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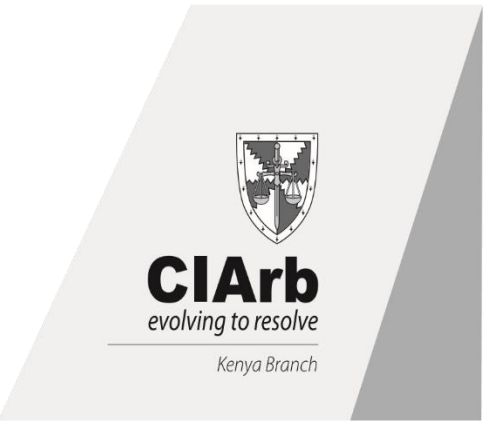

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Editor's Note

Welcome to the *Alternative Dispute Resolution (ADR) Journal*, Volume. 11, No.1, 2023.

The Journal is a peer-reviewed/refereed publication of the Chartered Institute of Arbitrators Kenya (CIArb-K), engineered and devoted to provide a platform and window for relevant and timely issues related to Alternative Dispute Resolution mechanisms. The role of ADR in access to justice has been recognised under the Constitution of Kenya, 2010. The Journal covers pertinent and emerging issues across all ADR mechanisms.

This volume contains papers and case reviews on salient themes in ADR including *Understanding the Place of Conflict Management in Sustainable Development Agenda; Reflections on the African Continental Free Trade Area Agreement (AfCFTA) Dispute Settlement Mechanism: Some Imperatives for Reform; Arbitrability: Marriage Nullification & Custody of Children in Kenya; Transitional Justice and Human Rights; Africanisation of International Dispute Resolution: Stocktaking of African Construction and Engineering Disputes with Reference to the FIDIC Conditions of Contract for Construction; The Implied Promise to Honour an Arbitration Award and the Remedies for its Breach; The Future of Environmental Conflict Management; Absolute Immunity of Arbitrators: Fact, Fallacy or Fantasy?; Tracing The Confines and Boundaries of the Arbitrator's Immunity: The Kenyan Context; Energy Disputes Arbitration: A Focus on Independent Power Producers' (IPPS); The Anatomy of Maritime Arbitration in Africa* and *The Notion of Good Faith in Construction and Arbitration.* The Journal also contains two reviews of the following books *Accessing Justice Through ADR (2022)* and *UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwean Arbitration Act.*

The Editorial Board welcomes feedback from our readers across the globe to enable us continue improving the Journal.

The Editorial Board also welcomes and encourages submission of articles on emerging and pertinent issues in ADR for publication in subsequent issues of the Journal. The Editorial Board receives and considers each article received but

does not guarantee publication. Submissions should be sent to the editor through *editor@ciarbkenya.org* and *adrjournal@ciarbkenya.org* and copied to *admin@kmco.co.ke*. 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 continue publishing this Journal that continues to shape the discourse on ADR in Kenya and across the globe.

The Journal is available online at *https://ciarbkenya.org/journals/*

Dr. Kariuki Muigua, Ph.D; FCIArb; C.Arb
Editor.
Nairobi, January 2023.

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"…a very detailed person who is very passionate about anything that he does" Chambers & Partners 2020 Ranking.
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Alternative Dispute Resolution – Volume 11 Issue 1

Understanding the Place of Conflict Management in Sustainable Development Agenda

By: ***Kariuki Muigua****

Abstract

The Preamble to the 2030 Agenda for Sustainable Development envisages a world where there is a plan of action for people, planet and prosperity as well as strengthening universal peace in larger freedom through integrating the indivisible three dimensions of sustainable development: the economic, social and environmental, by striking a balance across them. Each of these three dimensions is likely to result in conflicts and defeat the very purpose of the sustainable development agenda. It is for this reason that the 2030 Agenda acknowledges the need for strengthening universal peace. This paper discusses the importance of effective conflict management as a step towards achieving sustainable development. The author argues that unless peace is achieved, it may not be possible to achieve the sustainable development agenda.

1. Introduction

The Sustainable Development Goals (SDGs) adopted by the United Nations (UN) in 2015 are widely hailed as a huge success: they represent a global agreement on a comprehensive strategy to address the social and environmental issues that are affecting people all over the world.[1] Instead of relying on nature for survival, as we have done for ages, sustainable development offers a framework for people to coexist with and thrive in harmony with the natural world.[2]

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[1] Higgs, Kerryn. "How sustainable are the SDGs?" (2020): 109-130, 109 <*https://anzsee.org.au/wpcontent/uploads/2020/07/EESolutionsFutureRoyalDraftJuly2ndFINALEbook.pdf#page=109*> accessed 13 July 2022.

[2] Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction." Sustainability 3, no. 3 (2011): 531-540, 531.

The main principles of sustainable development agenda as captured in the *2030 Agenda for Sustainable Development*[3] include the economic, social and environmental sustainability. These are encapsulated in the 17 Sustainable Development Goals and 169 targets, which are meant to lay out a plan of action for people, planet, and prosperity that will strengthen universal peace in larger freedom. They also identify eradicating poverty in all of its manifestations, including extreme poverty, as the greatest global challenge and a crucial prerequisite for sustainable development.[4] The Sustainable Development Goals (SDGs) also envisage a world in which democracy, good governance and the rule of law as well as an enabling environment at national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger.[5] The term "governance" is used to describe "steering" in this context, which includes both processes and institutions and involves an element of authority. Process relates to how decisions are made on priorities, how conflicts are addressed and maybe handled, and how coordination of people's actions with regard to resource usage is made easier. On the other hand, the structural aspect relates to how these procedures are set up and 'managed'.[6]

It has been observed that COVID-19 tremendously disrupted the world's economy where the pandemic left the world's informal employees, especially young workers and women, on their own with no support or protection against financial and health issues. This was as a result of massive job losses, enlarged

[3] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

[4] United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs' <*https://sdgs.un.org/2030agenda*> accessed 13 July 2022.

[5] Ibid.

[6] Vatn, Arild, Environmental governance: institutions, policies and actions, Edward Elgar Publishing, 2015, p. 133.

market gender gap, informal workers' lack of social safety, and decreased work and education opportunities for youth.[7]

Despite having adopted the SDGs into its domestic laws and planning, Kenya still faces the risk of widespread poverty, natural resources and biodiversity degradation, lack of access to safe water for all, escalating climate change, desertification, land degradation, soil erosion, flooding and drought; and increased natural disaster risks.[8] This paper argues that these challenges cannot and should not be addressed in a disjointed manner, if any real progress is to be made.

This paper seeks to analyze the aspects of governance as well as how they interact with the environmental and social tenets of sustainable development with the aim of ensuring that the SDGs are achieved, especially post the COVID-19 pandemic. Arguably, sustainable development as a process of transformation of the economy must, in consequence, also result in a transformation of society and its governance structures for a sustainable future.[9] All this must also be accomplished in a way that takes into account environmental sustainability.
The paper discusses the Environmental, Social, and Governance (ESG) approach to sustainability and how different players, including governments, communities and businesses can participate in promoting and achieving sustainability through ESG approach as a way of addressing and avoiding conflict.

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[7] Fallah Shayan, N., Mohabbati-Kalejahi, N., Alavi, S. and Zahed, M.A., 'Sustainable Development Goals (SDGs) as a Framework for Corporate Social Responsibility (CSR)' (2022) 14 Sustainability 1222, 8 <*https://www.mdpi.com/2071-1050/14/3/1222*> accessed 13 July 2022.

[8] National Environment Management Authority, Kenya State of Environment Report 2019-2021<*https://www.nema.go.ke/images/Docs/EIA_1840-1849/Kenya%20State%20of%20Environment%20Report%202019-2021%20final-min.pdf* accessed 17 July 2022.

[9] Ketschau, T.J., "Social sustainable development or sustainable social development-two sides of the same coin? the structure of social justice as a normative basis for the social dimension of sustainability." International Journal of Design & Nature and Ecodynamics 12, no. 3 (2017): 338-347, 338.

Addressing conflict of whatever nature is part of the social aspects of sustainability that must be put into consideration if sustainable development agenda is to be achieved. This paper discusses the place of conflicts, especially those related to environmental resources, in achieving the sustainable development agenda.

2. Environmental Aspect of Sustainable Development Agenda

The world leaders who signed the 2030 Agenda stated in the preamble that they are "Determined to protect the planet from degradation, including through sustainable consumption and production, sustainably managing its natural resources, and taking urgent action on climate change, so that it can support the needs of the present and future generations."[10] A number of SDGs are dependent on the health of the environment for their realisation. These include but are noted limited to: Goal 2 seeks to end hunger, achieve food security and improved nutrition and promote sustainable agriculture; Goal 6 seeks to ensure availability and sustainable management of water and sanitation for all; Goal 12 seeks to ensure sustainable consumption and production patterns; Goal 13 urges State parties to take urgent action to combat climate change and its impacts; Goal 14 calls for conservation and sustainable use of the oceans, seas and marine resources for sustainable development; and Goal 15 urges State parties to protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.[11]

In order to achieve environmental sustainability, natural resources management and disaster risk management, there is also a need for improved management of natural resources and biodiversity; access to safe water for all; climate change;

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[10] Environment UN, 'Sustainable Development Goals' (UNEP - UN Environment Programme, 19 October 2017) <*http://www.unep.org/evaluation-office/our-evaluation-approach/sustainable-development-goals*> accessed 17 July 2022.

[11] 'List of the 17 Sustainable Development Goals | Agora' <*https://agora-parl.org/resources/aoe/list-17-sustainable-development-goals*> accessed 17 July 2022.

desertification, land degradation, soil erosion, flooding and drought; and natural disaster risk reduction and management.[12] It is thus arguable that unless the environmental problems facing the planet are addressed, the other SDGs will remain a mirage. In addition, environmental related conflicts will continue affecting communities.

3. Economic Aspect of Sustainable Development Agenda

The SDGs envisage a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all.[13] The economic aspect is to be achieved through ensuring that every State has, and shall freely exercise, full permanent sovereignty over all its wealth, natural resources and economic activity.[14]

SDG 8 seeks to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.[15] Some of the related relevant targets include: Sustain per capita economic growth in accordance with national circumstances and, in particular, at least 7 per cent gross domestic product growth per annum in the least developed countries;[16] achieve higher levels of economic productivity through diversification, technological upgrading and innovation, including through a focus on high-value added and labour-intensive sectors;[17] promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro, small- and

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[12] Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," SDplanNet Africa Regional Workshop, March 3–5, 2014, 3.

[13] United Nations, 'Transforming Our World: The 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs' <*https://sdgs.un.org/2030agenda*> accessed 13 July 2022.

[14] Ibid.

[15] SDG 8, UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

[16] Target 8.1.

[17] Target 8.2.

medium-sized enterprises, including through access to financial services;[18] improve progressively, through 2030, global resource efficiency in consumption and production and endeavour to decouple economic growth from environmental degradation, in accordance with the 10-year framework of programmes on sustainable consumption and production, with developed countries taking the lead;[19] by 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value;[20] by 2020, substantially reduce the proportion of youth not in employment, education or training;[21] take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms;[22] protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment;[23] by 2030, devise and implement policies to promote sustainable tourism that creates jobs and promotes local culture and products;[24] strengthen the capacity of domestic financial institutions to encourage and expand access to banking, insurance and financial services for all;[25] increase Aid for Trade support for developing countries, in particular least developed countries, including through the Enhanced Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries;[26] and by 2020, develop and operationalize a global strategy for youth employment and implement the Global Jobs Pact of the International Labour Organization.[27]

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[18] Target 8.3.
[19] Target 8.4.
[20] Target 8.5.
[21] Target 8.6.
[22] Target 8.7.
[23] Target 8.8.
[24] Target 8.9.
[25] Target 8.10.
[26] Target 8.A.
[27] Target 8.B.

