determination of a particular issue or claim in the arbitration.[6]

Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against an award otherwise than in the manner provided by the Arbitration Act.[7] The effect of a valid award is to render the dispute referred to arbitration *res judicata*. Barring any successful challenge or appeal against it, the award is conclusive and enforceable as to the issues framed before the arbitrator.

Bernstein, Tackaberry and Marriot explain the import and impact of an award as follows:-

"The award creates a new right or rights in favour of the successful party, which he can enforce in the courts in substitution for the rights upon which the claim or the defence respectively were founded. The award has two further consequences. First, it precludes either party from contradicting the decision of the arbitrator on any issue decided by the award, and also upon any issue that was within the jurisdiction of the arbitrator to decide but which whether deliberately or accidentally he was not asked to decide. Secondly, the

[5] Chapter 49, Laws of Kenya, Section 3.
[6] Russel on Arbitration, London, Sweet and Maxwell, p.249.
[7] Section 32A of the Arbitration Act, Chapter 49, Laws of Kenya.

award can operate to bar the claimant, whether successful or unsuccessful, from bringing the same claim again in a subsequent arbitration action.''[8]

An award does not immediately entitle the successful party to levy execution against the unsuccessful party. Such a party must first lodge the Award with the court for recognition and enforcement after which it is treated as a judgment of the court clearing the way for enforcement.[9]

The two concepts are expressly set in Section 36 of the Arbitration Act. In respect to Domestic Arbitral Awards, Section 36(1) provides thus:-

''A domestic arbitral Award, shall be recognised as binding, and upon application to the High Court, shall be enforced subject to this Section and Section 37.''[10]

In respect to International Arbitral Awards, Section 36(2) provides thus:-

''An international arbitration Award, shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other Convention to which Kenya is a signatory and relating to arbitral Awards''

The same language is adopted and/or borrowed from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. They are a touchstone of the arbitration arch and remain of great significance, importance and final vindication of the full cycle of the arbitral process.[11]

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[8] Handbook of Arbitration Practice, Sweet & Maxwell 1998.
[9] Njoroge Regeru, *Recognition and Enforcement of Arbitral Awards*, Chapter 7, Arbitration Law & Practice, Published by Law Africa, p.121.
[10] Section 37(1), n.5 above, sets out the grounds upon which recognition and enforcement of arbitral awards may be refused. These include, among others, that the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.
[11] Mustill & Boyd (1989), Commercial Arbitration, 2nd Edn, Butterworths, London and Edinburg.

The concepts of recognition and enforcement go hand in hand. One is a necessary part of the other because a court that is prepared to grant enforcement of an award will do so because it recognises the award as valid and binding upon the parties to it thus suitable for enforcement.

The phrase is however rather confusing as it is apt to give the impression that the terms ''recognition'' and ''enforcement'' are synonymous.[12] The two terms are, however distinct. Recognition is a defensive process and it arises when a court is asked to grant a remedy in respect of a dispute which has been the subject of previous arbitral proceedings. The court would be asked to recognise the Award as valid and binding upon the parties in respect of the issues which were framed before and it dealt with, and in so doing put an end to the new proceedings by rendering them to be *res judicata*.[13] It acts as a shield and is used to block any attempt to raise fresh proceedings on issues which have already been decided upon in the arbitration. The other purpose of recognition is to act as estoppel by record.[14] Enforcement refers to an application made to a court to recognise the legal force and effect of an arbitral award and to ensure that it is carried out by using the available legal sanctions.[15] A court seeking to enforce an Award recognises that it is validly made and binding upon the parties to it. The purpose of enforcement is to act as a sword and it is a positive action taken to compel or coerce the losing party to make good an award that s/he is unwilling to make good voluntarily. Possible legal sanctions include seizure of property, forfeiture of bank accounts, and in the extreme may include imprisonment.[16]

[12] Kariuki Muigua, *Settling Disputes through arbitration in Kenya*, Glenwood Publishers Ltd, 2022.
[13] For detailed analysis of this doctrine refer to: - https://www.crushell.ie/what-is-res-judicata. Accessed on 25th February, 2024.
[14] Njoroge Regeru, n.5 above, p.122.
[15] Redfern A, Hunter M, 1999, '*Law and Practice of International Arbitration'* 3rd Ed., Sweet and Maxwell: London p.449.
[16] Njoroge Regeru, n.5 above, p.122.

3.0. Public Policy under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Public Policy refers to the set of socio-cultural, legal, political and economic values and principles that are deemed so essential that no deviation therefrom can be tolerated. Public policy acts as a shield for safeguarding the public good, upholding justice and morality and preserving the deep-rooted traditions and interests of a given society at a given time.[17] Much of the controversy arising from this seemingly innocuous concept of public policy has its roots in the wording of the New York Convention, which seemingly refers to a state – specific – and thereby prone to local manipulation – public policy. Indeed, the New York Convention did not offer a transnational definition of public policy, but rather referred to the public policy of the specific state where recognition and/or enforcement of the arbitral award is sought. The Convention's state –specific scope is illustrated by the wording of art. V(2) (b) which provides thus:-

''Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that… (b) The recognition or enforcement of the award would be contrary to the public policy of that country.''

The absence of a transnational definition of public policy remains the major cause of the divergent trends and the resulting uncertainty in constructing and applying the public policy exceptions universally. So long as there remains an absence of universal or uniform principles of public policy, parties and courts will continue to invoke the doctrine haphazardly. In the words of Sir John Donaldson:-

''Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution…It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly

[17] Samaa A.F. Haridi & Mohamed S. Abdel Wahab, *Public Policy: Can the Unruly Horse be Tamed?* (2017) 83, Issue 1 © 2017 Chartered Institute of Arbitrators, p.36.

injurious to the public good or, possibly, that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.''[18]

Kenya acceded to the New York Convention on 10th February, 1989 with a reservation on reciprocity.

4.0. Public Policy Provisions under the Arbitration Act, in Brief & as applied by Courts

Section 35(2)(b)(ii) read with 37(1)(b)(ii) of the Arbitration Act, provides that an arbitral award may be set aside or recognition and enforcement refused only if the High Court finds that the award is in conflict with the public policy of Kenya.

The Kenyan courts have in several instances been tasked to make a determination on applications touching on the above sections of the Arbitration Act, and to specifically deal with breach of public policy as a ground for setting aside, non-recognition and unenforceability of an arbitral award.

In *Christ for All Nations – V – Apollo Insurance Co. Ltd*[19], the Applicant brought an Application under Section 35 of the Arbitration Act seeking to set aside an arbitral Award on the ground that the Award was in conflict with public policy. After reciting Section 35(2)(b) of the Arbitration Act, and guided by the Indian Supreme Court decision in the case of *Renusagar Power Co. Ltd – V – General Electric Co.*[20], Justice Aaron Ringera (as he then was, but now retired), restated the principles on setting aside an arbitral award on the basis of breach of public policy as hereunder:-

''I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition or that as

[18] *Deutsche Schachtbau-und Tiefbohr-Gesellschaft M.B.H – V - Ras Al Khaimah National Oil Company* [1987] 2 Llpyd'S Rep. 246.
[19] Civil Case 499 of 1999 [2002] 2 E.A. 366.
[20] [1994] S.C. 860 (India)

the common law judges used to say, it is an unruly horse. An award could be set aside under Section 35(2)(b)(ii) of the Arbitration Act as being inconsistent with the Constitution or other laws of Kenya whether written or unwritten; inimical to the national interests of Kenya, contrary to justice or morality.''

In the latter category, the learned Judge gave the examples of Awards induced by corruption or fraud or Awards founded on contracts contrary to public morals. In the second category of national interest, he gave examples of national defence and security, economic prosperity of Kenya, among others. The Judge was however quick to point out that the list was not exhaustive of instances in which public policy may be said to have been breached; each depending on its own peculiar facts and circumstances.[21] Similar views on the non-exhaustive definition of public policy were made in the case of *National Oil Corporation of Kenya – V – Prisco Petroleum Network Limited*[22] holding that:-

'neither the Court nor the Legislature can provide an exhaustive list of the elements or items that constitute public policy…It will all depend on the circumstances of the particular case. The facts pleaded, and the evidence offered in support of those facts.''

In the case of *Glencore Grain Limited – V – TSS Grain Millers Limited*[23], the Applicant sought leave of the Court to enforce an international arbitral Award arising out of the Respondent's refusal to pay for the delivery of South African white maize. The Respondents filed a counter application seeking leave of the court to oppose the enforcement of the Award and have it set aside. The Respondents argument was, among others, that the subject matter of the Award and enforcement proceedings being maize which the Applicant purported to sell was not what was contracted for (being a supply of white maize of South African origin as opposed to US No. 2 white corn); that the said supply from South Africa had been declared totally unfit for human consumption; and that any award on the subject was

[21] Njoroge Regeru, n.5 above, p.133 - 134.
[22] Miscellaneous Civil Case No. 27 of 2014 eKLR.
[23] [2002] I KLR 606 also reported in the Yearbook Commercial Arbitration , Vol. XXXIV, 2009, Kluwer international, p. 666.

contrary to public policy. The court agreed with this argument and declared the arbitral award unenforceable. Justice Mwera had this to say:-

''In this case the court is persuaded to protect a public policy in favour of Kenyan citizens who would be exposed to a health risk as discussed hereinabove. In my opinion, a contract or an Award whose effect would be to release to the public maize unfit for human consumption would itself be (tortious) as well as illegal within the legal meaning used hereinabove and accordingly the transaction or contract would be against Kenya's public policy.''

In *Evangelical Mission for Africa & Another – V – Kimani Gachuhi & Another*[24], the tribunal had ordered the demolition of a school constructed on the suit property. The applicants applied to the court to set aside an arbitral tribunal on the grounds that it breached the national values and principles of governance as provided for under Article 10 of the Constitution of Kenya. The court made a finding that the arbitral tribunal had ignored the economic and social benefits of the school to the claimants, the students, the government and the people of Kenya. It further made a finding that the tribunal ignored the public policy of Kenya towards social economic developments.

In *Afrasia Bank Limited – V – SBM Bank (Kenya) Limited*[25], the Appellant filed Nairobi HCCC No. 103 of 2019 claiming USD 7,500,000/= together with interest from the Respondent on the basis that the Respondent did not publish the mandatory notice under Section 3 of the Transfer of Business Act. Through a Consent Order dated 6th July 2020, the parties agreed to refer the matter for resolution by arbitration. The Arbitrator delivered an arbitral Award on 23rd April, 2021 finding in favour of SBM Bank that it was not liable to Afrasia Bank. This was notwithstanding the requirements for publication of notice under Section 3 of the Transfer of Business Act. The Applicant filed the application /appeal dated 21st May 2021 under Sections 35(2)(a)(iv)(b)(ii) and 39(1)(b)

[24] Misc. Civil Application No. 479 of 2014, (2015) eKLR
[25] (Miscellaneous Application E386 of 2021) [2022] KEHC 12084 (KLR) (Commercial and Tax) 21 July 2022 (Judgment).