The underlying affirmation of these targets are that "economic, social, and technological progress" must occur "in harmony with nature," envisaging "a world in which ... consumption and production patterns and use of all natural resources—from air to land, from rivers, lakes and aquifers to oceans and seas—are sustainable ... One in which humanity lives in harmony with nature and in which wildlife and other living species are protected," but the SDGs fail to offer any quantified target for resource efficiency, and do not specify what a sustainable level of material footprint might be.[28]

It has been noted that in the economic debate, sustainable development is most frequently defined as the requirement to maintain a continuous flow of income for humanity, produced from non-declining capital stocks. In this perception, at least, steady stocks of human, man-made, natural, and social capital are seen as necessary and frequently sufficient criteria for sustainable development.[29] Economic sustainability has been defined as the meeting the economic needs of the present without diminishing the economic needs of the future.[30] Although intergenerational equity is frequently viewed as a factor in economic sustainability, it is not always clear what exactly needs to be perpetuated.[31]

The question that has, therefore, been frequently asked is whether the world be able to sustain economic growth indefinitely without running into resource

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[28] Hickel, J., "The contradiction of the sustainable development goals: Growth versus ecology on a finite planet." Sustainable Development 27, no. 5 (2019): 873-884, at 874 & 875.

[29] Joachim H Spangenberg, 'Economic Sustainability of the Economy: Concepts and Indicators' (2005) 8 International Journal of Sustainable Development 47, 48 <*http://www.inderscience.com/link.php?id=7374*> accessed 14 July 2022.

[30] Solin, J., "Principles for Economic Sustainability: Summary," (a summary of John Ikerd's Principles of Economic Sustainability. It was developed based on attendance a 5-day workshop taught by John and John's Essentials of Economic Sustainability book) <*https://www3.uwsp.edu/cnrap/wcee/Documents/Principles%20for%20Economic%20Sustainability%205%20page%20summary.pdf*> accessed 14 July 2022.

[31] Sudhir Anand and Amartya Sen, 'Human Development and Economic Sustainability' (2000) 28 World Development 2029, 2029 <*https://linkinghub.elsevier.com/retrieve/pii/S0305750X00000711*> accessed 14 July 2022.

constraints or despoiling the environment beyond repair.[32] Thus, the relationship between economic growth and the environment is, and always remains, controversial.[33]

However, what may be universally accepted is that increased private earnings are only one aspect of economic growth; it may also make a substantial contribution to the production of resources that can be mobilised to enhance social services (such as public healthcare, epidemiological protection, basic education, safe drinking water, among others).[34] These are ultimately important in realisation of SDGs. Economic empowerment of individuals as well as investing in social services that will benefit the current wider citizenry as well as future generations is thus an important step towards achieving sustainability.

4. Social Aspect of Sustainable Development Agenda

Social sustainability entails robust, inclusive communities where people may voice their opinions and governments act on them. In order to achieve social sustainability, opportunities must be increased for everyone, both now and in the future. It is essential for eradicating poverty and promoting shared wealth, together with economic and environmental sustainability.[35]

Social problems, in particular, prohibit individuals from living healthy lifestyles, disturb communities, and interfere with businesses. While most of these problems are universal, some are particular to particular regions or populations. These problems may include, but are not limited to, discrimination (based on race, colour, and gender), poverty, homelessness, hunger, malnutrition, and obesity, a lack of basic freedoms, the unemployment crisis, pandemics and epidemics, disabilities and chronic diseases, violence, crime, and

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[32] Panayotou, T., "Economic Growth and the Environment." CID Working Paper Series (2000), 1.

[33] Brock, W.A. and Taylor, M.S., "Economic growth and the environment: a review of theory and empirics." Handbook of economic growth 1 (2005): 1749-1821.

[34] Ibid, 2032.

[35] 'Overview' (World Bank) <*https://www.worldbank.org/en/topic/socialsustainability/overview*> accessed 14 July 2022.

insecurity as well as wars and political conflicts, gender inequality, and a lack of education and opportunities.[36]

The distribution of economic opportunities and social services while resolving power disparities constitutes the process of social development, which involves institutions at all levels, from national governments to various civil society groups.[37] Social development has also been defined as "a process of planned social change designed to promote people's welfare within the context of a comprehensive process of economic development".[38] The emphasis of social sustainability and inclusion is on the requirement to "put people first" throughout the development process. By empowering individuals, creating cohesive and resilient societies, and making institutions accessible and answerable to citizens, it fosters social inclusion of the underprivileged and vulnerable.[39] Efforts towards sustainability must thus take note of these aspects of social sustainability for creation of an inclusive society.

5. Peace and Sustainable Development: Addressing Causes of Resource Related Conflicts

Sustainable development agenda has gained the support of the international community as part of adopting an integrated approach to development issues and environmental conservation and protection. Sustainable development seeks to ensure that all development activities are conscious of environmental conservation and protection. The underlying thread in this paper is to promote

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[36] Fallah Shayan, N., Mohabbati-Kalejahi, N., Alavi, S. and Zahed, M.A., 'Sustainable Development Goals (SDGs) as a Framework for Corporate Social Responsibility (CSR)' (2022) 14 Sustainability 1222, 14 <*https://www.mdpi.com/2071-1050/14/3/1222*> accessed 13 July 2022.

[37] Julie L Drolet, 'Chapter 14 - Societal Adaptation to Climate Change' in Trevor M Letcher (ed), The Impacts of Climate Change (Elsevier 2021) <*https://www.sciencedirect.com/science/article/pii/B9780128223734000112*> accessed 14 July 2022.

[38] Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." Sustainable Development (1996), 79.

[39] 'Social Sustainability and Inclusion' (World Bank) <*https://www.worldbank.org/en/topic/socialsustainability*> accessed 14 July 2022.

sound environmental governance and management for sustainable development. The discourse recognises that sustainable development agenda not only deals with the environment, but it seeks to address all the factors that affect people's livelihoods and consequently the sustainability of environment and natural resources. This is in recognition of the fact that people's livelihoods mainly depend on the natural and other environmental resources. It has rightly been pointed out that "When people lose their means of subsistence, their capacity to exercise political voice, their...access to social services, jobs, and their fundamental right to remain on their property, you create a vacuum in which radicals may come and exploit that sense of insecurity".[40]

Sustainable development agenda is not only concerned with environmental matters. Instead, it adopts both anthropocentric and ecocentric approaches. There is a need for promotion of sustainable development using the two approaches: Some of the running themes that are informed by the anthropocentric approach to environmental management include Poverty Eradication, Food Security, Environmental Democracy, Environmental Justice, Environmental Security, Public Participation, Gender Equity, Access To Information, Conflicts Management, amongst others. All these themes are discussed within the broader theme of human rights while emphasizing the special relationship between human rights and the environment. This is particularly important in light of the new Constitutional provisions on governance and in the Bill of Rights including Articles of the Constitution that touch on environment and natural resources.[41]

Ecocentric arguments also inform the discussion on themes such as combating climate change, impact of resource extraction, environmental health, and environmental conservation for the sake of the Mother Nature. However,

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[40] 'In Sustainable Development and Conflict Resolution, Women Seeing Larger Roles' (New Security Beat, 22 June 2016) <*https://www.newsecuritybeat.org/2016/06/sustainable-development-conflict-resolution-women-larger-roles/*> accessed 17 September 2022.

[41] Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016, pp. xi-xii.

promoting such rights as the right to a clean and healthy environment has both anthropocentric and ecocentric benefits and should therefore be pursued.[42]

Thus, the sustainable development agenda advocates for an integrated approach to tackling environmental management challenges as well as social problems affecting the society.[43] This is in line with the UNDP's approach in the recent past where it has been advocating for inclusivity, sustained political commitment and national ownership alongside the need to have gender equality, and integrated planning, budgeting and monitoring as part of achieving the 2030 Sustainable Development Goals (SDGs) agenda.[44] OECD also calls for an integrated approach to the implementation of sustainable development and argues that many SDGs are interconnected with each other; an integrated approach implies managing trade-offs and maximising synergies across targets.[45]

6. Governance Aspect of Sustainable Development Agenda

The environmental rule of law is crucial to sustainable development because it combines environmental requirements with the fundamental components of the legal system and lays the groundwork for better environmental governance.[46]

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[42] Ibid, p. xii.

[43] See also Hussein Abaza and Andrea Baranzini, Implementing Sustainable Development: Integrated Assessment and Participatory Decision-Making Processes (Edward Elgar Publishing 2002).

[44] United Nations Development Programme, "Implementation of 2030 Agenda has to be inclusive, participatory and bottom-up," Jul 18, 2017. Available at *https://www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/07/18/implementation-of-2030-agenda-has-to-be-inclusive-participatory-and-bottom-up.html* [Accessed on 6 April 2022]; See also Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019) <*https://aer.eu/integrated-approach-sdgs/*> accessed 6 April 2022;

[45] Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019*)* <*https://aer.eu/integrated-approach-sdgs/*> accessed 6 April 2022.

[46] Environment UN, 'Promoting Environmental Rule of Law' (UNEP - UN Environment Programme, 5 October 2017) <*http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law*> accessed 17 July 2022.

In addition, by linking environmental sustainability to fundamental rights and responsibilities, it draws attention to environmental sustainability, reflects universal moral principles and ethical standards of conduct, and establishes a basis for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and responsibilities, it is possible to argue that environmental governance will be arbitrary, that is, discretionary, subjective, and unpredictable.[47]

The rule of law fosters equality of treatment, increases personal and property security, and offers a fair and amicable means of resolving conflicts.[48] The rule of law was defined by United Nations Secretary-General Kofi Anan in 2004 as follows:

> *The rule of law . . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*[49]

The place of rule of law in promoting sustainability is well captured under SDG 16 which seeks to promote just, peaceful and inclusive societies.[50] The law is

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[47] Ibid.

[48] Michel J, The Rule of Law and Sustainable Development. Center for Strategic & International Studies, 2020, 5 <*https://www.researchgate.net/profile/James-Michel-3/publication/342881527_The_Rule_of_Law_and_Sustainable_Development/links/5f0b3464a6fdcc4ca46389c5/The-Rule-of-Law-and-Sustainable-Development.pdf*> accessed 17 July 2022.

[49] Ibid, 8.

[50] Martin, 'Peace, Justice and Strong Institutions' (United Nations Sustainable Development) <*https://www.un.org/sustainabledevelopment/peace-justice/*> accessed 17 July 2022.

important as it provides essential tools and institutions for governing resources sustainably.[51] In addition to being critical (and frequently last) stages in itself for effectively adopting sustainability solutions, laws and governance are also vital elements to assist technological and economic progress.[52]

It has been emphasised that the presence of robust, well-resourced public institutions at the national and international levels is essential for the execution of the 2030 Agenda's necessary policy reforms.[53]

It has been observed that the SDGs have thus far mostly been implemented through a top-down, government-led strategy, with goals and initiatives determined at the global (and increasingly, national) level.[54] To achieve the SDGs, grassroots action for sustainable development, also known as "solutions that react to the local context and the interests of the communities concerned," is necessary.[55] The SDGs' localization is based on Local Agenda 21, a bottom-up, participatory initiative allowing local governments to interact with their citizens on sustainable development.[56]

To co-create locally relevant sustainability routes, communities, stakeholders, and academics must collaborate, and participatory approaches are crucial for

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[51] Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction." Sustainability 3, no. 3 (2011): 531-540, 532.