(2)(a)(b) of the Arbitration Act, seeking among others, setting aside/varying of the arbitral Award issued in breach of public policy requirement of publication of notice under Section 3 of the Transfer of Business Act; and pursuant to this for the court to enter judgment in favour of the Appellant in the sum of USD 7,500,000/= together with interest and costs being the amount deposited by the Appellant in Chase Bank (K) Limited (in receivership) for which the Respondent was liable to the Appellant for failure to comply with Section 3(1) of the Transfer of Business Act. The Application for setting aside of the arbitral Award was premised on, among others, the fact that it was in conflict with public policy against fraudulent transfer of businesses in Kenya; that the arbitrator erred in law and in fact by failing to give effect to the stated objectives and purpose of the Transfer of Business Act as previously held and interpreted in among others the case of *Dubai Bank Kenya Limited – V – Insurance Company of EA Limited*[26], *Oriental General Stores Ltd – V – Bhailalbhai Rambai Patel & Other*[27], *New Kenya Cooperatives Creameries - V – John Kahiato Bari & Another*.[28] Citing previously decided cases on public policy as a ground for setting aside an arbitral award (among them *Christ for All Nations*, *Mall Developers Limited*[29], *Kenya Shell Limited*[30], *Open Joint Stock Company*[31]), the learned Judge W.A. Okwany made a finding that the arbitral award conflicted with public policy in that the Arbitrator erred in law in excluding the applicability of a law that was intended to protect the general public by preventing fraudulent transfers of business.[32]

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[26] 2013 eKLR
[27] 1957 EA Vol. 177.
[28] 2020 eKLR
[29] Full Citation is *Mall Developers Limited – V – Postal Corporation of Kenya* (ML Misc. No. 26 of 2013 [2014] eKLR where the court observed that public policy must have a connotation of national interest and that it cannot mean fairness and justice as was submitted by the parties as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the arbitrator and that they did not both demonstrate to the court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend the public policy.
[30] [2006]
[31] n.1 above.
[32] Para 62 – 63 of the *Afrasia Bank* Judgment.

In *Cape Holdings Limited – V – Synergy Industrial Credit Limited*[33]*,* the Applicant sought to set aside an arbitral award made in favour of the Respondent arising out of a dispute in relation to purchase of an office block. The application was based on several grounds including public policy the basis being that the arbitrator allowed payment of outrageous sums of money without any evidence rendering such payments illegal and contrary to public policy of Kenya. The court made a finding that the arbitral tribunal violated the relevant provisions (being Sections 19 and 27) of the Arbitration Act by admitting an expert report through at the submissions stage which report was used in computation of the claim of interest in favour of the Respondent. In setting aside the arbitral award, the court made a finding that the award was contrary to public policy. Regrettably the High Court decision was overturned by the Court of Appeal[34]

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[33] (2016) eKLR

[34] *Synergy Industrial Credit Limited – V – Cape Holdings Limited* [2020] eKLR, Civil Appeal No. 81 of 2016 dated 6th November, 2020 and as corrected on 29th January, 2021. The Synergy Industrial Credit matter has been heavily litigated all the way to the Supreme Court hence its recommend to read the Supreme Court's ruling on *Cape Holdings Limited* – V - *Synergy Industrial Credit Limited, Application No. 5 of 2021(E007 of 2021).* This was an application for review of the Ruling of the Court of Appeal delivered on 5th March 2021, denying certification and leave to appeal to the Supreme Court and stay execution against the Judgment and Orders of the Court of Appeal (M'Inoti, Sichale & Mohammed JJ.A) delivered on 6th November 2020. Ruling on the application, the Supreme Court reiterated its holding in *Geo Chem Middle East – V – Kenya Bureau of Standards* (Supreme Court of Kenya, Petition No. 47 of 2019) [2020] and made a finding that it lacked jurisdiction to entertain the appeal challenging the Court of Appeal Judgment, where the Court of Appeal assumed jurisdiction in conformity with the principles in the *Nyutu Agrovet Limited – V – Airtel Networks Kenya Limited & Another* (Supreme Court of Kenya, Petition No. 12 of 2016) and *Synergy Industrial Credit Limited – V – Cape Holdings Limited* (Supreme Court of Kenya, Petition No. 2 of 2017) decisions/judgment and delivered a consequential judgment. For further readings where public policy as a ground for setting aside an arbitral award has been upheld please refer to: - *Teejay Estates Limited – V – Vihar Construction Limited* (Miscellaneous Civil Application No. E184 of 2021, (2022) eKLR; For reading on instances where setting aside of an arbitral award on public policy exceptions has been declined please refer to: - (i) *Open Joint Stock Company Zambeznstony Technology – V – Gibb Africa Limited* (Miscellaneous Application No. 158 of 2016) eKLR; (ii) *Sandhoe Investments Kenya Limited - V – Seven Twenty Investments Limited* (Miscellaneous Case No. 373 of 2014, (2015) eKLR; (iii) *Rwama Farmers Cooperative Society Limited – V – Thika Coffee Mills Limited,* 2012, eKLR; (iv) *Comroad Construction & Equipment Limited – V – Iberdrolla Engineering Limited & Construction Limited* (HCCC No. 579 of 2014); (v) *Manara Limited – V – Britania Foods Limited* (Miscellaneous Application No. E007 of 2021, (2021) eKLR; (vi) *Mahan Limited –V – Villa Care Limited,* Miscellaneous Civil Application No. 216 of 2018, (2019) eKLR; and (vii) *Intoil Limited – V – Total Kenya Limited* (High Court of Kenya at Nairobi, Milimani Civil Suit No. 658 of 2012). For detailed analysis on the judicial application of Public Policy as a ground to for setting aside arbitral awards in Kenya please refer to

5.0. Centurion Engineers & Builders Limited – V - Kenya Bureau of Standards - (Nairobi Civil Appeal E398 of 2021) [2023] KECA 1289 (KLR)

1. Contract Initiation and Works Commencement

Desirous of refurbishing its biochemical laboratories the Kenya Bureau of Standards (KBS) initiated bids for building works under Tender No. KEBS/T054.

Among the participating bidders, Centurion Engineers & Builders Limited (Centurion) emerged the lowest evaluated and successful bidder the outcome of which they secured the contract with KBS dated 27th April 2008 for Kshs. 79,910,440/=. The contract spanned 24 weeks, starting from the signing date until 3rd October 2009.

Commencement of works led to necessary variations in the project scope, resulting in a supplementary contract at KBS's request, to take care of the extra work and variations.[35]

2. Disagreement and Lawsuit Filing

A dispute arose regarding the interpretation of the supplementary contract between KBS and Centurion.

KBS perceived the supplementary contract as having two distinct components: (i) additional works; and (ii) variations in the original contract. However, Centurion disagreed, stating that essential variations during project completion would be addressed accordingly.

Jack Shivugu, *A Critical Examination of the Doctrine of Public Policy and its Place in International Commercial Arbitration,* (2022) 10(3) Alternative Disputes Resolution Journal, Chartered Institute of Arbitrators (Kenya), pp. 190 – 197, available online.

[35] Para 2 of the Civil Appeal judgment, *Centurion Engineers & Builders Limited – V – Kenya Bureau of Standards* (Civil Appeal No. E398 of 2021). Judgment dated 27th October, 2023 by Justices H.A Omondi, K.I Laibuta & G.W.N Macharia.

Despite Centurion completing the works, including variations, by July 2010, KBS refused to effect any payment. Consequently, and to enforce payment, Centurion filed a lawsuit against KBS in the High Court.[36]

3. Arbitration Process and Award Challenge

KBS made an Application on 7th September 2012 to stay the High Court suit, opting for arbitration as per the procurement agreement executed by the Parties.

Despite an already filed plaint, Centurion submitted a claim for a significantly higher amount, with KBS claiming that the Arbitrator's scope had expanded beyond the initial issue referred to the court.

The arbitration led to an award by the Arbitrator dated 28th November 2013. Dissatisfied with the award, KBS moved to the High Court to have the award set aside and/or varied.

The High Court, in its 26th June 2014 ruling, allowed KBS's Application, remitting the matter back to the Arbitrator for further consideration. Subsequently and after the second referral, a new award was issued.

4.

5. High Court Applications and Ruling

The High Court received two Applications: one by the KBS on 9th June 2015 to set aside the Arbitral Award and another by Centurion on 10th August 2015 to recognize and adopt the Arbitral Award as a Court Judgment.

The Court prioritized the Application to set aside the award, acknowledging its significant impact on the potential enforcement of the award.

In a ruling issued on 9th December 2016, the High Court[37] stated that an award upholding a public procurement contract variation contrary to statute clearly

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[36] *Centurion Engineers & Builders Limited – V – Kenya Bureau of Standards* (HCCC No. 506 of 2012). Ruling dated 9th December, 2016 by Francis Tuiyott.

[37] *Ibid*, n.36.

violates public policy, emphasizing its duty to evaluate if such an award conflicted with Kenya's public policy principles.[38]

Consequently, the High Court granted the Application dated 9th June 2015, effectively setting aside the Arbitral Award issued by the Arbitrator for non-compliance with Section 47 of the Public Procurement and Disposal Act, No. 3 of 2005 and Regulation 31 of the Public Procurement and Disposal Regulations, 2006[39] and, dismissing the Application seeking recognition and adoption of the Arbitral Award as a Court Judgment. Section 47 of the PPDA, 2005 provided thus:-

An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if – (a) the amendment has been approved in writing by the tender committee of the procuring entity; and (b) any contract variations are based on the prescribed price or quantity variations for goods, works or services.

Regulation 31(c) of the PPDR, 2006 provided thus:-

For the purposes of section 47(b) of the [PPDA, 2005], any variation of a contract shall be effective only if the quantity variation for works does not exceed fifteen per cent of the original contract quantity.

The governing provision on amendments or variations to contracts under the prevailing law currently is Section 139 of the PPADA, 2015. It provides, among others, thus:-

6. Parties' Rival Arguments

[38] *Ibid*, Para 55.

[39] Now repealed and hereinafter referred to as PPDA, 2005 and PPDR, 2006 (now repealed by the Public Procurement and Asset Disposal Act, No. 33 of 2015 and Public Procurement and Asset Disposal Regulations 2020)

The Appellant's Case

(i) Variation of additional works sought by Respondent, No Influence from Appellant & Compliance was responsibility of Respondent

The Appellant (Centurion) asserted that the Respondent (KeBS) sought variations and additional works through its project architect. They highlighted evidence of instructions from the Respondent and a supplementary contract dated 17th December 2009 supporting their claim and that there was no evidence that the appellant influenced the respondent to award it the extra works and contract variation and yet the respondent refused to pay for the additional work on account of being in violation of the statute law.

The Appellant argued that compliance with the Act was the Respondent's onus and responsibility, and that they would not have refused to carry out the extra work, merely because its charges would have varied the original contract by more than 15%.[40] In support of their argument, the appellants referred to the case of *Kenya Sugar Research Foundation – V – Kenchuan Architects Ltd*[41], for the proposition that, where a party alleges that the way in which an award was procured contrary to public policy, it is necessary to satisfy the court that some form of reprehensible or unconscionable conduct on the part of the successful party, contributed in some way to the award being made.