[52] Clune WH and Zehnder AJB, 'The Three Pillars of Sustainability Framework: Approaches for Laws and Governance' (2018) 9 Journal of Environmental Protection 211.

[53] Martens, Jens. "Redefining policies for sustainable development." Exploring (2018): 11, 20 <*https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight_Innenteil_2018_redefining_policies_martens.pdf*> accessed 13 July 2022.

[54] Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 Sustainability Science 1251, 1251 <*https://doi.org/10.1007/s11625-021-00921-2*> accessed 13 July 2022.

[55] Ibid.

[56] Ibid.

fostering this cooperation in governance issues.[57] Notably, the 2010 Constitution of Kenya provides that 'all State organs, State officials, public offices, and all individuals are bound by the national values and principles of governance whenever any of them: apply or interpret this Constitution; enact, apply, or interpret any legislation; or make or implement public policy choices'.[58] Good governance, integrity, transparency, accountability, sharing and devolution of power, the rule of law, democracy, and public participation are among the national values and guiding principles of governance. Other national values and guiding principles include good governance, integrity, transparency, and accountability, patriotism, national unity, as well as sustainable development.[59] "Social Development is based on positive, humane, people oriented development in society....The basic principles... are human dignity, equality, social justice, and equitable distribution of resources.... People's participation and empowerment are necessary conditions…."[60]

These principles are especially relevant in light of the spirit of devolution, where the Constitution states that 'the objects of the devolution of government are, among other things—to promote democratic and accountable exercise of power; to give powers of self-governance to the people and enhance their involvement in the exercise of State authority and in making decisions that affect them; to acknowledge the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalised communities'.[61]

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[57] See Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 Sustainability Science 1251 <*https://doi.org/10.1007/s11625-021-00921-2*> accessed 13 July 2022.

[58] Article 10 (1), Constitution of Kenya 2010.

[59] Ibid, Article 10 (2).

[60] Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." Sustainable Development (1996), 79.

[61] Article 174, Constitution of Kenya 2010.

There is a need for efforts geared towards achievement of the principle of sustainable development to be moulded around the foregoing national values and principles of governance to ensure that there is an inclusive approach to governance matters in the country, for the benefit of all.

7. Realising Environmental, Social and Governance Tenets for Sustainable Development: Moving Forward

Integrated decision-making, or the process of incorporating environmental, social, and economic goals and factors into choices, is the key action principle of sustainable development.[62] It has rightly been pointed out that despite the fact that all countries, regardless of their economic, social, or environmental contexts, can benefit from the Sustainable Development Goals (SDGs) framework, norms, and principles, translating global objectives into specific national contexts is difficult because of varying starting points, capacities, and priorities, among other factors.[63] Global goals will be transformed into targets and indicators that take into account the specific national settings of each country in order to be relevant to all nations (and to foster national ownership). Keeping broad global aims and very different national settings coherent will be a problem.[64]

Economic, social and governance aspects of sustainable development must take into account the environmental aspect of sustainable development. This is because environmental protection is essential to promoting sustainable economic growth because the natural environment supports economic activity both directly and indirectly through ecosystem services like carbon

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[62] Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: an introduction. Sustainability, 3 (3), 531-540." (2011), 532.

[63] Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical Alignment at the National and Subnational Levels in Africa," SDplanNet Africa Regional Workshop, March 3–5, 2014, 2 < *https://www.iisd.org/system/files/publications/sdplannet_africa.pdf*> Accessed on 25 June 2022.

[64] Ibid, 2.

sequestration, water purification, managing flood risks, and nutrient cycling. Directly, the natural environment provides resources and raw materials such as water, timber, and minerals that are required as inputs for the production of goods and services.[65]

In the institutional arrangements of governments and parliaments, scholars have argued that it is crucial to reflect the encompassing nature of the 2030 Agenda and the SDGs. If competent national equivalents do not reflect and "own" the new, more cogent global government, the effort will be in vain.[66] To make the UN system "fit for purpose" on a global scale, it is necessary to reform already-existing institutions and establish new bodies in regions where there are governance gaps. This can only be done by making a commitment to address the unequal distribution of resources as well as access to participation and decision-making.[67] This is especially important considering that the SDG index, which displays each country's compliance with the SDGs and breaks down each score by SDG, reflects the fact that governments have varying degrees of commitment to the SDGs.[68]

The 2030 Agenda presents a challenge to UN Environment to create and improve integrated approaches to sustainable development, methods that will show how enhancing environmental health would have positive social and

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[65] UN Environment, 'GOAL 8: Decent Work and Economic Growth' (UNEP - UN Environment Programme, 2 June 2021) <*http://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-8*> accessed 13 July 2022.

[66] Martens, J., "Redefining policies for sustainable development." Exploring (2018): 11, 20 <*https://www.2030spotlight.org/sites/default/files/spot2018/chaps/Spotlight_Innenteil_2018_redefining_policies_martens.pdf*> accessed 13 July 2022.

[67] Ibid.

[68] Del-Aguila-Arcentales, S., Alvarez-Risco, A., Jaramillo-Arévalo, M., De-la-Cruz-Diaz, M. and Anderson-Seminario, M.D.L.M., 'Influence of Social, Environmental and Economic Sustainable Development Goals (SDGs) over Continuation of Entrepreneurship and Competitiveness' (2022) 8 Journal of Open Innovation: Technology, Market, and Complexity 73, 1 <*https://www.mdpi.com/2199-8531/8/2/73*> accessed 13 July 2022.

economic effects. UN Environment's initiatives support the environmental component of sustainable development and promote socio-economic development by aiming to lower environmental hazards and boost society's and the environment's overall resilience.[69]

The Sustainable Development Goals (SDGs) are global, multifaceted, and ambitious, and it is arguable that in order to fulfil them, we need an integrated framework that encourages a growth path that protects the environment and whose benefits are shared by everyone, not just by the fortunate few.[70] Thus, the idea of sustainable development forces us to reconsider how we interact with the world and how we anticipate that governments would implement policies that promote that worldview.[71] Local communities need to concentrate on a locally relevant subset of goals and comprehend potential future pathways for key drivers which influence local sustainability because the Sustainable Development Goals (SDGs) recognise the importance of action across all scales to achieve a sustainable future.[72] There is need for continuous creation of public awareness, civic education and creating avenues for public participation among the communities because to guide long-term local planning and decision-making to achieve the SDGs, local communities also need to understand the range of potential future pathways for their region and how they align with local sustainability objectives.[73]

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[69] Environment UN, 'Sustainable Development Goals' (UNEP - UN Environment Programme, 19 October 2017) <*http://www.unep.org/evaluation-office/our-evaluation-approach/sustainable-development-goals*> accessed 17 July 2022.

[70] Ramos, G., "The Sustainable Development Goals: A duty and an opportunity." (2016): 17-21, in Love, P. (ed.), Debate the Issues: New Approaches to Economic Challenges, OECD Publishing, Paris, *https://doi.org/10.1787/9789264264687-3-en*.

[71] Ibid.

[72] Szetey, K., Moallemi, E.A., Ashton, E., Butcher, M., Sprunt, B. and Bryan, B.A., 'Co-Creating Local Socioeconomic Pathways for Achieving the Sustainable Development Goals' (2021) 16 Sustainability Science 1251, 1251 <*https://doi.org/10.1007/s11625-021-00921-2*> accessed 13 July 2022.

[73] Ibid, 1251.

It has rightly been pointed out that 'since the world's poor understand scarcity and live "closer to nature," they have a better understanding of the finite nature of natural resources than the world's powerful and affluent elite, and they have a much greater immediate and vested interest in promoting change in the way that the world does business. As a result, they have a better understanding of the need to focus social development strategies on empowering the poor. They must thus be given the authority and influence to actively shape economic policy rather than just responding to circumstances outside their control'.[74]

This calls for adoption of participatory an inclusive governance approaches that give all members of society and/or their representatives to air their views and actively participate in governance matters, in a meaningful way that impacts their lives positively. It has also been pointed out that while environmental law is essential to attaining sustainability, we also need to acknowledge that there is a need for a wide range of other pertinent laws, such as those governing land use and property, taxes, our governmental system, and other issues.[75] This is important in ensuring that sustainability is achieved in environmental, economic, social and governance aspects of development.

Corporations, through following ESG frameworks or guidelines, such as the *Nairobi Securities Exchange ESG – Disclosures Guidance Manual, 2021,* can also play a huge role in promoting sustainability within the localities that they operate in and the country at large. ESG Reporting should be encouraged and used as a tool of promoting sustainability within the companies, communities and country. Under this, organisations make it part of their operational procedures to report publicly on their economic, environmental, and/or social impacts, and hence its contributions – positive or negative – towards the goal of sustainable

[74] Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." Sustainable Development (1996), 84.
[75] Dernbach, J.C. and Mintz, J.A., "Environmental laws and sustainability: An introduction," Sustainability 3, no. 3 (2011): 531-540, 532.

development.[76] As the business community seeks to invest in various sectors, there is a need for them to take into account ESG requirements under SDGs. The law (government) and other policy makers should work towards supporting businesses in their efforts to transition to more sustainable business models, through using various legal, policy and other effective incentives. The law should move towards ensuring that non-financial reporting on ESG becomes the standard mode of operation for ease of enforcing such principles as "the polluter pays principle", among others. This is especially important as it has been pointed out that 'previous literature, which attempted to investigate the link between sustainability and investment performance, found that a critical barrier to ESG integration is that investors lack reliable and non-manipulated information', at least in other jurisdictions, practices which may also take place in Kenya.[77] While it may not be disputed that institutional investors vary in their approaches to integrating ESG factors into their investment decisions, the end game should at least show some tangible an verifiable positive results.[78]

It has also been suggested that businesses and companies should embrace technology and innovation in engineering and product development as well as with regard to management structures and entrepreneurship, which will arguably continue to be crucial to overall sustainability strategy. Doing more with less may be a challenge that technology may help solve since it can reduce the strict ecological limitations while also relieving political and economic pressures (thereby allowing space and opportunity for more sustainability solutions from all quarters).[79]

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[76] Nairobi Securities Exchange ESG – Disclosures Guidance Manual, November 2021< *https://sseinitiative.org/wp-content/uploads/2021/12/NSE-ESG-Disclosures-Guidance.pdf*> accessed 17 July 2022.

[77] Roy, P.P., Rao, S., Marshall, A.P. and Thapa, C., 'Mandatory Corporate Social Responsibility and Foreign Institutional Investor Preferences' (2020).

[78] OECD, OECD Business and Finance Outlook 2020: Sustainable and Resilient Finance (OECD 2020) <*https://www.oecd-ilibrary.org/finance-and-investment/oecd-business-and-finance-outlook-2020_eb61fd29-en*> accessed 17 July 2022.

[79] Clune WH and Zehnder AJB, 'The Three Pillars of Sustainability Framework: Approaches for Laws and Governance' (2018) 9 Journal of Environmental Protection 211.

8. Conclusion

It has rightly been opined that conflict is a complex phenomenon that contributes significantly to sustainability challenges, necessitating a holistic approach to its prevention through the integration of Strategic Sustainable Development (SSD) at the structural level of conflict prevention that can offer long-term solutions to conflict escalation throughout the world. This is due to the fact that SSD offers a comprehensive strategy for tackling sustainability issues and the complexity of conflict resolution.[80]

Conflicts wipe out years of development work and have long-lasting negative effects on the economy, society, politics, and regions involved.[81] Citizens' fundamental rights are viewed as the cornerstone for managing and resolving disputes, promoting economic development, and preserving human dignity in nations with democratic freedoms where people can live up to their full potential.[82] Additionally, it has been suggested that democratic nations that uphold citizens' rights and uphold the rule of law both at home and abroad are safer places to live, work, and conduct business.[83]

According to stakeholders, the primary pillars of economic transformation and inclusive growth are: inclusive growth that reduces inequality; sustainable agriculture, food self-sufficiency and nutrition; diversification, industrialization and value addition; developing the service sector; and infrastructure development.[84] These focus on the economic growth as well as social aspects of

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[80] Odiniya, A.B., Fofuleng, B.J. and Vong, P., "Strategic Sustainable Development as an Approach to Conflict Prevention in Conflict-Prone Societies." (2014).

[81] Bitterman, M., Lopez, V. and Wright, F., "A bridge to peace: Strategic sustainable development as an approach to conflict resolution." (2007).

[82] 'Democracy, Human Rights and Governance | U.S. Agency for International Development' (26 March 2022) <*https://www.usaid.gov/democracy*> accessed 21 May 2022.

[83] 'The Role of Human Rights, Democracy, and Good Governance in Promoting Sustainable Development' (GSDRC) <*https://gsdrc.org/document-library/the-role-of-human-rights-democracy-and-good-governance-in-promoting-sustainable-development/*> accessed 21 May 2022.

[84] Urama, Kevin, Nicholas Ozor, and Ernest Acheampong, "Achieving Sustainable Development Goals (SDGs) Through Transformative Governance Practices and Vertical

development. The main goal of Social Sustainability and Inclusion's work is to support people in overcoming barriers that prevent them from fully participating in society, regardless of their gender, race, religion, ethnicity, age, sexual orientation, or disability, by collaborating with governments, communities, civil society, the private sector, and other stakeholders to create more inclusive societies, empower citizens, and foster more sustainable communities.[85]

It has rightly been pointed out that 'every objective and target in the SDG framework is implied to depend on and impact one another, although the precise nature of these connections is yet unknown at this time. Due to the goals' and targets' integrated structure, advancements made toward one objective or another are connected to other goals and targets via causal chains and feedback loops. For these reasons, an integrated and systems-based approach to the SDGs is required to guarantee that these feedbacks are understood and handled. Countries will be better positioned to realise the transformational potential of the 2030 Agenda if mutually reinforcing activities are implemented and target trade-offs are minimised'.[86] As already pointed out, achieving sustainable development agenda requires an integrated approach that looks at the economic welfare of the people and the nation at large, while adopting a socially inclusive approach in all governance matters. Economically and socially empowered people are more likely to participate in governance matters objectively, without being distracted by poverty and other social ills, in order to also on the intergenerational aspect of sustainable development agenda for the sake of future generations. Thus, it is necessary at the local level, to support the

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Alignment at the National and Subnational Levels in Africa," SDplanNet Africa Regional Workshop, March 3–5, 2014, 3
< *https://www.iisd.org/system/files/publications/sdplannet_africa.pdf*> Accessed on 25 June 2022.

[85] 'Social Sustainability and Inclusion: Overview' (World Bank)
<*https://www.worldbank.org/en/topic/socialsustainability/overview*> accessed 14 July 2022.

[86] Cameron, A., Metternicht, G. and Wiedmann, T., "Initial progress in implementing the Sustainable Development Goals (SDGs): a review of evidence from countries." Sustainability Science 13, no. 5 (2018): 1453-1467, 1453.

economic and social self-determination of oppressed individuals and groups by enlisting the help of community leaders and the general public in creating locally tailored institutional responses to issues (such as fostering environmentally friendly industries as a means of combating unemployment) and encouraging communication between local interest groups regarding issues of sustainable development, and at the national level, for the government to offer all necessary support in promoting sustainability.[87] There is a need to adopt innovative governance approaches which integrate economic, social development and sustainable development principles at multiple levels of social organization in addressing the serious challenges facing our globe and achievement of the 2030 Agenda on Sustainable Development Goals.[88]

What can be deduced from the foregoing discussion is that it is not enough to achieve sustainable development, as conceptualized by the ruling class and those in positions of decision-making; communities must actively be involved in decision-making to come up with strategies and approaches that take into account the unique economic, social and governance needs of particular group or class of people. The fundamental principles and values have already been captured under Article 10 of the 2010 Constitution of Kenya and if fully adopted and implemented within the development agenda, they can go a long way in ensuring that Kenya achieves satisfactory results as far as implementation and localization of the 2030 Agenda for Sustainable Development, and the SDGs are concerned. This is the only way that sustainability can be truly achieved and appreciated by all the people affected, while leaving a positive mark on their lives and the country in general. Thus, it is important to consider conflict management as being fundamental to democratic institutional design.[89] Additionally, the process of managing conflicts should be seen as a crucial

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[87] Kramer, J.M. and Johnson, C.D., "Sustainable Development and Social Development: Necessary Partners for the Future." Sustainable Development (1996), 85.
[88] Ibid, 89.
[89] Kyllönen, S., Calpaert, A., Heikkinen, H., Jokinen, M., Kumpula, J., Marttunen, M., Muje, K. and Raitio, K., 'Conflict Management as a Means to the Sustainable Use of Natural Resources' (2006) 40 Silva Fennica <*https://www.silvafennica.fi/article/323*> accessed 17 September 2022.

component of continuous co-management practices of resource usage rather than as a separate stage of dispute settlement.[90] Managing conflicts effectively is indeed a prerequisite for realising Environmental, Social and Governance (ESG) tenets of the Sustainable Development agenda.

[90] Ibid.

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'Democracy, Human Rights and Governance | U.S. Agency for International Development' (26 March 2022) <*https://www.usaid.gov/democracy*> accessed 21 May 2022.

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Reflections on the African Continental Free Trade Area Agreement (AfCFTA) Dispute Settlement Mechanism: Some Imperatives for Reform

By: ***WiIfred A. Mutubwa*** *

Introduction

The blue moon is rising over the African continent. Or is it? Trading under the AfCFTA Agreement begun on 1st January 2021. This is not only a momentous occasion for African trade and investment law and practice but also for regional integration. It is perhaps, therefore, a convenient, if not opportune, time to reflect on the dispute settlement system set out under the AfCFTA arrangement. The problems associated with dispute resolution mechanisms in Africa's regional and sub-regional integration efforts have traditionally largely fallen into two categories. Firstly, where regional and sub-regional courts are preferred, the inclination has always been to default to the adoption of the European Union Court of Justice (ECJ) model. Efforts at adapting the ECJ system to suit Africa's unique circumstances has had serious shortcomings.[1] Secondly, where commercial and investment Arbitration has been favoured, the establishment of arbitration centres by states, or under regional and sub-regional courts modelled on European institutional arbitration centres, has been the norm.

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[1] See, O Akinkugbe, "What the African Continental Free Trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution" (2019). <*http://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/*> accessed on 28th December 2020 [4, 5 and 6].

Shortly thereafter, African states find it difficult to live up to the lofty standards set in the institutions they set up. It takes ages to establish functional courts, most remain underfunded and understaffed. Some which see the light of day are either frustrated into submission or extinction, while decisions of most of the few progressive regional courts are contemptuously ignored by state parties. This approach to dispute resolution as being at the heart of the failure or sub-optimum performance of regional dispute settlement systems in Africa.

Lately, there has been substantial scholarship around the decolonisation of the teaching, and I may add, the practice, of international law in Africa, and the global south in general. [2] Perhaps, it would be convenient to dovetail into this discourse by suggesting a threesome of decolonisation, decentralisation and devolution of the continental trade and investment dispute settlement system under the AfCFTA Agreement.

Conceptual Basis

The conclusion of the 1991 African Economic Community (AEC) Treaty formally set in motion the creation of the Africa Economic Community. This is still set to be achieved by 2030. Even before the ACJ created under Article 28 of the Treaty was established, significant events that would reshape the route to the continental economic integration occurred. Firstly, there was the decision, in 2008, to amalgamate the African Court of Justice (ACJ) and the African Court

[2] See. for example, Vanni A and Gathii J "Did Decolonisation Stall in the Global South? A Conversation with Ian Taylor: Symposium Introduction" *https://www.afronomicslaw.org/2020/10/18/did-decolonisation-stall-in-the-global-south-a-conversation-with-ian-taylor-symposium-introduction/* accessed on 28th December 2020; see also, Fagbayibo B "Of Integracidaires and the Contemporary Publics of Continental Integration in Africa" *https://www.afronomicslaw.org/2020/10/28/of-integracidaires-and-the-contemporary-publics-of-continental-integration-in-africa/* accessed on 28th December 2020. In the practice of international arbitration, the equal representation pledge is an affirmative action plan that seeks to advance the participation of arbitrators and lawyers from Africa and the developing world, hitherto marginalised, in that sphere. See, *http://www.arbitrationpledge.com/about-the-pledge* accessed on 28th December 2020.

of Human and Peoples' Rights ACH&PR into the African Court of Justice and Human Rights (ACJ&HR), as the African Union (AU) single court. Secondly, the promulgation of the Constitutive Act of the AU in 2001, stressed the importance of continental economic integration.

Despite the evolution of the AU and its ideas on continental trade and investment, the theme that remains constant throughout the various instruments on continental integration is the harmonisation of trade and investment regulation; and the use of sub-Regional Economic Communities (RECs) as the building blocks of continental integration. It, therefore, has become necessary to re-evaluate the dispute resolution systems available in supporting and promoting intra-African trade and Investment.

While there is no gainsaying, the critical role that a reliable, independent, efficient and acceptable continental dispute resolution plays in strengthening an integration effort, access to the system and enforcement of its decisions will determine its success. The proposals advanced in this paper seek to ensure that the decisions that emanate from the proposed trade and investment chamber of the court are easily and promptly enforced. In essence, the system should build a truly continental community law that is predictable and uniformly applied across the continent; and avoid further fragmentation of the continent. The proposals made in this thesis speak to all these imperatives.

Weaknesses of the Current System

The integration of markets and trade policies is a cumbersome process. It has to be undertaken with the acknowledgement of the diversity in socio-politico-legal and cultural backgrounds of member states. In reference to building strong supranational institutions, Fagbayibo notes that "it demands cautious and

calculated steps, tactful negotiations, constant assurances and compromises, and the skilful management of national egoisms."[3]

The primary objectives of integration are twofold: economic and political. However, other objectives have since also emerged, but with less prominence and include social, cultural, technical, environmental and human rights objectives.[4] Fundamentally, therefore, integration of economies is a quest for the member nations' general economic welfare and, hopefully, in the ultimate, global welfare.

While there are several theories of integration propounded, three principal approaches to integration have been preferred in Africa: intergovernmentalism, functionalism and supranationalism. Intergovernmentalism is preferred in Africa because of its philosophical underpinnings, particularly since states retain their central role in integration.

Most African integration efforts are mostly intergovernmental and state-centric. Although Africa's economic integration also exhibits functionalist and neo-functionalist approaches to integration, it is intergovernmentalism that finds favour among African states. This is partly because intergovernmentalism seems to assure states of retention of their sovereign authority with little, if any, of its authority ceded to the integration organs. It is also partly embraced because of the intergovernmental origins of Africa's continental integration

[3] B Fagbayibo, "A Supranational African Union? Gazing into the Crystal Ball" (2008) *De Jure* 493-503, at 500.