(ii) **Lack of Prior Reference to the PPDA & Evidence Supporting PPDA Breach**

Indirectly pleading estoppel, the Appellant further submitted that the Respondent did not at any one time raise the question of the Public Procurement and Disposal Act, and did not seek guidance or inform the appellant that it would not pay any fee exceeding 15% of the original contract price; that the high court's ruling failed to find public bodies accountable and facilitated them to hide under the provisions of the PPDA to avoid fulfilling their contractual obligations, and

[40] Paras 12 & 13 of the Civil Appeal No. E398 of 2021) judgment.
[41] [2013] eKLR

that the Respondent had been unjustly enriched as the Appellant carried out works to completion, and the respondent has received the renovated premises and put them to use, but refused to pay the appellant for work satisfactorily done. They further submitted that, in his findings, the arbitrator held that no evidence was tendered to demonstrate breach of section 47 of the PPDA, that the Supplementary Agreement did not prohibit variation beyond 15% by giving a fixed maximum limit; and that the respondent, being fully aware that it was a public entity, nonetheless used a private document to contract.[42]

(iii) Contractual Valuation Dispute

The Appellant urged the Court of Appeal to consider the agreed-upon final valuation by the Ministry of Public Works before payment as provided for and agreed upon by the parties under the contract. Invoking the principle of *quantum meruit* as enunciated in the case of *Stephen Kinini Wangondu – V - The Ark Ltd*[43], the Appellants implored upon the court to make a finding that it was entitled to the claim having taken up loans to enable it fulfil its contractual obligations.[44]

The Respondent's Case

Breach of the PPDA & Public Policy Argument

The Respondent contended that the Arbitral Award and any recognition and enforcement of the same would violate Section 47 and Regulation 31 (c) of the PPDA, 2005 & PPDR, 2006 respectively as it surpassed the 15% limit set forth in the Act and Regulations for contract variations.

The Respondent urged the Court of Appeal to adopt Ringera, J's definition of public policy from *Kenya Shell Ltd – V - Kobil Petroleum Ltd* concerning setting aside an arbitral award under Section 35 of the Arbitration Act.[45] This definition highlighted that an award could be set aside if it's shown to be: a) inconsistent

[42] Paras 15 & 16 of the Civil Appeal No. E398 of 2021 judgment.
[43] [2016] eKLR
[44] n.42, Para 17.
[45] No. 4 of 1995

with Kenya's Constitution or laws, (b) against Kenya's national interest, or (c) contradictory to principles of justice or morality.[46]

7. Identified Issues for Court's Determination

The Court of Appeal focused on determining if there was a breach of statute, specifically whether the provisions of the PPDA and PPDR was violated. Both parties acknowledged that the PPDA forbids payment exceeding 15% of the original contract sum.

Breach of Statute and Contractual Interpretation

The Court of Appeal focused on whether there was a breach of the Public Procurement and Disposal Act (PPDA) limiting payments beyond 15% of the original contract sum. The Court emphasized the long standing principle that parties are bound by their contracts, citing the case of *National Bank of Kenya Limited – V - Pipe Plastic Samkolit (K) Ltd*[47]. The Court of Appeal held that parties to contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts.[48]

The Court made a finding that there was a meeting of the minds for both parties in effecting the variation. It also affirmed the existence of a valid contract based on the instructions for additional works and the Supplementary Contract, aligning its judgment with the principles laid out in *Jiwaji – V - Jiwaji*[49] that where there is ambiguity in an agreement it must be construed according to the clear words used by the parties.[50]

Further, the Court relied on the principles in *Brogden – V - Metropolitan Rly Co,*[51], where Lord Blackburn stated that when an offer includes a requirement, either

[46] n.42, Para 18
[47] [2002] 2 EA 503 [2011] eKLR at 507.
[48] n.42, Para 22.
[49] [1986] E.A 547.
[50] n.42, Para 24.
[51] [1876-77] L.R. 2 APP CAS 66.

explicitly or implicitly, for the other party to demonstrate acceptance by performing a specific action, fulfilling that action establishes binding agreement.

Estoppel and Late Invocation of PPDA

By invoking the legal concept of estoppel, the Court of Appeal rejected the Respondent's late invocation of the provisions of the PPDA on variation of public procurement contracts. It held that the Respondent's attempt to raise and use as a shield the PPDA provisions belatedly was an afterthought to avoid fulfilling contractual obligations. Additionally, the Court highlighted the absence of evidence supporting the Respondent's claim of breach of PPDA Section 47 and observed the lack of PPDA references in relevant documents.[52]

On this issue the Court relied on the case of *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH – V - Ras Al Khaimah National Oil Company*[53], where Sir Johnson Donaldson M.R. stressed that 'consideration of public policy cannot be exhaustively defined but should be approached with extreme caution'.

5.7.3. Public Policy Argument and Statutory Compliance

The Court addressed the Respondent's argument about public policy and statutory compliance. It noted the absence of substantiated evidence supporting the alleged breach of PPDA provisions. The Court observed the Respondent's conduct as a public entity using a private document for engagement and concluded that it aimed to evade obligations, rather than genuinely upholding public policy or statutory compliance.[54]

5.8. Court's Judgment/Findings

The Court of Appeal set aside the High Court's ruling dated 9th December, 2016. Instead, the Arbitral Award issued by Mr. Onesmus Mwangi Gichuri on 5th May, 2015, was affirmed as binding, enforceable and declared as the official judgment

[52] n.42, Paras 26 – 29.
[53] [1987] 2 All ER 769.
[54] Paras 30 of the Civil Appeal No. E398 of 2021 judgment.

of the Court of Appeal. Consequently, the Appeal was granted in favour of the Appellant, and costs awarded to them.[55]

6.0. A Critique of the Court of Appeal Judgment

(i) Decision Incentivises breach of the Public Procurement and Arbitration law

By making a finding that the Appellants were entitled to payment in respect of a contract variation which was effected against clear provisions of the public procurement law provisions on public procurement contract variations the learned judges of the appellate court undermined the clear provisions of the Arbitration Act, Chapter 49 Laws of Kenya. In particular, Section 35(2)(b) provides that an arbitral award may be set aside by the High Court if the High Court finds that (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or (ii) the award is in conflict with the public policy of Kenya.

Section 27(1 – 4) of PPDA, 2005 called for mandatory compliance with the provisions of the Act and Regulations on not only the public entity, accounting officer, member of the board or committee but equally the contractors, suppliers and consultants. Section 72 of the now prevailing PPADA, 2015 is couched in similar terms and wordings. Relatedly, Section 68(1) of the PPDA, 2005 provides that the person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under Section 62 and any corrections under Section 63 of the Act. This provision is in effect similar to Section 135(2) and (6) of the PPADA, 2015.[56]

[55] Paras 31 & 32 of the Civil Appeal No. E398 of 2021 judgment.

[56] The said Sections provide that an accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings; and that the tender documents shall be the basis of all procurement contracts [including variations – emphasis mine].

Section 70 of the PPADA, 2005 further provides that the procuring entity shall not request or require as a condition of awarding a contract that a person who submitted a tender undertake responsibilities not set out in the tender documents. This provision is in effect similar to Section 137 of the PPADA, 2015.

It is a Kenyan public procurement law and public policy position that variations emanating out of public procurement must accord to the process and provisions of public procurement and any such contract is null and void and unenforceable. The learned judges of the court of appeal appear to have in giving regard to estoppel and legitimate expectation to the Appellant overlooked the foregoing particular provisions of the law and case precedents.

(ii) The Contract change was substantive necessitating a fresh procurement and not variation

In the award, the Arbitrator rejected the Respondent's submissions that the supplementary Contract was a separate and independent contract from the original contract. He further found that the Supplementary Agreement was not meant to supplant the original contract but to supplement it. Another important finding of the Arbitrator is that the revised contract sum was Kshs. 228,768,660.32 and in so doing held that thus:-

> *''I find that Certificate No. 10 was properly prepared and in accordance with the Contract between the parties, the original Contract read together with the Supplementary Agreement. The Certificate was properly served upon the Respondent.''*

I do agree with the High Court judge, that given the set of findings by the Arbitrator that the variations were for additional work; that is they were quantity variations (and which seems to have resulted from a proper and correct evaluation of the evidence), the axiomatic and inescapable finding of the Arbitrator would have been that the quantity variation of works doubled the original contract quantity and that this resulted to a clear violation of Section 47

of the PPDA, 2005 as read with Regulation 31(c) of the PPDR, 2006. The legal thing to do was to procure the additional needed quantities of works through a new procurement process and contract as opposed to variation. Indeed, there is a good reason why Public Policy and procurement laws require that substantial variation to contracts of public nature to be subjected to new procurement procedure.

> *''A key reason for this principle relates to the purpose of the legislation of ensuring that work is awarded in accordance with transparent procedures to prevent discrimination. If the contract awarded is later changed, there is a risk that such changes are made for discriminatory motives (for example, to award the firm more work or allow it to operate under easier terms) and that firms, in collusion with the contracting authority or otherwise, may be able to obtain an advantage in the award procedure by tendering favourable terms in the expectation that they will be changed after the conclusion of the contract. Changes to concluded contracts can also potentially undermine any policy that contracts should be undertaken by the best tenderer in order to develop the single market. If this is considered as an objective of the directive, rules to limit changes to concluded contracts are also appropriate from this perspective, on the basis that the existing contracting partner may not be the best from to perform the revised contract. Changing a contract also potentially violates the equal treatment principle that can support such objectives. From a national perspective, changing a contract without competition for the revised contract raises a value-for-money issues as the change is made without considering whether other economic operators can offer value for money without the terms being fixed under the pressure of completion.''*[57]

I agree with the learned judge of the High Court that although the above discussion is on the European Union Directive on Public Procurement, the concerns hence the need to trammel discretion on variations in public procurement contracts are as valid as or more compelling in Kenya. Indeed variations can be utilised as Trojan horses to mask direct procurements the effect of which would be suppressed competition, value for money, integrity and

[57] Arrowsmith: The law of Public and Utilities Procurement (3rd Edition) quoted in the Decision of *R (On the application of Gottlieb – V – Winchester City Council* [2015] EWHC 231 (Admin).

accountability in public procurement. The matter at hand was a classic example whereby additional and substantial scope of work was contracted for without inviting fresh bids when there was legally a need for the same to be done.

(iii) The Arbitral award offended Public Policy and Public Interest Principles

Under the provisions of Section 35(2)(b)(ii) of the Arbitration Act, the mandate of the Court is to examine whether an award is in conflict with the Public Policy in Kenya. That duty requires the court to scrutinise the award in the context of public policy questions that are raised and while there is deference to the Arbitrators findings of facts and the law, a court should not be bound by the Arbitrator's own finding that the decision is not contrary to public policy. The principle of party autonomy can never mean that an Arbitrator's own finding that his/her award is not against public policy must be accepted without question. If called upon to address this the court ought to do so and make its own independent evaluation, otherwise the awards will never be subjected to review under Section 35(2)(b) (ii) of the Arbitration Act. In essence, it cannot be said that the Court has sat on appeal over an arbitral award simply because it has reached a different conclusion. In determining a setting aside of an arbitral award application premised under Section 35(2)(b) (ii) of the Arbitration Act, the court must make its own finding on whether or not the Arbitral Award is aligned and doesn't in any way run afoul of public policy.

(iv) Ex-turpi causa non oritur actio - The Court should have frowned upon and not facilitated an illegality

Indeed, violation of the law should not be permitted. This should be the position whether or not the public entity has benefitted from the flawed public procurement. If the courts were to uphold such a breach on the argument that to do otherwise would be to cause loss and suffering to the Contractor, and unjustly enrich the public entity, then this will be opening a Pandora's box and incentivise wanton breach of public procurement laws by both the public entity and contractors only the biggest loser being the public and to the detriment of the

public good and interest. In the *Royal Media Services - V – Independent Electoral & Boundaries Commission & 3 Others.*[58], the court was categorical that contractors cannot expect the court to aid them in the violation of procedures set up by people of Kenya to regulate the use of public funds. Similar decisions have been reached on public policy, public interest and other reasons in the cases of *Multi-line Motors (K) Limited – V – Migori County Government*[59]. It is a general principle of law that from an illegal action, no rights will accrue or will be enforceable. In its Latin rendition, this principle is reflected in the maxim *ex turpi causa non oritur actio.* Similar pronouncements were made by the Kenyan court in the case of *Kenya Pipeline Company Limited – V – Glencore Energy (U.K) Limited*[60].

It is good law to say that when an issue of breach of a statute is brought to the attention of the court it is in the interest of justice that the court must investigate that issue because the court's fundamental role is to uphold the law. This was the position by the court in *Kenya Pipeline Company Limited – V - Glencore Energy (U.K) Limited*[61], where the old English case of *Holman – V - Johnson*[62] where Chief Justice Mansfield pronounced the words:

> *"The principle of public policy is this: Ex dolomalo no ovitur action. No court will lend its aid to a man who found his cause on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi cause, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."*[63]

[58] [2019] eKLR
[59] (HCCC No. 9 of 2016)
[60] [2015] eKLR.
[61] [2015] eKLR
[62] (1775 – 1802) All ER 98.
[63] Referred to in *Ederman Property Limited – V – Lordship Africa Limited, Public Procurement Administrative Review Board & Nairobi City County (*Nairobi Civil Appeal No. 35 of 2018).

(v) Legitimate Expectation cannot override clear provisions of the law

In *Pevans East Africa Limited & another – V - Chairman Betting Control and Licensing Board & 7 others*[64], it was held that a legitimate expectation cannot be an expectation against the clear provisions of a statute. A decision maker cannot be expected to act against the clear provisions of a statute as that would be illegal and a violation of the principle of the rule of law.[65]

(vi) Contract Variation undermined constitutional and public procurement principles

The law on procurement is on the side of the Kenyan public and it must be strictly and ruthlessly enforced. Any good deal and value for money should result from a competitive process and not a closed arrangement. It is for this reason that the Constitution of Kenya provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost – effective.[66] The said principles, among others are espoused under Sections 3 and 4(1) (e) & (3) of the PPADA, 2015.[67]

7.0. Impact, Conclusion and Recommendations

The Court of Appeal decision rendered Section 35(2)(b)(ii) read with 37(1)(b)(ii) of the Arbitration Act, Section 47 of the PPDA, 2005 as read with Regulation 31(c) of the PPDR, 2006 (now repealed) inoperative, redundant and mere pious aspiration. It in essence created an incentive for wanton breach of the public

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[64] *Civil Appeal No 11 of 2018 [2017] eKLR.*

[65] Also refer to Civil Appeal No. 283 of 2014; *Pharmaceutical Manufacturing (K) Co Ltd & 3 others – V - Commissioner General of Kenya Revenue Authority & 2 others* [2017] eKLR.

[66] Article 227(1) of the Constitution of Kenya, 2010.

[67] It provides that the PPADA, 2015, applies to all State organs and public entities with respect to contract management and that for greater certainty [and save for the exempted procurements under 4(2)], all public procurements are procurements with respect to the application of the Act. Similar provisions existed under Sections 4(1)(a) & (b) and (2) & (3), 5,6 & 7 of the repealed PPDA, No. 3 of 2005.

procurement laws as relates to variation of contracts, among others to the chagrin of the public good.

Whereas public policy as a ground for setting aside an arbitral award remains in flux, the Centurion Court of Appeal Case was a clear case where the same ought to have been upheld. Under an analysis of the public policy exception to the enforcement of arbitral awards, the Court of Appeal judges should have held that an arbitral award in breach of clear provisions of the Kenya public procurement law and especially on variations, and which law calls for compliance by both parties to a procurement process violated public policy. The Court of Appeal should have recognised that any such an award was in breach of public policy, an illegality and an affront to the general public interest. In essence, the learned judges of the Court of Appeal should have recognised that vacating the arbitral award on public policy grounds would not be in contravention of the well-established and dominant public policy supporting the validity of arbitral awards based on general considerations of public interest. Unfortunately, the learned judges failed in giving regard to this much important principle.

The Court of Appeal decision has the effect of influencing the Kenyan courts to continue to apply an overly narrow approach and interpretation to the public policy exception in the recognition and setting aside of arbitral awards even in cases where vacating an arbitrator's award on public policy grounds is warranted and justified. In an era of increased litigation, this narrow interpretation will undoubtedly increase challenges under the public policy exception.[68] Recognising that public procurement law in Kenya, and especially the area of contract variations and the need for compliance by both contracting parties is one of the most regulated area, this narrow application of the public policy exception undermines the strong public policy to stave off illegal and irregular public

[68] Please refer to Scott Barbakoff, *Application of the Public Policy Exception for the Enforcement of Arbitral Awards: There is No Place Like the Home in Saint Mary Home, Inc. – V – Service Employees International Union, District 1199*, 43 Vill. L. Rev. 829 (1998)

procurement contracting and variations to the detriment of public interest and value for money.

In view of the overly narrow application of the public policy exception by the arbitrator and the Court of Appeal in the *Centurion case*, arbitrators and courts alike should realise that whereas there are justifiable instances for deference to the arbitrator's award, sometimes, and unfortunately, in an effort to protect that principle they have regrettably and to the chagrin of clear statutory provisions of the law and public good failed to recognise the greater importance, proper and appropriate scope of the public policy exception.

Worth mentioning is that the law on procurement is on the side of the Kenyan public and it must be strictly and ruthlessly enforced and any good deal and value for money should result from a competitive process and not a closed arrangement. It is for this reason that the Constitution of Kenya provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost – effective.[69] The said principles, among others are espoused under Sections 3 and 4(1) (e) & (3) of the PPADA, 2015[70]. They are not mere pious aspirations or hortatory statements and must be upheld and given regard to at all times the reason why the Constitution of Kenya calls an interpretation of its provisions in a manner that promotes its purposes, values and principles; permits the development of the law; and contributes to good governance.[71]

[69] Article 227(1) of the Constitution of Kenya, 2010.

[70] It provides that the PPADA, 2015, applies to all State organs and public entities with respect to contract management and that for greater certainty [and save for the exempted procurements under 4(2)], all public procurements are procurements with respect to the application of the Act. Similar provisions existed under Sections 4(1)(a) & (b) and (2) & (3), 5,6 & 7 of the repealed PPDA, No. 3 of 2005.

[71] Refer to Article 259 (1) of the Constitution of Kenya 2010.

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Arbitral Tribunals: Do they have the power to issue interim measures during the proceedings?

By: ***Juvenalis Ngowi (FCArb)****

Abstract

When arbitration proceedings are initiated, and after the composition of the Arbitral Tribunal, one or more of the parties in the proceedings may need to obtain tribunal orders for specific purposes before the hearing of the dispute in merits and delivery of the Award. The interim measures may vary in nature and effect from one case to another, and the source of tribunal jurisdiction in granting these orders may be the legislation or the procedural rules governing the proceedings or event of the Arbitration Agreements. This paper discusses the powers of the Arbitral Tribunal to grant such orders and examines some procedural rules which empower arbitrators to issue such orders, the scope of those powers, and the factors to be considered when granting interim measures in the arbitral proceedings.

1. Introductions

In some legal proceedings, be it in state courts or arbitration proceedings, a party may need interim orders pending the final determination of the dispute for different purposes, but mainly to protect the disputed subject matter and any interest related to it. Depending on the applicable rules of procedure, the arbitral tribunal can issue interim orders, and the primary purpose is to ensure that the final award to be issued is effectual[1]. Sometimes, a party may apply to Courts to

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* *Juvenalis Ngowi is an Arbitrator and an Advocate based in Tanzania with over 20 years of legal experience. He is a Fellow of the Chartered Institute of Arbitrators and is a panel member of several Arbitral Institutions domestically and internationally. He holds an LLB Hon from the University of Dar es Salaam and a master's in business administration (MBA) from Eastern and South African Management Institute (ESAMI), and he also holds a Certificate in International Commercial and Investment Arbitration from Roma Tre University. He is the founding partner of Dentons Dar es Salaam Office and leads the Dispute Resolution and Litigation department.*

[1] Interim Relief in Arbitration (https://uk.practicallaw.thomsonreuters.com/w-025-8599?transitionType=Default&contextData=(sc.Default)&firstPage=true)

obtain those interim measures to aid the arbitration proceedings, but as we shall see, this will happen when the legislation or rules of procedures or Arbitration Agreement requires a party to seek such relief in the state courts.

2. Source of Jurisdiction for Arbitral Tribunals to Issue Interim Measures

2.1 Most Rules of Procedures of different Arbitral Institutions provide for the powers of the Tribunal to issue interim reliefs. For example, under Article 47 of the ICSID Rules, these powers are referred to as provisional measures. Different Rules use different terminology in regard to interim measures. ICC Rules, on the other hand, refer to these interim orders as conservatory measures, while Article 25 of LCIA Rules refers to such orders as Interim and Conservatory Measures.

2.2 Legislation is another source for the Arbitral Tribunal to issue interim measures. Legislation governing arbitration in different jurisdictions provides the tribunals with the power to grant interim measures during the pending arbitral proceedings. The legislation may even give the scope of such powers and how the orders granting the interim measures can be enforced. The provisions of the legislation may expressly provide for such powers or by necessary implication. For example, section 38 (1) of the English Arbitration Act 1996 provides that the parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings. The provision continues to give general powers to the Arbitral Tribunal, including preservation orders for purposes of proceedings. Looking at section 38 of the English Arbitration Act 1996, it can be concluded that this legislation empowers the arbitral tribunal to grant temporary measures subject to the parties' agreement.

2.3 Arbitral Agreements. One of the principles of arbitration is the party's autonomy. If parties agree in their Arbitration Clause that either party to the agreement may seek interim measures from the arbitral tribunal, such

clause will be binding to the parties, and it will be a source of the arbitral jurisdiction to grant temporary measures.

3. Procedural and substantive aspects for the Arbitral Tribunal in granting temporary measures.

Different rules of procedure provide for the necessary conditions that should be considered when granting interim measures. Some rules provide for broad discretion for the tribunal in granting the orders. However, in any case, several decisions have attempted to lay down some criteria for consideration when the tribunal is faced with an application for interim measures. One of the rules that provides for the scope of the powers of the arbitrators in exercising powers to grant interim measures is the UNCITRAL Model Law, 2006, which, under Article 17, provides for the powers of the arbitral tribunal to order interim measures. The Rule provides that unless otherwise agreed by the parties, the arbitral tribunal may grant interim measures at a party's request. The interim measures are defined under these Rules to mean any temporary measure, whether in the form of an award or in another form, by which, at any time before the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) Preserve evidence that may be relevant and material to resolving the dispute.[2]

Despite the scope of interim measures that can be ordered by the tribunal as provided under the Model Law or any other rules of procedure, tribunals have

[2] Article 17(2) of UNICITRAL Model Law, 2006.

to observe and determine whether the interim orders sought by a party should be granted. There are different criteria which should guide the tribunal in making its determination. One of the criteria is the necessity for granting such orders. The tribunal should consider whether the party seeking the order has established that such orders are necessary to resolve the dispute properly. In *the case of Paul Donin De Rosiere, Panacaviar, S.A. V. The Islamic Republic Of Iran, Sherkat Sahami Shilat Iran*[3], the Arbitral Tribunal emphasised that the Tribunal must determine whether interim measures of the type requested are necessary and appropriate. The orders, in essence, are to ensure that the Tribunal's final Award will not be nugatory, and this can be achieved by either granting an order to maintain the status quo or, in some instances, it might be necessary to obtain the order to protect the integrity of the arbitral proceedings or to order production of evidence or any other order necessary for proper determination of the matter in dispute. The Order for protecting the integrity of the arbitral proceedings may be required, for example, when there is a pending arbitral proceeding, and one of the parties initiates judicial proceedings in a matter so connected with the subject matter of the arbitration, such that the arbitral proceedings may be jeopardised in one way or another.