[4] J Gathii, "Mission Creeper for Relevance: The East Africa Court of Justice's Human Rights Strategy" (2013) 24 *Duke Journal of Corporate and International Law* 249-280, at 249. S Balton and R Balton observe that there is a direct co-relation between the observance of human rights and the attraction of Foreign Direct Investment; S Balton and R Balton, "What attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment" (2007) 96 (1) *Journal of Politics* 96 (1) 143-155 [1].

under the now defunct Organisation of African Unity (OAU). The OAU was essentially an intergovernmentalist approach to continental integration. Its successor, the AU, has followed the same approach, albeit with attempts at establishing supranational organs such as the ACJ&HR.

Overall, trade and investment dispute settlement in Africa take two forms, the judicial (adjudicative) and the diplomatic (non-judicial). Adjudicative methods offer legally binding outcomes, while diplomatic ones rely on the goodwill of parties for their observance.

Two procedural approaches are preferred in international dispute settlement: the use of permanent bodies, and ad hoc tribunals. Non-formal methods employed in dispute resolution in Africa include: negotiation, mediation and conciliation. Formal dispute settlement methods commonly used in Africa include international courts and arbitral tribunals. International courts and tribunals in Africa are mostly supranational bodies, although they are often set up under intergovernmental organisations.[5]

The weaknesses of the current formal adjudicative processes in Africa are basically twofold. These are: the lack of supremacy of their decisions over national courts, and the reliance on voluntary compliance with their decisions. Despite these weaknesses, settlement of trade and investment disputes in Africa still favours the use of adjudicative processes for three broad reasons. These reasons include the self-executing or direct effect of its decisions, especially with respect to international arbitration; domestic recognition and enforcement of international tribunals' decisions; and the perceived transparency of the

[5] The East African Court of Justice (EACJ), the Southern Africa Development Community (SADC) Tribunal, the Economic Community of West Africa (ECOWAS) Community Court and the Common Market for Eastern and Southern Africa (COMESA) Court of Justice, are examples of efforts at establishing supranational courts under integration organisations that are intergovernmental in nature.

processes of international tribunals which contribute to the predictability of norms.

The post-colonial history of efforts in the integration of the African continent occurred in different socio-economic, geo-political and domestic political contexts and dynamics. However, the golden thread running through the entire period was the need for either economic integration or cooperation through the establishment of continental and sub-regional intergovernmental economic blocs.

In 2001, the Constitutive Act of the AU created the AU to replace the OAU. A new push towards continental economic integration took root. The RECs deepened their integration with many achieving Customs Union, Common Markets and Monetary Unions.[6] At this stage a need for strong supranational institutions arose to give effect to the objectives of the integration units.

In the upshot, it can be argued that for the continental economic integration of Africa to succeed, it is imperative that it is supported by a legal system that underpins an efficient and effective dispute settlement system. In essence, that the economic integration of the continent must be underpinned by an African continental legal system anchored in an African community law; and a continental dispute settlement system whose centrepiece is the ACJ&HR, the AU single court. This ensures the deepening and underwriting of the continental economic integration of Africa through a robust supranational and devolved trade and investment dispute resolution system anchored on the ACJ&HR.

[6] For example, the EAC progressed into a Customs Union and Common Market, it also concluded a Monetary Union Protocol. ECOWAS also concluded a Common Market and Customs Union Protocol and Monetary Union. COMESA, on the other hand, transformed from a Preferential Trade Area (PTA) to a Common Market.

The two principal objectives on which Africa's continental economic integration is anchored are: harmonisation of policies and regulation; and devolution through the sub-regional RECs.[7] The role of the AU single court in Africa's economic integration, as advanced in this paper, is to provide a supranational continental dispute resolution mechanism for intra-Africa trade and investment. In advancing this objective, RECs and sub-regional courts form the building blocks for the desired continental integration.

The AU has set 2030 as the year in which it will decide the readiness of the continent for the creation of a single government and the form it should take. This date coincides with that set for the complete and successful implementation of the AEC Treaty. If successfully implemented, the integrated continental court should offer a useful tool for evaluating the readiness of the continent, in the creation of the single government and the appropriate form it should take.

It is on the foregoing premises that the following recommendations are made.

a) Institutional Superstructure of the Proposed Trade and Investment Chamber of the ACJ&HR as an Overarching Mechanism

The two types of disputes identified in the continental economic integration require different approaches. Trade disputes largely fall within the realm of public law, and mostly involve states. Commercial and investment disputes are matters of private law and involve private parties. It is, therefore, proposed that a trade and investments chamber of the AU single court be created, with two sections: one for the resolution of trade disputes; and another to cater for investment and commercial disputes. To give effect to this proposal, an amendment to Article 19 of the Statute of the ACJ&HR will be necessary to provide for this additional chamber of the Court.

[7] Article 6 of the AEC Treaty and Article 3 of the AfCFTA Agreement.

To achieve the desired harmony, and in line with the AU policy of using sub-regional RECs as building blocks for continental integration (as underscored in the AEC Treaty), it is recommended that a devolved structure of the court's trade and investment chamber be created. This will require that the judicial organs of the eight RECs in Africa serve as the devolved units of the ACJ&HR, with specific trade and investment disputes resolution mandates. This recommendation intends to not only ensure access to trade and investment justice throughout the expanse of the continent but to also make good use of the REC structures (including buildings), personnel as well as jurisprudence that have been built and developed over decades.

b) Overarching Jurisdiction of the Court: Supremacy, Direct Effect and Use of the Preliminary Ruling Procedure

(i) *Supremacy*

The current normative architecture and jurisdictional competencies of the Court lean heavily towards dealing with human rights and international criminal law cases.[8] The design of the ACJ&HR's jurisdiction and competence, with respect to trade and investment dispute resolution, are not clothed with the requisite supremacy, or with precedence over national and sub-regional judicial organs. The principle of supremacy of the continental court is imperative in ensuring predictability of norms, thus ensuring efficiency of the system. This would guarantee a consistent interpretation and application of common continental trade and investment laws and regulations.

To achieve decisional and normative supranationalism, it is critical that the AU single court's decisions have direct effect in the domestic courts of its member states. It is also imperative that the Court has exclusive apex jurisdiction on matters of African Economic Community law. This can be achieved through the

[8] Article 28 of the ACJ&HR Statute.

creation of an appellate jurisdiction for the Court in intra-African trade and investment disputes.

It is, therefore, further recommended that the REC Courts act as courts of first instance, with the ACJ&HR, serving as an appellate review mechanism. This recommendation is meant to ensure that there is consistency, coherency and uniformity in the interpretation and application of African continental trade and investment law. It will also help to develop a recognisable body of law that constitutes African Economic Community trade and investment law.

To give effect to this recommendation, there is a need to amend the treaties establishing regional courts in Africa so as to expressly provide for the hierarchical structure of the African Court system, with the ACJ&HR at the apex while the regional courts serve as the courts of first instance. This recommendation is also in furtherance of the step-wise integration approach articulated in Article 6 of the AEC Treaty. Furthermore, this recommendation is in line with Article 3(l) of the AU Constitutive Act, which enjoins the AU to harmonise the policies and norms of the RECs under a continental umbrella.

To effectively achieve and advance its overriding status on matters relating to the African Economic Community law, it is recommended that decisions of the ACJ&HR's Trade and Investment Chamber be regarded as supreme over national courts and laws (including national constitutions); and sub-regional laws, organs and judicial organs.

(ii) ***Direct effect***

It is also recommended that the decisions of the chamber have direct effect at both national and sub-regional levels without the intervention of the regional or national courts, or authorities. To this end, it is recommended that the OHADA approach be adopted, whereby member states are under obligation to enforce

decisions of the OHADA CCJA, without any requirement to adopt proceedings under national laws.

(iii) ***The Use of the Preliminary Ruling Procedure***

To achieve supremacy, consistency and coherence in African community law, it is recommended that national and regional courts request for a preliminary ruling from the ACJ&HR where the following matters are in issue:

- the interpretation of continental Trade and Investment treaties, protocols, codes, regulations or guidelines,
- the validity or interpretation of the Acts of the African Economic Community Institutions; or
- the interpretation of the statutes of bodies created by the African Economic Community.

It is further recommended that this procedure be available to national and regional courts before they pronounce their final judgment on a matter relating to African community law. It is proposed that this procedure be modelled along the lines of Article 234 of the Treaty establishing the European Community, in

terms of scope of matters to be referred.[9] The EAC and COMESA models can also be adopted.[10]

(iv) Advisory Opinions

It is recommended that Article 53, of Statute of the ACJ&HR, be amended to confer specific jurisdiction to the Court and particularly its trade and investment chamber. This is to give advisory opinions on matters of African trade and investment law to AU organs such as the Assembly of Heads of State and Government; the Pan African Parliament (PAP); the Executive Council; the Peace and Security Council; AU financial institutions; and member states as may require such advisory opinions.

To give effect to this recommendation, it will be necessary that Article 28 of the Statute of the Court be amended to specifically provide for the supremacy, direct effect, preliminary ruling and advisory jurisdiction of the Court.

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[9] Article 234 of the Treaty establishing the European Community provides that:

> *The Court of Justice shall have jurisdiction to give preliminary rulings concerning:*
> *a) the interpretation of this Treaty;*
> *b) the validity and interpretation of acts of institutions of the community and the ECB;*
> *c) the interpretation of Statutes of bodies established by an act of the council, where those statutes so provide.*
>
> *Where such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it give judgment, request the Court of Justice to give a ruling thereon.*
> *Where any such question is raised in a case pending before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law, the court or tribunal shall bring the matter before the Court of Justice.*

[10]The Preliminary ruling/ reference procedure and its application under the Article 29 of the EAC Treaty, Article 25 of the COMESA Treaty, Article 14 of the UEMOA Treaty, Article 16 of the SADC Tribunal Protocol and Article 10 of the Community court of the ECOWAS.

It is appreciated that African states will not easily give up the exercise of their sovereignty to a supranational continental judicial organ. This may explain the slow pace of ratifying protocols establishing continental courts. However, continental and sub-regional hegemons, which control substantial trade on the continent and stand to benefit most from free trade, can influence this aspect of the integration process. By adopting the supremacy of the continental trade and investment chamber of the court and requiring, through reciprocity, for its intra-African trading partners to follow suit, the court may find less resistance to its acceptance. Further, a cost-benefit analysis of deepening free trade may help persuade reluctant converts to adopt the supremacy of the court. All countries wish for economic prosperity, growth of trade volumes (from 17% to 52 %) and a resultant four-fold rise in Gross Domestic Product (GDP), as a result of efficient cross border trade, may help put the proposition into a persuasive perspective.

(v) Appointment and Qualifications of Judges and Arbitrators of the Trade and Investment Chambers of the ACJ&HR

The appointment of judges of the Court by member states from amongst national court judges negates the perception of independence of the court from the appointing member states. Foreign investors are generally apprehensive of domestic courts, largely due to the perception of state control. To carry over the same judges to the AU single court, through the current appointment procedure that requires the secondment of national court judges to the court, will transfer the same perceptions and fears to the continental court.[11]Therefore, it is proposed that a process of competitive recruitment, remuneration and retention of the members of the court be implemented. This ensures equity in representation and assures the judges of security of tenure and emphasises on

[11] The current appointment mechanism under Article 6 of the Statute of the ACJ&HR enjoins states to nominate Judges to the court. The practice at both regional and continental courts has been for states to second serving judges of national courts to the regional or continental courts.

the professional qualifications in international trade and investment law. This also ensures competence and high moral standing. These qualities will underwrite the integrity, meritocracy and independence of the court.