Looking at Article 17 of the UNCITRAL Model Law, one will note that an interim order may also be issued if the asset expected to be used in satisfying the award is in danger and there is a need to preserve it. Interim measures can also be issued to protect the evidence, which is crucial in determining the dispute[4].

The question might be, what are the criteria to be used by the arbitral tribunal in determining whether the interim measures should be issued in the arbitral proceedings? In the matter between *Sergei Paushok CJSC Golden East Company CJSC Vostokneftegaz Company and the Government of Mongolia*, the Tribunal determined five criteria to guide the Arbitrators in deciding whether or not to grant interim relief. These criteria are *prima facie* jurisdiction, *prima facie*

[3] IUSCT Case No. 498
[4] Article 17(2) (d) of UNICITRAL Model Law, 2006.

establishment of the case, urgency, imminent danger of serious prejudice (necessity) and proportionality.

The Arbitral Tribunal's powers to issue interim measures have its legal basis on the Tribunal's competence to decide on the merits of the dispute. In authorizing a private tribunal to resolve existing or future disputes between them, the parties have vested in the arbitrators the inherent power to issue measures of provisional relief connected to the subject matter of the dispute, which serves to safeguard the efficiency of the tribunal's decision-making[5]. Most procedural rules also provide for these powers. We have seen an example of Article 17 of the UNCITRAL Rules, which provides for the power of the Tribunal to issue temporary measures. Another example of Rules which expressly empowers the tribunal to issue interim measures is Article 25 of the London Court of International Arbitration (LCIA) Arbitration Rules, which similarly states that a tribunal may issue interim measures upon such terms as the tribunal considers appropriate in the circumstances. Also, Article 28 of the ICC Arbitration Rules states that a tribunal may issue any interim or conservatory measure it deems appropriate. Looking at the wording of Article 25 of the LCIA Rules and Article 28 of the ICC Rules, one may note that these rules appear to be very wide and do not provide any conditional requirements within which the tribunal should exercise its powers. On the other hand, UNCITRAL Rules at least set standards to guide the tribunal when exercising its powers under the rule. The Stockholm Chambers of Commerce Rules (SCC Arbitration Rules) also appear to give wide discretion to the tribunal in determining whether interim measures should be issued. Article 37 of the SCC Arbitration Rules states that a tribunal can order any interim measure deemed appropriate. It would probably be safe to assume that the tribunal should be guided by the criteria set in the case of *Sergei Paushok CJSC Golden East Company CJSC Vostokneftegaz Company and the Government of Mongolia* (supra).

[5] History & Modern Evolution of Transnational Commercial Law (https://www.trans-lex.org/969010)

The standards for granting interim measures provided by UNICIRAL Rules are considered low. They are regarded as low standards because all that is required for the Applicant to be successful in an application for interim measures is to show that he will suffer irreparable loss, that such loss substantially outweighs the loss likely to be sustained by the other party should the interim measures be granted, and that there is a reasonable probability that the Applicant may prevail on the merit of the main dispute subject of arbitration.[6] The criteria used when using low standards are also somehow ambiguous. For example, there is no common understanding of what is meant by "irreparable loss." While there is a common understanding of the term to mean a loss that the monetary award cannot compensate, there are instances where the tribunal has granted temporary measures in cases where the award of damages would suffice to make good the loss sustained. For example, in *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*,[7] The Tribunal defined irreparable loss as not necessarily meaning loss which cannot be compensated. The Tribunal stated;

"There are variations in approach or the precise wording used by the ICSID tribunals as to whether this requirement is that of "irreparable" harm, or whether a demonstration of "serious" harm will suffice. In the Tribunal's view, the term "irreparable" harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally "irreparable."[8]

The Tribunal continued to hold that the requesting party need not prove that "serious" harm is certain to occur. Instead, it is generally sufficient to show that there is a material risk that it will happen. The requirement of showing material risk does not imply showing any percentage of likelihood, or probability, that the risk will materialize. The proper requirement is that the requesting party establish a sufficient risk or threat that is grave or severe harm will occur if provisional

[6] Interim Measures in International Arbitration: The Case for Applying High Standards by Mohannad A. El Murtadi Suleiman, The American Review of International Arbitration, Columbia Law School,
[7] (ICSID Case No. ARB/13/33)
[8] See paragraph 109 of the Award (ICSID Case No. ARB/13/33)

measures are not granted. However, this does not mean hypothetical allegations will be acceptable when granting interim measures. In the matter of *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*[9] the Tribunal had this to comment;

"*Provisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions. Rather, they are meant to protect the requesting party from imminent harm.*"

Going through different decisions of the arbitral tribunals, it would appear that even if the standards set by the Rules are low, the Applicant seeking interim measures should establish the following;

1. The interim measures are necessary, and the question subject of the temporary orders cannot wait for the outcome of the Award. The Tribunal will only grant provisional measures if necessary and urgent and are required to avoid irreparable harm.[10] It is well-established that the requesting party has the burden of showing why the requested provisional measures are necessary and should be ordered by the Tribunal. The party requesting provisional measures must demonstrate that if the requested measures are not granted, there is a material risk of serious or irreparable.

2. An order of provisional measures is necessary to preserve the requesting party's rights and is urgently required to avoid serious harm. In *City Oriente v. Ecuador*, the tribunal made a clear decision that provisional measures may only be ordered if their adoption is necessary to preserve the rights of the parties and guarantee that the award will fulfil its purpose of providing adequate judicial protection. Necessity was defined in the

[9] (ICSID Case No. ARB/06/21), Decision on Provisional Measures, dated 19 November 2007,
[10] *Schreuer et al*, The ICSID Convention: A Commentary, CUP (2nd ed., 2009),

case of *Burlington v. Ecuador,* where the tribunal held that the requirement of "necessity" means that the requested provisional measures "must be required to avoid harm or prejudice being inflicted upon the applicant."[11]

3. It is also important to show that the matter is urgent and cannot wait for the final award. This aspect was discussed in the case of *Biwater Gauff (Tanzania) Ltd. V. United Republic of Tanzania* (ICSID Case No. ARB/05/22), where the Tribunal emphasised that "…*the degree of 'urgency' which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award. In most situations, this will equate to 'urgency' in the traditional sense (i.e. a need for a measure in a short space of time). In some cases, however, the only time constraint is that the measure be granted before an award – even if the grant is to be some time hence. The Arbitral Tribunal also considers that the level of urgency required depends on the type of measure which is requested."*

4. The party seeking interim measures must show that the Tribunal has prima facie jurisdiction. The Tribunal need not definitely satisfy itself that it has jurisdiction in respect of the merits of the case at issue to rule upon the requested provisional measures. It will not order such measures unless there is a prima facie basis upon which the Tribunal's jurisdiction might be established.[12] The fact of registration of the Request for Arbitration alone is not sufficient to establish prima facie jurisdiction for the purposes of the provisional measures. The fact that a request for arbitration has been registered does not by itself give jurisdiction to the Tribunal. The Tribunal has to satisfy itself that there is a basis for the Tribunal to have jurisdiction in issuing the interim measures sought. In

[11] Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador) (ICSID Case No. ARB/08/5),
[12] Occidental Petroleum Corporation and, Occidental Exploration and Production Company v. The Republic of Ecuador (ICSID Case No. ARB/06/11),

the PNG case, the Tribunal held that the determination of the prima facie jurisdiction for provisional measures is a somewhat higher threshold than that to be applied at the registration stage, although it, of course, also falls short of a final decision on jurisdiction.

5. A party seeking interim measures must also establish that the matter is *prima facie* success on the merits. However, granting the interim measures in any way should not involve the tribunal pre-judging the main dispute. The issues in arbitration should be determined after submissions on substantive matters of the dispute by all parties involved.

After knowing the conditions that should be established by a party seeking interim measures in the arbitration proceedings, another question would be the scope of the interim orders that the arbitral tribunal can issue. Rules of procedures and practice will determine the range of interim orders that can be issued. For example, Article 28 (1) of the ICC Rules of Procedures 2021, which deals with conservatory and interim measures, provides as follows;

" 28 (1) Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate."

The rule provides a broad scope of interim orders that the tribunal can issue. The tribunal may order any measure it deems appropriate.

Article 47 of the ICSID Convention, Rules of Procedure provides that except as the parties otherwise agree, the Tribunal may recommend any provisional measures necessary to preserve the parties' rights. For example, a party may request provisional measures to prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process (e.g., preventing

prejudicial interference by one party), maintain or restore the status quo (e.g., staying parallel domestic or arbitral proceedings, or staying the execution of administrative decisions) preserve evidence that is relevant to the resolution of the dispute[13]. Article 47 (2) provides that provisional measures can be sought at any time during the proceedings. This rule also does not restrict the tribunal to any specific orders which it can issue but provides that the scope is "measures necessary to preserve parties' rights".

Another example of procedural rules on the scope of the arbitral tribunal is Article 25 of the LCIA Arbitration Rules, which states that a tribunal may issue interim measures "upon such terms as the tribunal considers appropriate in the circumstances" The Article does not provide any guidance regarding the requirements for such measures. This may be interpreted to mean that the tribunal is given far-reaching powers when dealing with interim measures. The measure may be of preserving evidence, ordering parties or a party to provide necessary cooperation in the arbitral proceedings, or an anti-suit injunction or producing specific evidence, or an injunctive order prohibiting a party from doing certain acts or omissions, etc.

It is also essential to note that some rules of procedures or even the Arbitration Agreements may allow a party to seek interim measures from state courts without affecting the arbitration proceedings. For example, Article 28 (2) of the ICC Rules provides as follows;

"*Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application*

[13] *https://icsid.worldbank.org/procedures/arbitration/convention/provisional-measures/2022*

and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof."

When parties enter into an arbitration agreement, it is considered that it is the parties' choice to resolve all disputes agreed upon in the arbitration agreement using an arbitral tribunal; therefore, it would be expected that parties will be more inclined to obtain all remedies, including the interim measures from the tribunal rather than knocking at the court's doors. In the case of *Cobrain Holdings Sdn GDP Special Projects Sdn*[14], the Court made the following holding;

As has been emphasised in numerous cases, when parties have contractually resorted to arbitration as a forum of choice, the court of law should be slow to interfere in the arbitration proceedings, and should do so only where the governing statutory framework grants it the jurisdiction. Any necessary application should first be made to the arbitral tribunal, unless of course the particular jurisdiction happens not to be conferred on the arbitral tribunal within the statutory framework. These principles are stated and emphasised in the leading House of Lords decision in Channel Tunnel Group Ltd v Balfour Beatty Construction [1993] AC 334.[2]

The above-quoted decision is a call for parties who have opted to use the arbitration process to refrain from referring matters which can be resolved under arbitration to state courts unless it is necessary to do so for reasons like legislative requirements.

4. Conclusion

Generally, Arbitral Tribunals have jurisdiction to grant interim measures which will assist the whole arbitration process at the conclusion of the matter to be meaningful. Parties and Arbitrators should be guided by legislation, rules of procedures applicable in particular proceedings and decisions which give guidance in regard to what type of interim measures can be granted in certain proceedings, what should be established for the orders to be awarded and the

[14][2010] 1 LNS 1834

basis for such applications. Parties and their counsel should also know when to approach the state courts to seek some relief, considering the fact that in the Arbitration Agreement, parties had opted for a specific forum to resolve their differences. Before making an Application for interim measures, parties should consider, among other issues, the material facts of the particular matter, the Arbitration Agreement and applicable procedural laws and rules.