It is recommended that Article 3 of the Statute of the ACJ&HR be amended to increase the number of Judges from sixteen to at least 22 judges with at least six judges being allocated to the trade Section of the Court. In addition to the qualifications set out in Article 7 of the Court's Statute, it is recommended that the judges to serve in the trade section of the Court be persons trained in international trade law. Rather than see the different legal philosophies, cultures and languages on the African continent as being an impediment to a unified legal system, this variety in legal and cultural backgrounds should offer a mosaic of different perspectives that will enrich and ultimately, cultivate a robust *sui generis* African continental economic law.

It is further recommended that the persons serve in the investment disputes section of the Court's chamber and should possess qualifications in international arbitration. Furthermore, it is also proposed that the Judges and arbitrators serving in the trade and investment sections, respectively, should be recruited through a competitive process and not be appointed by member states to the protocol. The process should involve a public call for applications to all Africans in possession of the required qualifications. Thereafter, shortlisted applicants should be invited to participate in interviews conducted by a panel of peer reviewers using an objective evaluation criteria and transparent procedures. This will enhance the independence of the judges and arbitrators since they will not owe their appointment to any political facilitators, but will instead have been appointed purely on merit.

This recommendation is also aimed at enhancing the independence of the Court in general and insulate it from the control of state parties besides ensuring that only persons who possess the highest competence and qualifications are

appointed to these positions. Through this move, it is also anticipated that the court's independence will be underwritten and the jurisprudence emanating from the court will be of the highest quality.

(vi) Financing the Expanded ACJ&HR

The financial constraints of the AU have a direct relation with the independence of the court. Inadequate funding of African regional and sub-regional courts, and the AU itself, may also impact negatively on the operations and, ultimately, the effectiveness of the trade and investments chamber of the ACJ&HR.

There are at least four models of funding the expanded court explored. Firstly, state parties can fund the expanded court through their subscriptions to the AU. This is the ordinary way through which regional organisations raise resources. The second model involves payment of court fees by court users from state member countries and surcharging for citizens of non-member states. This approach has as the adverse potential of portending an increase in the cost for doing business and creating a barrier to access to justice for small traders who form the majority of African entrepreneurs.

The third proposal is attributed to reforms initiated by the immediate former AU Chairman, President Paul Kagame of Rwanda.[12] The model, aimed at a sustainable financing of the AU and reducing its dependency on the EU and Asian support, involved the collection of a 0.2% levy on all imports into all AU

[12]At the 27th Ordinary Session of the AU Assembly of Heads of State and Governments in 2016, Rwanda's President Paul Kagame was entrusted with leading the institutional reform process in the AU. A raft of 19 measures aimed at streamlining the operations of the AU Commission were proposed, including a levy of 0.2% on all imports into Africa. This fund was meant to be collected by member states for purposes of financing AU activities and weaning it off donor funding. See, [12] Y Turianskyi and S Gruzd, "The Kagame Reforms of the AU: Will they Stick?" (2019) South *African Institute of International Affairs SAIIA Occasional Paper* no. 299 <*https://saiia.org.za/research/the-kagame-reforms-of-the-au-will-they-stick/.*> accessed on 28th December 2020 at pp.1-4.

member states from non-member states to fund the AU operations, projects and its activities.[13] Since most African states are net importers of goods, mainly from Europe and Asia, the intention is to indirectly pass the cost of funding the AU to the countries exporting into Africa. This model is yet to find traction with most members yet to implement it.[14] However recent statistics indicate that more African countries are willing and have started implementing the levy.[15]

There is a fourth model that is connected to the third. It involves regional economic hegemons that stand to benefit most from the free trade arrangements entered into at both the continental and sub-regional levels. Countries such as South Africa in the south, Nigeria in the west, Kenya in the east, and Egypt in the north form the regional economic hegemons in Africa.[16] This is primarily because these regional economic powerhouses exert influence in their respective economic blocs through investments, macro-economic stability and general economic strength. These regional hegemons can play a critical role in ensuring the success of continental integration as a whole.[17] Indeed, countries such as Egypt and South Africa have already indicated their willingness to collect, through other means, the levy necessary to finance the operations of the AU

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[13] This is one of the 19 core measures articulated in the Report by the then AU Chairman, Rwanda President Paul Kagame.

[14] Although 21 countries have agreed to implementing this levy, only 12 are so far doing so, and another 5 have committed to start. Cameroon, Chad, Republic of Congo, Cote d' Ivoire, Djibouti, Gabon, The Gambia, Guinea, Kenya, Rwanda, Sierra Leone and Sudan are already implementing the Levy. Benin, Ethiopia, Ghana, Mauritania and Senegal have committed to implement the levy. but are yet to start. See, AU (2018) "Revised Report on the Implementation of the Kigali Decision on Financing of the African Union". Available at *https://au.int/sites/default/files/pages/34871-file-report-20institutional20reform20of20the20au-2.pdf*. Accessed on 28th December 2020.

[15] Ibid.

[16] For a discussion on the political and economic influence of Regional hegemons in Africa, see B Fagbayibo, "Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview" (2013) 16 1 *PER/PELJ* 32-69 at pp. 54-56.

[17] Ibid, 55-56.

organs.[18] Countries that are willing to pay beyond the prescribed 0.2 % levy should by all means be encouraged to do so.

A combination of the four models for financing the court will suffice. Each approach addresses different aspects and unique circumstances. Reasonable court fees paid by users of the court will serve two primary purposes; to deter frivolous claimants, and to ensure that cost is not a deterrent to accessing justice. It will also mitigate the financial hardships which may occur due to the chronic delays and defaults by African states in meeting their subscription obligations to regional organs.

In the upshot, however, the architecture of the chamber as proposed does not materially change the structure of the court as it is currently set up. It merely proposes to expand the court by creating a trade, commercial and investments disputes chamber. It also proposes to devolve the court through the existing RECs. As a result, the court will still be financed as a part of the AU single court and the sub-regional REC courts. The financing proposals made in this thesis aim to avoid dependency on donor funding, reduce reliance on member states' contributions, ensure self-sustainability of the court, and to promote access to the court.

(vii) Access by Individuals

Individuals, natural or juristic, can only access the ACJ&HR in human rights and international crimes cases. Article 28 of the Statute of the ACJ&HR and Article 6 of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, also make the resolution of disputes under the two instruments of an inter-state affair. As a result, they exclude individuals from accessing the court on their own right.

[18]Y Turianskyi and S Gruzd, (n) 12 at p. 17.

The foregoing provisions limit the jurisdictional competence of the dispute settlement mechanisms by excluding, all together, investor-state disputes and commercial disputes between private parties. The irony here is that individuals are the motors which drive trade and investment. It, therefore, undermines the essence of the entire system when disputes arising from transactions between individuals are excluded from the primary dispute settlement mechanisms that are created to promote cross-border trade.

The ACJ&HR and AfCFTA dispute resolution systems only attends to (public law) inter-state disputes without addressing the private party disputes at the micro level. Interestingly, the current regime also seems oblivious to the fact that states can also be private legal persons while acting in a commercial capacity through state entities and corporations.

The architecture of the current system may be sufficient to deal with public law inter-state disputes. However, access to the processes used for resolution of investment and commercial disputes at the micro-level, where individuals form the central actors, require reform.

Access to justice, for both natural and juristic persons, is crucial to effective economic integration of the continent. Access to justice is a concept accepted in international law as being a universal, inalienable and inviolable right.[19] It refers to both judicial and administrative remedies and procedures available to persons aggrieved or likely to be aggrieved by a matter. Access by individuals to the ACJ&HR, particularly its commercial and investments section, is crucial for the attainment of continental trade and investment justice.

[19] Article 8 of the Universal Declaration of Human Rights (1948) (UDHR) <*https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf* > accessed on 28th December 2020.

Although accruing largely in the area of human rights, the significant contribution to the development of progressive jurisprudence by the continental and sub-regional courts in Africa is largely attributable to cases filed by individuals, Non-Governmental Organisations (NGOs) and civil society groups. The role of public spirited pressure groups in trade and investment policy formulation and execution is significant in this era of sustainable development goals, environmental protection, human rights and ethics in transnational trade. NGOs and civil society groups act as vanguards or guarantors of these principle, particularly against multinational corporations with financial muscle and political influence. It is, therefore, recommended that NGOs and civil society groups be accorded access to the Court in public interest litigation and matters that concern common community interests.

To give effect to this proposal, it is recommended that Article 28A of the Court's Statute be amended to specifically confer rights of access to the court's trade and investment chamber, by individuals, both natural and juristic. The chamber's jurisdiction to entertain trade and investment disputes should be expanded to include investor-state, state-state, and disputes between private disputants, *inter se*. In public interest matters (which involve matters such as investment of public funds and environmental issues), civil society groups, NGOs, bodies with observer status at the AU, as well as members of the academia (as amicus curie), should similarly be granted rights of audience and access to the Court.

This expanded access to the court by various actors is likely to make the Court more vibrant, forward looking, develop a more expansive and incisive jurisprudence and, in the ultimate, espouse a versatile trade and investment regime that is unique to the social-cultural-economic and political mosaic of Africa.

(viii) Enforcement of Decisions

Enforcement of international courts' decisions is a perennial problem that emanates from a lack of coercive powers by international organisations to enforce their decisions. International courts, therefore, largely depend on domestic courts' enforcement mechanisms to give effect to their decisions even where treaties for recognition and enforcement exist.

In strengthening the enforcement mechanisms of the proposed chamber's decisions, three approaches have been considered and recommended. The first is to adopt the approach taken by the Court of Justice of the European Union (CJEU). Article 260 of the CJEU Treaty confers jurisdiction upon the Court to sanction a state member that fails to comply with the Court's Judgment by meting out fines and other punitive orders including declarations of breach under Article 253 and 259. Such jurisdiction is absent from the Protocol and Statute of the ACJ&HR. It is recommended that the Protocol and Statute be amended to grant the court similar jurisdiction.

The second approach is where the judgement is enforceable as a decision of the highest domestic courts without the rigours of adoption through national law processes. This approach is preferred by investor friendly states with common business laws, such as those in the OHADA region. It is also the approach taken through treaty enforcement interventions such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the International Centre for Settlement of Investment Disputes (ICSID). Other effective approaches have also evolved. The ECOWAS Court of Justice has an enforcement organ in each state that can follow the implementation of the decision of the Court.

A hybrid of the foregoing three approaches will suffice. A unit established in every member state for monitoring implementation of the court's decisions, similar to the one used by ECOWAS is proposed. The direct effect of decisions

of a supranational court/arbitral tribunal without domestic recognition procedures has been largely successful in the Organisation for the Harmonisation of Business Law in Africa (OHADA) region. It has therefore been a testament to the ability by Africans to embrace supranational regulation and dispute resolution, particularly in commercial matters.

(ix) Harmonisation of Continental and Sub-Regional Investment Arbitration through the AU Single Court

In an effort to reign in the proliferation of investment codes and international arbitration on the continent, it is proposed that the Chamber is conferred with commercial and investment arbitration jurisdiction. The Pan African Investment Code (PAIC) presents a viable remedy to the problem of fragmentation of investment codes in Africa. The ACJ&HR should be the preferred mode of settlement of investment disputes under PAIC. This will not only address the problem of proliferation of investment codes in Africa, but also harmonise continental investment policies and regulation.

However, for it to be effective, the PAIC dispute settlement system should allow not only for state-state but also investor – state dispute resolution. This should be for both African and foreign investors. To give access to its dispute settlement system, the PAIC should merge and harmonise the sub-regional codes and devolve its tenets to RECs and national levels.

A commercial and investments disputes section of the ACJ&HR Trade and Investment Chamber specifically entrusted with the role of intra-Africa investment arbitration will ameliorate the problems arising out of the proliferation of commercial and investment arbitration in Africa. Firstly, it will lead to the harmonisation and development of an African community investment law. Secondly, it will also develop the capacity and experience of African Arbitrators in international arbitration, as well as in readiness for international assignments. Thirdly, it will also offer, through the ACJ&HR, a

recognition and enforcement mechanism for arbitral awards and therefore, avoid or limit interaction with domestic courts which are perceived to be state influenced. This will give comfort to the intra-African and foreign investors, of the transparency and integrity of the dispute settlement system. To this end, it will be imperative that the arbitrators on the ACJ&HR roster be recruited competitively, on merit, without the option of states nominating members to the panel.

In the spirit of harmonisation of African Investment laws, codes and protocols, and in line with the Preamble and Article 3 (c) of the AEC Treaty, it is also proposed that all the sub-regional investment protocols be aligned with the PAIC so as to ensure harmony in African investment law. In terms of dispute resolution, arbitration under the ACJ&HR and/or sub regional courts should be specifically included in the PAIC, as the preferred or prescribed method for resolution of all intra-African investment disputes.

Arbitrability: Marriage Nullification & Custody of Children in Kenya

By: ***Paul Ngotho HSC*** *

Introduction

A tutor who is good, and I aspire to be one, needs a few memorable, catchy phrases and examples of the kind which students would remember in the heat of an exam and in future classmate banter.

I have been teaching arbitration courses in various institutions for over a decade. Murder was, for many years, my favourite, not sin but, example to students of what was not arbitrable. It fitted the bill. But that was before hearing – at first, I could not believe my ears, Dr. Francis Kariuki's presentation in an arbitration conference on *Republic v. Mohamed*[1], in which the judge on 2nd May 2013 dismissed an alleged murderer on the basis that the deceased's family had entered into an out of court settlement under customary law. I immediately replaced murder with divorce proceedings at the top of my shrinking list of what was not arbitrable in Kenya.

In my interaction with lawyers on this issue the last one year, I have administered a little quiz and asked them to mark for themselves privately to save them from embarrassment. The scores are also confidential. I have learnt to treat all lawyers like my actual or potential in-laws in order to survive as an arbitrator. The quiz is: Could an arbitrator nullify a marriage or give orders on the custody of children? The answers must be either "yes" or "no". No "ifs",

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[1] Republic v. Mohamed Abdow Mohamed [2013] eKLR at *http://kenyalaw.org/caselaw/cases/view/88947/*

"buts" or "requests for clarification or better particulars" are allowed. No time to take further instructions. Subsequent discussions show that even some specialist family lawyers are at best, unsure.

Some of the lawyers whom I have asked casually if divorce was arbitrable have, while trying to show any respect they considered due to me, emphatically said "no". Others considered my question outrageous, if not disrespectful or proof that, as they suspected all along a non-lawyer should be seen and not heard on matters law.

My last such encounter was in small talk in the lobby of a Nairobi hotel on 17th January 2023 at the official opening of the CIArb (K) newly purchased office premises and arbitration facilities. I was in a group of an eminent Senior Counsel and professor of law, a former Court of Appeal judge, a Chartered Arbitrator and a former chairman of the Chartered Institute of Arbitrators Kenya Branch. They were all quite sceptical of my proposition but very courteous. One of them accepted that Ismaili religious arbitral tribunals could dissolve marriages but was not prepared to consider the salient issues. I have sent an advance copy of this article to those gentlemen.

This article discusses the outer limit of arbitrability under Kenyan law with a focus on the dissolution of marriage. It will deliberately skip fraud and corruption because their arbitrability has arisen in several matters in which I am the arbitrator.

The sample court decisions from other jurisdictions below give a global flavour to the discourse. I will also skip the sharing of parental responsibility and sharing of assets after divorce and the other questions of family law which are undoubtedly arbitrable.

Freedom of Religion

Freedom of religion is guaranteed in Article 32 of the Constitution of Kenya 2010 (CoK 2010) as follows:

> "32. (1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.
> (2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.
> (3)..N/A.
>
> (4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion." (Emphases added.)

According to Black's Law Dictionary, religion is:

> "a [human's] relation. to Divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings. In its broadest sense [religion] includes all forms of belief in the existence of superior beings exercising."

Onguto J, in *His Highness Prince Aga Khan Shia & another v Attorney General [2016] eKLR*[2] dismissed a constitutional petition to challenge the HC decision in TSJ for being filed in the wrong forum but helpfully quoted *Nurani* and added that,

> *"I must say that I see no reason why either Article 159 (2) of the Constitution or the Arbitration Act should be interpreted to discourage*

[2] *http://kenyalaw.org/caselaw/cases/view/122800/*

> *instead of encouraging the use of forums that are established to give effect to other forms of Alternative Dispute Resolution."*

Generally, freedom of worship necessarily includes the right to obey deities, religious institutions, holy scriptures and oral traditions. The Bible prescribes[3], in Paul's typical strong language and clarity, that disputes between Christians should be resolved internally and not referred to secular courts. Adjacent text lists sexual immorality, swindling, greed, slander, etc. The substantive law and procedure are found in the Old Testament. Jesus himself[4] restated part of it.

Why should a couple which wishes to refer the dissolution of its marriage to a religious institution be denied that option or right and be required to submit to a secular[5] court in which the judges, even when they are personally of the same religion as the disputants, are bound to apply national laws?

Many religious people in Kenya marry under religious or cultural institutions, some of which offer counselling services before and after the wedding. Where do public interest considerations override those of the religious institutions? Sebayiga[6], takes a very cautious approach, saying that arbitration "may be unsuitable for child custody and maintenance disputes" and proposes legislative reforms in Kenya's family, children and arbitration laws to expressly state whether such disputes are arbitrable or not. Legislative reforms if any are required, would be simply to codify and restate the law and to fill any gaps and to ease make study of the law on the subject easier.

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[3] 1 Corinthians 6: 1-6 NIV
[4] Matthew 5:31-32
[5] Read heathen, pagan or *kafiri* (Kiswahili equivalent)
[6] Vianney Sebayiga, *The Arbitrality of Family Disputes in Kenya: A Case Study of the Court of Appeal Decision in TSJ v. SHSR (2019) EKLR which I read in (2022 10(1) Alternative Dispute Resolution*, a journal of the Chartered Institute of Arbitrators Kenya Branch.

His and the other common concerns and objections to the use of arbitration in family and children matters were addressed fully in *Hirani*. Thomas Carbonneau[7] also has concerns that arbitrators may lack expertise in family law because:

> "An arbitrator can be anyone: a mental health professional, psychologists, or family therapists so long as they have undergone arbitration training. These professionals may encounter challenges in interpreting the law… Worse still, any failure to follow due process requirements may lead to the setting aside of an arbitral award"

> "divorce arbitrators may not be trained jurists. An effective arbitral process, for instance, would have mental health professionals, as well as attorneys, serve as arbitrators. Obliging psychologists or family therapists to render an award according to law may riddle the process with problems and eventually reveal itself to be unrealistic and unsatisfactory."

The issue of the arbitrator's qualifications addressed quite simply by the couple, in choosing of the tribunal or the appointing authority.

Italy

This has been chosen as a sample of civil law jurisdiction. Baccaglini[8] notes that it is not a new phenomenon for arbitrators to determine disputes according to a religious law. She reports heated debate by scholars and politicians in Canada and United Kingdom on whether decisions of Sharia Councils, which decide on divorce and child custody, among other matters, should be recognised and

[7] A Consideration of Alternatives to Divorce Litigation, 1986 U. Ill. L. Revv. 1119 (1986). P. 1161.

[8] Baccagilini L,Prof, *Arbitration on family matters and religious law: A Civil Procedural Law Perspective in Civil Procedure Review*, v. n.2:2-3, may-aug., 2012

enforced by national courts. Baccaglini[9] estimated that there were at least 85 Islamic Arbitration Tribunals in the United Kingdom in 2009.

Apparently, the Roman Catholic Church provides Sacra Rosa tribunal, which is authorised to annul religious marriages. In *Pellegrini v. Italy*, the European Court of Human Rights overturned the decision of an Italian court, which had upheld the decision of an ecclesiastical court annulling a Roman Catholic marriage. Reason? The religious court had denied a party the right to be heard.

An Italian statutory provision expressly rules out personal status, legal separation and divorce from the ambit of arbitration. * Similar provisions are found in France and Germany.

India
The law in India is stated clearly below:

> "…In the instant case, there is no dispute about the arbitration agreement inasmuch as there is a specific arbitration clause in the partnership deed. However, the question is as to whether the dispute raised by the respondent in the suit is incapable of settlement through arbitration. As pointed out above, the Act does not make any provision excluding any category of disputes treating them as non- arbitrable. Notwithstanding the above, the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The Courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. The following categories of disputes are generally treated as non- arbitrable: (i) patent, trademarks and copyright; (ii) anti-trust/competition laws; (iii) insolvency/winding up; (iv)

[9] D. MacEoin, Sharia Law or "One Law for All"?

> bribery/corruption; (v) fraud; (vi) criminal matters.'' (Emphases added.) A. Ayyasamy v A. Paramasivam & Ors Civil Appeal No. 8245 – 8246 of 2016[10]

> *"Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication.[11]" (Emphasis added.) Booz Allen & Hamilla Inc –vs- SBI Home Finance Limited and others 2011 5 SCC 532[12]*

Vivek Maurya's 26th August 2021 blog titled *Can divorce be granted by arbitration*[13]

Uganda

In *Wissanja v. Wissanja*[14], the parties and their counsel signed a standard form titled, "Protocol for Reference of Court Cases to Arbitration" agreeing that "the case be referred to arbitration before Mr Jimmy Muyanja", who would determine "whether there was an irretrievable breakdown in the marriage and whether the parties should be granted a divorce". They also agreed, for the avoidance of doubt, that the arbitral award shall be incorporated as a substantive part of the judgment of the court.

They also agreed, in that form, that the Arbitration and Conciliation Act of Uganda was applicable. That Act is UNCITRAL based and similar to the

[10] *https://indiankanoon.org/doc/180680303/.* The case was referred to by a Kenyan Court in A Kenya court in *Miscellaneous Civil Suit E073 of 2018, Gerick Kenya Limited v Honda Motorcycle Kenya Limited [2019] eKLR*.

[12] *https://indiankanoon.org/doc/188958994/*
[13] *https://blog.ipleaders.in/can-divorce-granted-arbitration/*
[14] *https://ulii.org/ug/judgment/high-court-uganda/2009/34* last accessed on 1st March 2022.

arbitration Acts of Kenya and of India in the areas which are critical here i.e. the definition of an arbitration agreement and the grounds for setting aside.

The definition of an agreement in s. 2. (1)(e) of the Ugandan Act is straight from the UNCITRAL Model Law[15] and identical to s. 3. (1) of the Arbitration Act of Kenya, that an arbitration agreement means

> *"means an agreement by the parties to submit to arbitration all or certain disputed which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not." (Emphasis added.)*

That provisions makes any dispute arising from any defined legal relationship, "whether contractual or not" arbitrable at the option of the parties.

The arbitrator was Jimmy Muyanja, who is well known in Kenyan arbitration circles and was a member of the board of the Nairobi Centre of International Arbitration for many years. Having heard the parties, issued both degree nisi and, later, decree absolute in the award. High Court Registrar rejected an application under s. 35(2)(a) to register the decree absolute, which was in the form of an arbitral award, leading to this suit.