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Examining The Efficacy of Mediation as A Tool for Accessing Justice in Kenya: Opportunities, Challenges, and Future Perspectives

By: ***Murithi Antony****

Abstract

Cognizant of the ongoing efforts to solidify the use of ADR in accessing justice, this article undertakes a thorough examination of mediation as a form of ADR in the Kenyan context. It scrutinizes the effectiveness of mediation and highlights its success stories while also addressing the challenges it faces within the legal framework. The article identifies opportunities arising from the integration of mediation into the country's legal system and explores barriers impeding its widespread adoption. Additionally, practical recommendations are presented to advance the practice of mediation in Kenya. The article concludes with a resounding call to action for all stakeholders to champion the use of mediation collaboratively and proactively, given its proven efficacy in dispute resolution.

1. Introduction.

That disputes are inevitable and have been part and parcel of human society for a considerable period, is axiomatic.[1] While several and diverse approaches have been employed to resolving these disputes for centuries,[2] mediation has stood out as an effective and inclusive approach,[3] adept at resolving a diverse array of

LL.B (Cnd), University of Embu; Legal Researcher – Njuguna & Njuguna Co. Advocates; Email: amurithi326@gmail.com

[1] Agnetta S Okallo, 'Mainstreaming Alternative Justice Systems for Improved Access to Justice: Lessons for Kenya' (LL.M Thesis, University of Nairobi, 2019), *See also*, Murithi Antony, "*Towards Enhanced Access to Justice: Leveraging the Role of Kenyan Law Schools in Promoting ADR*" ((2023) 11(3) Alternative Dispute Resolution)) Page 123-141.

[2] Cappelletti, M. (1993). Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-To-Justice Movement. The Modern Law Review, 56(3), 282-285.

[3] Muigua, K., '*Alternative Dispute Resolution; Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya,*' 2013, Vol. 4, Glenwood Publishers.

disputes, ranging from commercial,[4] family[5] to international,[6] political,[7] and even criminal matters.[8] Mediation is one of the many mechanisms of Alternative Dispute Resolution (ADR).[9] ADR refer to those processes of resolving disputes without resorting to courts,[10] and are meant to overcome the technicalities associated with litigation, hence enhancing access to justice.[11]

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[4] *See,* Lon L. Fuller, *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray,B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases' *Utah Law Review,* (2009) [NO. 3] op. cit. PP. 802-803].

[5] Muigua, K., Entrenching Family Mediation in the Law in Kenya, Available at < http://kmco.co.ke/wp-content/uploads/2018/08/Entrenching-Family-Mediation-in-the-Law-in-Kenya-Kariuki-Muigua-Ph.D-7TH-JULY-2018.pdf> accessed on 6th November 2023.

[6] BERCOVITCH, J. and HOUSTON, A., *'The study of International Mediation: Theoretical Issues and Empirical Evidence' in Resolving International Conflicts: The theory and practice of mediation,* (ed) BERCOVITCH, JACOB. Lynne Rienner Publishers, US, 1996, p. 13.

[7] Muriuki, Pamela and Nyaga, Bernard Murimi and Ochieng, Julius B., Mediation of Election-Related Disputes in Kenya: Challenges, Opportunities and The Way Forward (March 26, 2023). Chartered Institute of Arbitrators Journal (ISBN 978-9966-046-15-4) Vol. 11 (2), Forthcoming , Available at SSRN: <https://ssrn.com/abstract=4400296> or <http://dx.doi.org/10.2139/ssrn.4400296> accessed on 6th November 2023.

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[10] Murithi Antony, "*Towards Enhanced Access to Justice: Leveraging the Role of Kenyan Law Schools in Promoting ADR"* ((2023) 11(3) Alternative Dispute Resolution)) Page 123-141.

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2. Mediation as a form of Alternative Dispute Resolution Mechanism.

The term "mediation" lacks a singular, universally accepted definition and its interpretation may vary depending on the context,[12] as noted by various scholars.[13] Ridley and Bennet, for instance, propose that in attempting to define mediation, it is beneficial to delineate what it is not.[14] They posit that mediation is distinct from conciliation, a process whereby a third-party facilitates disputing parties towards a mutually acceptable compromise.[15] Similarly, it differs from arbitration, which involves an impartial third party making a final and typically binding award after hearing arguments from both sides.[16] On the other hand, Kariuki Muigua defines the term mediation to encompass an informal process whereby a third party, with no decision making authority facilitates conflicting parties together to resolve their dispute.[17]

While diverse scholarly perspectives exist on the definition of the term mediation, a degree of consensus emerges, conceptualizing it as an ADR mechanism, where disputing parties endeavor to resolve their conflicts with the aid of an impartial third party known as a mediator.[18] The primary role of the mediator is to facilitate

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[12] LOEB, LEONARD L. "New Forms of Resolving Disputes— ADR." *Family Law Quarterly*, vol. 33, no. 3, 1999, pp. 581–88. *JSTOR*, http://www.jstor.org/stable/25740227, *See also,* Elisabeth Lindenmayer and Josie Lianna Kaye, "A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya," New York: International Peace Institute, August 2009.

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[14] Ridley-Duff, R. J. and Bennett, A. J. (2010) "Mediation: developing a theoretical framework to understand alternative dispute resolution", paper to British Academy of Management, University of Sheffield, 14th-16th September.

[15] *Ibid.*

[16] *Ibid.*

[17] Muigua K, 'Resolving Conflicts through Mediation in Kenya,' 2nd Edition, 2017, Greenwood Publishers, Nairobi.

[18] Court annexed mediation at the judiciary of Kenya handbook, available at http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-

discussions and the exchange of information, thereby facilitating the process of reaching an mutually acceptable agreement, without the mediator having to make a decision on behalf of the parties, unlike in litigation or arbitration.[19] This position has been reiterated by courts in several cases including the case of ***Amcon Builders Ltd v Vintage Investment Ltd & Another*** where the learned judge at paragraph 18 stated as follows;

> ***18. Unlike arbitration or litigation, the mediation process ends with an agreement not an award. The success of a mediation process is when parties come up with own resolution. The part of the mediator is merely to guide the parties by setting an atmosphere of mutual, candid, and honest discussions. He makes no own findings, nor does he make any coercive determination at all. His is to listen and assist the parties settle.***[20]

Therefore, in mediation, parties negotiate through the assistance of a third party, after which they come up with a mutual agreement on the settlement of the dispute, which can be enforced as an order of the court.

3. The Efficacy of Mediation as a Dispute Resolution Mechanism.

Over time, mediation has consistently demonstrated itself as a highly effective and inclusive approach to dispute resolution,[21] spanning from the pre-colonial

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Mediation-at-the-Judiciary-of-Kenya..pdf (last accessed on 14th June 2022). The Kenyan judiciary advocates for an out of court dispute resolution in family law and commercial disputes but regulated by court.

[19] Muigua, K., Entrenching Family Mediation in the Law in Kenya, Available at < http://kmco.co.ke/wp-content/uploads/2018/08/Entrenching-Family-Mediation-in-the-Law-in-Kenya-Kariuki-Muigua-Ph.D-7TH-JULY-2018.pdf> accessed on 6th November 2023.

[20] [2018] eKLR

[21] Muigua, K., Entrenching Family Mediation in the Law in Kenya, Available at < http://kmco.co.ke/wp-content/uploads/2018/08/Entrenching-Family-Mediation-in-the-Law-in-Kenya-Kariuki-Muigua-Ph.D-7TH-JULY-2018.pdf> accessed on 6th November 2023.

era to the modern times, significantly enhancing access to justice.[22] Notably, whereas the formal legal system was designed as a forum for access justice, several individuals are still unable to fully enjoy this right due to limited resources and or expertise to navigate its systemic complexities.[23] Mediation prove to be a solution to these challenges, and it has significantly provided solutions that are easily accessible and friendly, dispensing justice speedily and in devoid of discrimination, all of which encompass access to justice.[24] Mediation is favored in dispute resolution for several reasons, including its informality, flexibility, cost-effectiveness, restorative nature, and confidentiality, among other factors.[25]

To begin, mediation stands out for its informality and heightened flexibility compared to litigation.[26] In mediation, disputing parties engage in negotiations within a less formal environment and free from procedural technicalities.[27] Moreover, the parties enjoy the autonomy of selecting their mediator, determining the mediation venue, establishing governing rules, and deciding the timeframe for the resolution.[28] This inherent flexibility allows for a swift

[22] *See,* United Nations General Assembly, Transforming Our World: the 2030 Agenda for Sustainable Development, A/RES/70/1 (25 September 2015) available at https://sustainabledevelopment.un.org/post2015/transformingourworld/publication, accessed on 8th November 2023

[23] Supra, n6.

[24] See, M.T. Ladan, *'Access to Justice as a Human Right under ECOWAS Community Law'* (2009).

[25] *Ibid*.

[26] Yawanarajah, Nita (2021) "Informality and the Social Art of Mediation: How Pure Mediators Create Conditions for Making Peace," *New England Journal of Public Policy*: Vol. 33: Iss. 1, Article 10. Available at: https://scholarworks.umb.edu/nejpp/vol33/iss1/10

[27] *Ibid*.

[28] See, Lo, Chang-fa andothers, Draft 'Rules of Procedure for Mediation Conducted Under the Asia-Pacific Regional Mediation Organization' (March 30, 2018). Asian Journal of WTO & International Health Law and Policy, Vol. 13, No. 1, pp. 17-26, March 2018.

resolution of disputes, in stark contrast to court proceedings characterized by case backlog and a lack of control over when a matter will conclude.[29]

Secondly, confidentiality is a key aspect of mediation proceedings, barring third-party involvement without the explicit consent of the parties.[30] Further, any information disclosed during the mediation process is held in strict confidence, with even the mediator prohibited from using it to the detriment of any party involved.[31] This safeguard enables the parties to address sensitive matters privately and comprehensively, thereby safeguarding their reputation and influence, particularly in business contexts.[32]

Additionally, the cost-effectiveness of mediation stands as a significant advantage that should not be underestimated.[33] In litigation, a substantial number of individuals encounter difficulties in accessing justice due to the exorbitant expenses related to court fees and legal representation.[34] In contrast, mediation proves to be a more economical alternative, with the existence of court-annexed mediation, for instance, where the state covers the mediator's fees allowing parties to resolve their disputes without incurring costs.[35] Even in private mediation, the associated expenses are considerably lower compared to litigation.

4. Case Studies: Mediation in Action.

[29] Agnetta S Okallo, 'Mainstreaming Alternative Justice Systems for Improved Access to Justice: Lessons for Kenya' (LL.M Thesis, University of Nairobi, 2019).
[30] Kent L. Brown, *Confidentiality in Mediation: Status and Implications*, 1991 J. DISP. RESOL. (1991) Available at: https://scholarship.law.missouri.edu/jdr/vol1991/iss2/3 accessed on 9th November 2023.
[31] *Ibid*.
[32] *Ibid*.
[33] Brown, Jennifer Gerarda, and Ian Ayres. "Economic Rationales for Mediation." *Virginia Law Review*, vol. 80, no. 2, 1994, pp. 323–402.
[34] *Ibid*.
[35] Muigua K, 'Court Annxed ADR in the Kenyan Context,' available at < http://kmco.co.ke/wp-content/uploads/2018/08/Court-Annexed-ADR.pdf> accessed on 6th November 2023.

Mediation has established strong roots within Kenyan communities and is now an integral part of contemporary legal practice, as exemplified by numerous success stories. Perhaps the most prevalent and distinctive instance of mediation is exemplified by the events during the 2007-2008 post-election violence,[36] when disputing political sides engaged in a mediated process under the guidance of the then UN Secretary-General Kofi Annan.[37] This facilitated dialogue ultimately led to a mutually acceptable agreement, effectively bringing an end to the dispute, and uniting the whole country.[38]

Additionally, the utilization of mediation is a familiar practice within various Kenyan communities. It has been employed for a significant duration in addressing a spectrum of issues, including family and domestic disputes, land-related matters, neighborhood conflicts, and occasionally even in criminal cases.[39] In Kajiado County, for instance, communities continue to rely on mediation to settle disputes concerning land, especially on grazing areas, making the communities stay united.[40]

Further, mediation has become increasingly prevalent in the employment sector, with many companies and organizations embracing it as a method for resolving internal disputes.[41] Moreover, organizations and trade unions such as Central Organization of Trade Unions (COTU) have incorporated mediation into their

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[36] Elisabeth Lindenmayer and Josie Lianna Kaye, "A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya," New York: International Peace Institute, August 2009, *See also,* Hickman, John. "EXPLAINING POST-ELECTION VIOLENCE IN KENYA AND ZIMBABWE." *Journal of Third World Studies*, vol. 28, no. 1, 2011, pp. 29–46.

[37] Kanyinga K and Walker SPR, 'Building a Political Settlement: The International Approach to Kenya's 2008 Post-election Crisis' (2013) 2 Stability: International Journal of Security and Development Art. 34DOI: https://doi.org/10.5334/sta.bu

[38] *Ibid.*

[39] *Supra, n2.*

[40] *Ibid.*

[41] Schmedemann, Deborah A. "Reconciling Differences: The Theory and Law of Mediating Labor Grievances." *Industrial Relations Law Journal*, vol. 9, no. 4, 1987, pp. 523–95. *JSTOR*, http://www.jstor.org/stable/24050071. Accessed 12 Mar. 2024.

processes for addressing conflicts between employers and employees.[42] Its efficiency in facilitating mutually agreeable solutions has proven instrumental in preserving labor relationships.[43]

Equally, mediation has also found its way into resolving commercial disputes, particularly in Micro, Small, and Medium Enterprises (MSMEs).[44] The expediency of mediation renders it the best choice for dispute resolution in these sectors, as it is quicker, more cost-effective, and adept at maintaining business relationships.[45] This enables the MSMEs to thrive in a challenging environment, which consequently contributes to the development of the country's economy.[46]

In view of the foregoing, it's evident that mediation has permeated various facets of human life, spanning from age-old traditions to familial dynamics, the workplace, and commercial transactions, among others. Demonstrating efficacy and inclusivity, mediation has proven adept at addressing the underlying issues of conflicts amicably. Nonetheless, it hasn't been without its fair share of challenges, as discussed in the next section of this article.

5. Challenges facing Mediation as a method of Dispute Resolution in Kenya

While mediation has proven to be an efficient and effective method of dispute resolution, it has not fully realized its anticipated results due to several persisting

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[42] Schmedemann, Deborah A. "Reconciling Differences: The Theory and Law of Mediating Labor Grievances." *Industrial Relations Law Journal*, vol. 9, no. 4, 1987, pp. 523–95. *JSTOR*, http://www.jstor.org/stable/24050071. Accessed 12 Mar. 2024.

[43] *Ibid*.

[44] Kaur, H., & Bansal, P. (2020). Mediating role of utilization of financial products and services on the relationship between financial access and MSMEs growth in India. *SEDME (Small Enterprises Development, Management & Extension Journal)*, *47*(3), 261-278.

[45] *See,* Zhang, Y., & Ayele, E. Y. (2022). Factors affecting small and micro enterprise performance with the mediating effect of government support: Evidence from the Amhara Region Ethiopia. *Sustainability*, *14*(11), 6846.

[46] Rani, S. "Examining the mediating role of job satisfaction in the relationship between workplace spirituality and organizational commitment: A study of Indian MSMEs." (2023).

challenges.[47] These challenges include inadequate awareness of mediation as a form of dispute resolution, an inadequate legal, policy, and institutional framework concerning mediation, cultural attitudes, and perceptions, as well as disparities in power and inequality,[48] as espoused in the next paragraphs.

5.1. Lack of awareness on existence of mediation and its efficacy

A primary obstacle hindering the successful actualization of mediation is lack of awareness among the public.[49] While many individuals may have a basic understanding of mediation as a method for resolving disputes, they often harbor doubts about its effectiveness,[50] fearing they may not achieve a satisfactory resolution and ultimately resort to litigation.[51] Compounding this issue is the absence of effective mechanisms for disseminating awareness, and often individuals only become acquainted with mediation after they have already initiated legal proceedings.[52] Arguably, this insufficient awareness erodes confidence in the mediation process, presenting a formidable challenge to its widespread adoption in Kenya.[53]

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[47] MURITHI, TIM, and JUDI HUDSON. "The Challenges of Mediating and Implementing Peace Agreements in Africa." *UNITED NATIONS MEDIATION EXPERIENCE IN AFRICA*, Centre for Conflict Resolution, 2006, pp. 17–21. *JSTOR*, http://www.jstor.org/stable/resrep05182.7. Accessed 9 Nov. 2023.

[48] Dale Bagshaw, 'Mediation in the World Today: Opportunities and Challenges,' Journal of Mediation and Applied Conflict Analysis, 2015, Vol. 2, No. 1. Available at < https://core.ac.uk/download/pdf/297018241.pdf> accessed on 9th November 2023.

[49] Stoilkovska, Alerksandra & Palevski, Dr & Ilieva, Jana. (2015). Awareness about mediation as an alternative form of dispute resolution: Practices in the Republic of Macedonia. International Journal of Cognitive Research in Science, Engineering and Education. 3. 21-28. 10.23947/2334-8496-2015-3-1-21-27.

[50] *Ibid*.

[51] *Ibid*.

[52] Cappelletti, M. (1993). Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-To-Justice Movement. The Modern Law Review, 56(3), 282-285.

[53] Eric Kyalo Mutua, 'Access to Justice in Kenya: A critical Appraisal of the Role of the Judiciary in Advancement of Legal Aid Programs,' (LL.M Thesis, University of Nairobi).

5.2. Inadequate policy, legal and institutional framework on mediation

Despite numerous endeavors aimed at institutionalizing mediation and establishing comprehensive legal and policy frameworks,[54] significant challenges persist due to their inherent inadequacy.[55] Notably, save for the recent introduction of court-annexed mediation,[56] private mediation is primarily offered and governed by private institutions,[57] with a noticeable absence of a government institution focused on the provision and regulation of mediation practices.[58] Equally concerning is the fact that the proposed Dispute Resolution Bill which provides for Mediation and Conciliation has yet to be enacted into law, leaving a longstanding gap in the absence of a formal statutory provision for mediation within the legal framework.[59]

5.3. Inequality and Power Disparities

One often yet overlooked impediment to successful mediation is the issue of inequality and power disparity.[60] In instances where one party holds significantly more financial resources, influence, or political leverage than the other,

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[54] *Ibid*.

[55] James Ndungu Njuguna, 'Mediation as a Tool of Conflict Management in Kenya: Challenges and Opportunities,' (2020) Journalofcmsd Volume 5(2)) available at < https://journalofcmsd.net/wp-content/uploads/2020/10/Mediation-as-a-Tool-of-Conflict-Management-in-Kenya.pdf> accessed on 9th November 2023.

[56] The Judiciary, 'Court Annexed Mediation,' (Manual) available at < http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf> accessed on 7th November 2023.

[57] *Ibid*.

[58] *See,* Muigua K, "Overview of Arbitration and Mediation in Kenya"; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6 th May, 2011. Available at < http://kmco.co.ke/wp-content/uploads/2018/08/Overview-of-Arbitration-and-Mediation-in-Kenya.pdf> accessed on 9th November 2023.

[59] See, ADR policy, 2021.

[60] Greenhouse, Carol J. "Mediation: A Comparative Approach." *Man*, vol. 20, no. 1, 1985, pp. 90–114. *JSTOR*, https://doi.org/10.2307/2802223. Accessed 11 Nov. 2023.

negotiations can become skewed, leaving the disadvantaged party with limited bargaining power.[61] This power imbalance may compel the weaker party to reluctantly accept terms that are unfavorable, just to evade further conflict.[62] Consequently, trust in the mediation process is undermined, leading the disadvantaged party to prefer litigation in court, ultimately defeating the fundamental purpose of mediation.

5.4. Limited access to Mediation Services.

Mediation entails the resolution of disputes between two parties, facilitated by a neutral third party who is a professional mediator.[63] Nevertheless, in many marginalized communities in Kenya, locating a trained mediator can prove to be a significant challenge, thereby hindering access to high-quality professional services.[64] Compounding the issue, mediation institutions are primarily situated in urban areas, and many mediators predominantly operate within these urban settings, making the accessibility of professional mediation services nearly impossible for rural marginalized areas.[65]

6. Future Perspectives: Recommendations for promoting the use of Mediation.

The preceding discussion has demonstrated that mediation holds the promise of revolutionizing the dispute resolution sphere by fostering inclusive and effective mechanisms, tackling the underlying issues, and restoring relationships in an amicable manner. Nonetheless, as discussed, various obstacles hinder mediation from attaining its objectives, making it crucial to devise innovative and pragmatic approaches to surmount these challenges and promote the adoption of mediation

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[61] *Ibid*.
[62] *Ibid*.
[63] Muigua, Kariuki. "Making Mediation Work for all: Understanding the Mediation Process." *Chartered Institute of Arbitrators (Kenya). Alternative Dispute Resolution* 7.1 (2019): 120-141.
[64] Smith, Elaine. "Danger-inequality of resources present: Can the environmental mediation process provide an effective answer." *J. Disp. Resol.* (1996): 379.
[65] *Ibid*.

in a rapidly evolving world. The use of mediation is resolving disputes can be promoted through the following ways;

6.1. Creating Public Awareness

To enhance the widespread acceptance of mediation, creating public awareness is key. [66]This involves conducting workshops and outreach programs to educate people about the principles and benefits of mediation in alternative dispute resolution (ADR).[67] Once the public is well-informed, it instils confidence and trust in the mediation process, leading individuals to prefer mediation over court for dispute resolution.

6.2. Leveraging Technology

Technological advancement has transformed the world into a global village, enabling virtual transactions through e-contracts and online businesses.[68] However, within the realm of these e-contracts and business endeavors, disputes inevitably arise, necessitating an equally innovative and compatible approach to resolve them, without the need for travel to long distances.[69] Consequently, the integration of technology in mediation becomes crucial to maintain efficiency and accessibility in dispute resolution. Borrowing from litigation, the onset of the COVID-19 pandemic led to the establishment of virtual courts, prompting

[66] Dale Bagshaw, 'Mediation in the World Today: Opportunities and Challenges,' Journal of Mediation and Applied Conflict Analysis, 2015, Vol. 2, No. 1. Available at < https://core.ac.uk/download/pdf/297018241.pdf> accessed on 9th November 2023.
[67] *Ibid*.
[68] Sela, Ayelet. (2017). The Effect of Online Technologies On Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions. 21. 633.
[69] American Bar Association's Task Force on Electronic Commerce and Alternative Dispute Resolution in Cooperation with the Shidler Center for Law, Commerce and Technology, University of Washington School of Law. "Addressing Disputes in Electronic Commerce: Final Recommendations and Report." *The Business Lawyer*, vol. 58, no. 1, 2002, pp. 415–77. *JSTOR*, http://www.jstor.org/stable/40688128. Accessed 11 Nov. 2023.

issuance guidelines and rules that persist to this day.[70] Encouraging virtual mediation in cases where distance poses a challenge would provide a welcomed avenue for parties to efficiently resolve disputes, aligning with the overarching goals of the mediation process.

6.3. Establishing legal, Policy and Institutional Frameworks.

Reinforcing mediation with a comprehensive framework encompassing policy, legal, and institutional frameworks is an effective approach to foster dispute resolution through this avenue.[71] Such a framework would inherently integrate mediation into contemporary legal practices. This integration can be accomplished by expediting the passage of the Mediation and Conciliation Bill and advocating for the establishment of a governmental institution or regulatory authority exclusively dedicated to promoting mediation.[72] This entity would not only set standards for mediation but also oversee its implementation, ensuring its sanctity and effectiveness.

6.4. Training and Capacity Building.

As earlier discussed, a key obstacle in widespread use of mediation in Kenya is the limited availability of mediation services, especially qualified mediators. Consequently, beyond raising public awareness about the effectiveness of mediation, additional efforts must be directed towards training and enhancing the capacity of professionals in this field.[73] This ensures a sufficient pool of skilled

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[70] Waihenya, Jacqueline, The Art & Science of Virtual Proceedings: Shifting The Paradigm in Alternative Dispute Resolution Tribunals (June 30, 2020). ADR Journal Vol.8.2 2021

[71] James Ndungu Njuguna, 'Mediation as a Tool of Conflict Management in Kenya: Challenges and Opportunities,' (2020) Journalofcmsd Volume 5(2)) available at < https://journalofcmsd.net/wp-content/uploads/2020/10/Mediation-as-a-Tool-of-Conflict-Management-in-Kenya.pdf> accessed on 9th November 2023.

[72] *See*, The Alternative Dispute Resolution Policy, 2021.

[73] Stenner, C. (2017). The Institutionalization of Mediation Support. *Are Mediation Support Entities there yet*.

mediators across the nation, particularly in marginalized areas, facilitating the smooth resolution of disputes for those opting for mediation.[74]

7. Conclusion.

In conclusion, Mediation stands as a promising avenue for the effective and inclusive resolution of disputes, ultimately expanding access to justice. Nevertheless, despite its significant potential, mediation has encountered various hurdles, with limited nationwide adoption, thus falling short of its full potential. By uniting our efforts to confront the challenges that currently impede mediation, and by establishing a robust legal, policy, and institutional framework, mediation has the potential to substantially enhance access to justice, thereby reshaping the landscape of dispute resolution.

[74] Stenner, C. (2017). The Institutionalization of Mediation Support. *Are Mediation Support Entities there yet*.

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- should conform to international standards and must be one's original Writing

- should ideally be between 3,500 and 5,000 words although in special cases certain articles with not more than 7,500 words could be considered

- should include the author'(s) name and contacts details

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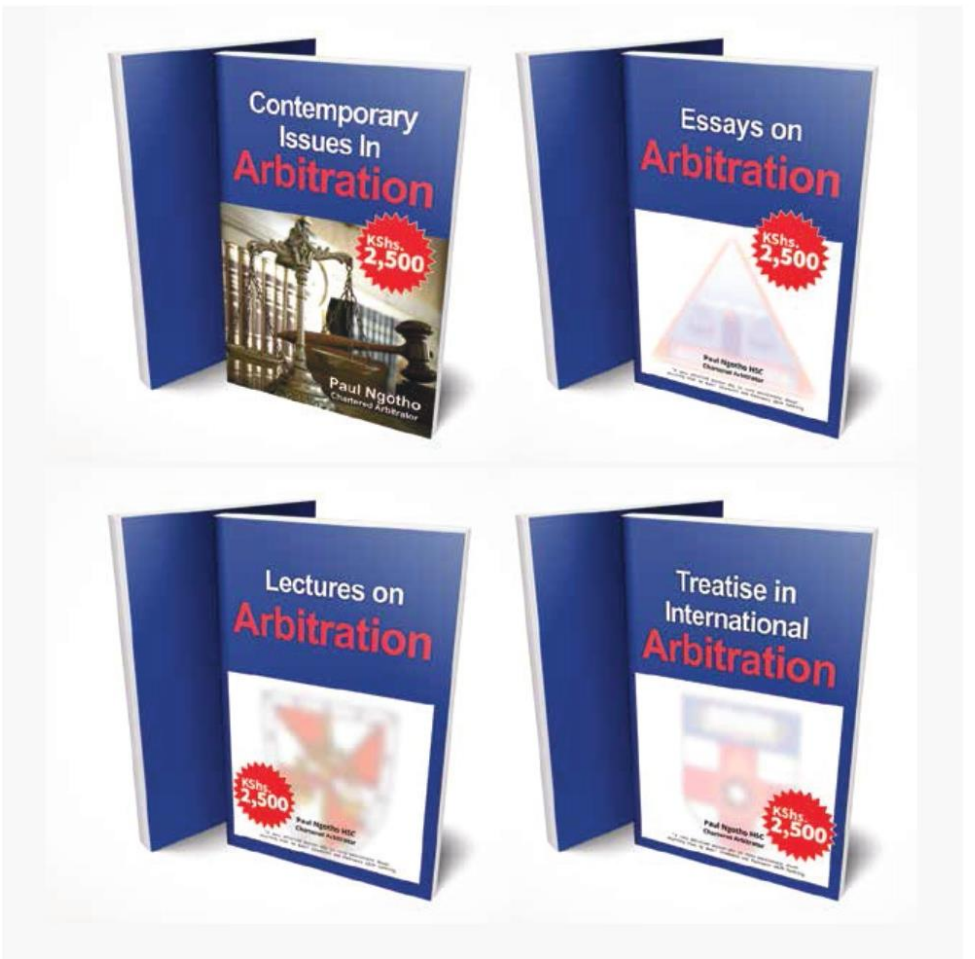

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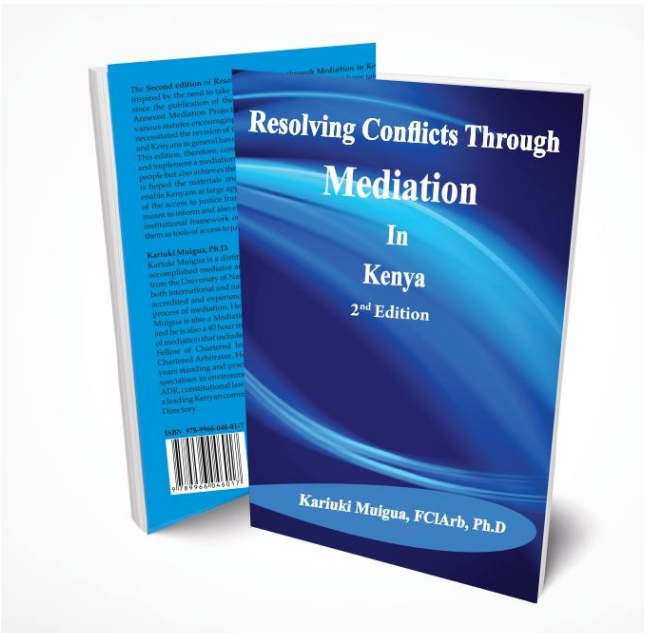

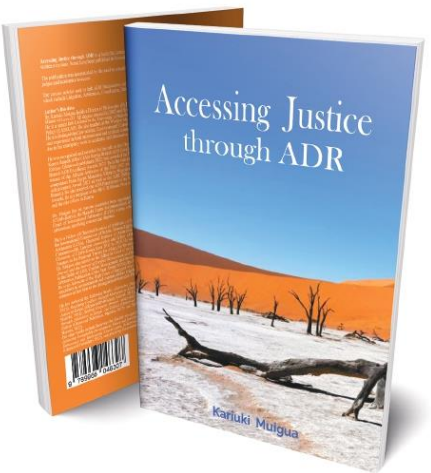

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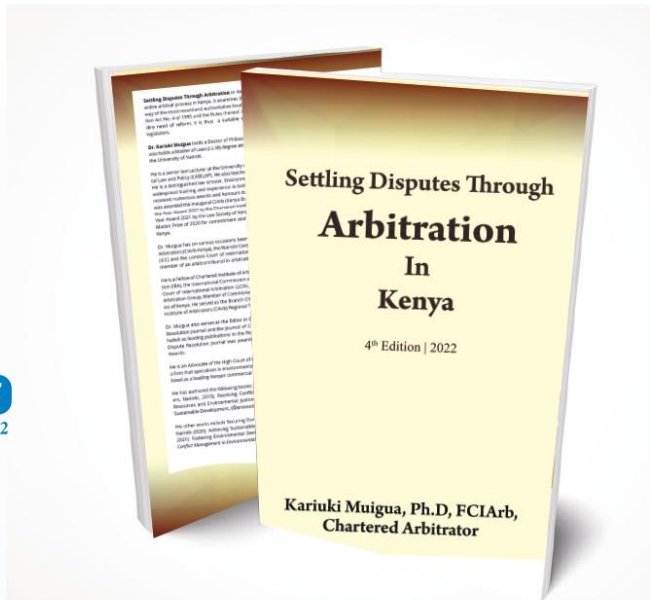

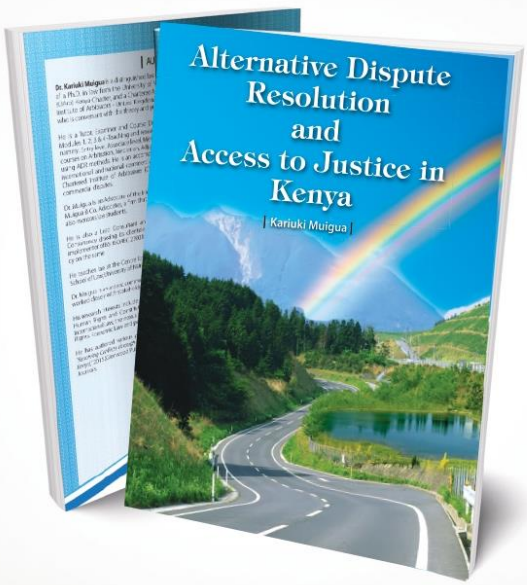

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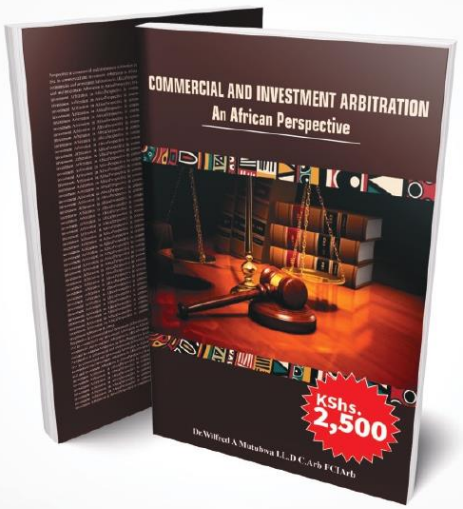

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ISBN 978-9966-046-14-7