The Court took issue in the title of the standard from which the parties filled to refer the dispute to arbitration and, in any case, somehow, found "no express or implied arbitration clause". Apparently, s. 3 of the Divorce Act of Uganda gives the High Court exclusive jurisdiction to nullify marriage. If that is so, then the Court was right in setting aside the arbitral award. Egonda-Ntende J, in setting aside the award, took a similar view as Kimaru J by saying as follows:

[15] Article 7

> "The agreement contains no express or implied clause…it is clear to me that the parties purport to grant jurisdiction to an arbitrator to decide questions which, in my view, can only be decided by a competent court. And the question is whether or not the parties ought to be granted a divorce.

The Court set aside the arbitral award on the basis of s. 3 of the Divorce Act, which states that:

> *"(1) Where all the parties to a proceeding under this Act are Africans or where a petition for damages only is lodged in accordance with Section 21, jurisdiction may be exercised by a court over which presides a magistrate grade 1 or a chief magistrate. (2) In all other cases jurisdiction shall be exercised by the High Court only."*

The Court added that agreements under which marriages could be dissolved through arbitration *"would be void on grounds of public policy".*

On children born in a marriage, the Court said that "it would not be right for the rights … should be determined by an agreement between the spouses without (their) participation". This was an *obiter dicta* comment as children were not the subject of either the arbitration agreement or of the award but is reflects the attitude of the court of the matter.

Kenya

Nurani v. Nurani[16]

This is probably the leading authority in this area. Madan JA noted:

> *"…it is the first time that the issues ventilated here have been considered and decided by the Court of Appeal; perhaps a service has been rendered to jurisprudence in Kenya"*

[16] Civil Appeal No. 52 [1981] KLR87 (also reported as AN v. MN (2008) 1KLR 65.

One of the appellant's complaints in *TSJ* (more on this later) was that the High Court had disregarded the *Nurani*, a binding precedent from the Court of Appeal upholding a High Court decision, which has stayed a divorce petition pending the hearing of the matter by the Ismailia Provincial Council, Kisumu, which:

> *"has jurisdiction because Ismailis submit to it in respect of their personal law, but Council is always subject to the supervisory jurisdiction of the High Court should it not act according to law" (Emphases added.)*

The bench in Nurani was made up of Madan, Law & Potter JJA. Notably, the judgment was issued some 28 years prior to the conception of article 159.2. (c) of the Constitution of Kenya 2010 and 38 years before TSJ.

One must bear in mind that the Court of Appeal was the apex court in Kenya then. The bench decided the case purely on the basis of simple common-sense approach without legalese or bothering to cite any authority, refer to the contractual nature of marriage or quite the arbitration legislation which was in applicable then. This is interesting, given the weight of the case and that the judges were aware that they were creating a precedent. To quote the court,

> *"Where a party has already submitted to the jurisdiction of the council … it is impossible for the same proceedings to be instituted in the High Court".*

All that mattered to the court was that:

"while the High Court has jurisdiction to hear and determine all matters arising out of Mohammedan marriages, it should not do so where a litigant has submitted to the jurisdiction of the Council…
Madan's mind was, as always, crystal clear:

> *"I am not aware of any statutory provision which prohibits a set within the general society from setting up their own tribunal for the settlement of matrimonial or other permitted disputes between its own members… In an orderly society the High Court gives, as it ought to give, recognition to a tribunal which is set up by the consent of members of a sect to administer their personal law"*

Madan J does not ask whether marriage can be dissolved through arbitration. Instead, he boldly asks, "Why not?".

The appellant had also complained about the religious council lacking powers to arrest a defaulter and to enforce its own orders. Listening to Madan is always a pleasure:

> *"True, orders made by court are effective, because once made, they are enforceable as they brook of less argument than a morally binding order… A Disciplinary Action, ordered by a sectarian tribunal, carries behind it the certainty of obedience arising from the immense might of moral sanctions which may be imposed by the united society through its power to order ostracism, excommunication, economic boycott, etc., it is a power which has been, and still is, practiced effectively since the early days of human history. It is a truism, for it is a fact that morally binding orders are usually obeyed and rarely disobeyed. That is also something which happens to court orders."*

One of the factors which Madan JA considered in depriving the prevailing party costs was that "Perhaps a service has been rendered to jurisprudence in Kenya". Right again.

The appellant had raised the issue of whether the Council had the capacity to apply the law of the custody of children, to enforce its decisions etc., Madan JA disagreed. Law JA added:

"… so far as the welfare of the children of the marriage is concerned, I see no reason at this stage to think that the Council will not properly discharge its duty" - Law JA.

She has also pointed out that the Council lacked the power to enforce its decisions. Of course, an arbitral tribunal's award is enforceable by courts. However, Madan addressed went a little further:

> *"A Disciplinary Action, ordered by a sectarian tribunal, carries behind it the certainty of obedience arising from the immense might of moral sanctions which many be imposed by the united society through its power to order ostracism, excommunication, economic boycott etc. moral orders are usually obeyed and rarely disobeyed. That is something which also happens to court orders. "*

The appeal was dismissed. The consequence was that the arbitral proceedings before the Council, for the dissolution of marriage and custody of children, were allowed to proceed.

TSJ v. SHSR[17].
TSJ was the wife while SHSR was the husband, duly married on 2nd May 1992 under the Islamic law, with their children ZS and SM born in 1994 and 2003, respectively. The couple belonged the Shia Imani Ismailia and had, prior to their marriage, affirmed its "entire and complete faith, devotion and loyalty in His Highness The Aga Khan".

In 2010, SHSR applied to the HH. The Aga Khan Shia Imani Ismailia National Conciliation and Arbitration Board, Nairobi ("**the Tribunal**"), for separation or dissolution of the marriage citing irreconcilable differences. The Tribunal's mandate, according to the Ismailia constitution, extended to arbitration of

[17] Civil Appeal No. 119 of 2017 accessed *http://kenyalaw.org/caselaw/cases/view/185178* on 12th February 2022.

"domestic and family matters including those related to matrimony, children of a marriage, matrimonial property, and testate and intestate succession."

The Tribunal, having heard the couple and its children, issued an arbitral award dated 15th September 2012 ordering the dissolution of the marriage and joint parental responsibility of the children, with the actual custody, care and control being given to the wife. The husband was given access and visiting rights and would be responsible for school fees, medical cover and medical expenses of the children and KES. 50,000/= monthly spousal and child maintenance. The other orders issued are not significant to this article.

On 18th February 2013, the wife filed a High Court application to recognize and enforce the award under s. 36 of the Arbitration Act of Kenya 1995. The husband opposed the application claiming that the Tribunal had no powers to order the dissolution of marriage or the maintenance and custody of children. He also filed a set-aside application under s. 35 of the Act. He opined that divorce was in the exclusive jurisdiction of the courts and cited to his petition[18], which seems to never have been pursued or determined.

In deciding whether the Board had jurisdiction to dissolve marriage, the High Court considered Article 170. (5) of the Constitution of Kenya 2010 where is stipulates that:

> "The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts." (Underlining added.)

A closer reading and alternative interpretation of the article shows that the Kadhi's courts are not, when applicable, granted exclusive jurisdiction on

[18] High Court Divorce Cause No. 118 of 2013

divorce. The article confers jurisdiction on Kadhi's courts (as opposed to other courts) and simply sets the outer limits of their jurisdiction, without granting them exclusive jurisdiction on the listed matter. That is where the High Court missed the ball. Kimaru J ruled that the arbitral award, "was null and void and is not capable of enforcement as it purported to grant and order of divorce which is within the exclusive jurisdiction of either the ordinary courts or the Kadhi's courts."

The judge did not elaborate why he considered that ordinary courts and Kadhi's courts had exclusive jurisdiction over the subject issues to the exclusion of arbitration. Actually, his view is deeply entrenched in the minds of Kenyan lawyers and judges.

Kimaru J went on: "The Board did not have jurisdiction to grant orders relating to custody of children under the Children Act. S. 73 of the Children Act states that:

> "73. Jurisdiction of Children's Court
>
> There shall be courts to be known as Children's Courts constituted in accordance with the provisions of this section for the purpose of—
> (a) conducting civil proceedings on matters set out under Parts III, V, VII, VIII, IX, X, XI and XIII;"

Those Parts deal with diverse issues from parental responsibility, children's institutions, custody and maintenance, guardianship, judicial orders of the protection of children, children in need of protection, foster case and child offenders. While s. 73 clothes the Children's Courts with jurisdiction to determine those issues, it does not say that the jurisdiction is exclusive. Kimaru

J is in good judicial company, considering *Wissanja v. Wissanja*[19] above, from the High Court of Uganda.

Having lost in the High Court, the wife appealed to the Court of Appeal complaining that: the High Court failed to appreciate that the marriage contract between the parties provided for arbitration of any matrimonial dispute; the Arbitral award fell within the meaning of an arbitral award under s. 3 of the Arbitration Act and was therefore enforceable; the High Court erred in finding that the dispute fell within the exclusive jurisdiction of Kadhi's courts and the High Court disregarded binding precedent, i.e. *Hirani.* Only the critical aspects of those complaints will be discussed below.

First and foremost was whether ordinary courts or Kadhi's courts have exclusive jurisdiction to grant divorce and orders relating to maintenance and custody of children and also whether such disputes were arbitrable anyway. To answer that question, the court traced the UNCITRAL origin of the Kenyan Arbitration Act 1995 and deliberations on the Arbitration Bill in Parliament all of which emphasised the role of arbitration in resolving commercial disputes. No wonder the Court noted that:

> *"Given that background, the Judge of the High Court was indeed right that the disputes envisaged for resolution under the regime of that Act were those of a commercial nature."*

They noted that "although it is not expressly stated the Arbitration Act "envisaged disputes to be resolved … are essentially disputes of a commercial nature and not of a personal nature". This is odd, considering s. 3. (1) of the Act, instead of restricting arbitration to commercial disputes, expressly contemplates that non-commercial disputes could be arbitrated. That section adds, for the avoidance of doubt, that it does not matter whether that relationship is

[19] *https://ulii.org/ug/judgment/high-court-uganda/2009/34*

contractual or not. All that is required in that clause is that a dispute, to be arbitrable, must arise from a "legal relationship", which marriage is.

Marriage is a contract anyway although a non-commercial contract, even though I have seen social media posts and memes to suggest that marriage has descended into a commercial venture.

Commercial disputes are only some of the legal relationships which are arbitrable under the Act. A classic example is that disputes within a political party are arbitrable even though the relationship between the members is not of a commercial nature. In *Livingstone Kamadi Obuga v. Uhuru Kenyatta & 3 Others [2006] eKLR*[20] Justice Alnashir Visram invoked s. 6 of the Arbitration Act of Kenya 1995 and referred a dispute among the members of a political party to arbitration in accordance with the constitution of the party.

Salient Issues

Article 159. (2)(c) of the Constitution of Kenya 2010
Article 159. (1) of the Constitution of Kenya 2010 (CoK) is categorical that,

> "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**." (Emphases added.)

This has at least three fundamental implications. The first one is obvious: that it is "the people" also referred to as "we the people of Kenya" in the preamble of COK or simply as "Wanjiku" in *Kenya speak*, who decide what is arbitrable or not. According to Article 1. (1) and 1. (3) of CoK, the People are sovereign and have simply delegated or donated some of their powers to the legislature, executive and judiciary. That means that neither the judiciary nor any other arm

[20] *http://kenyalaw.org/caselaw/cases/view/39100*

of government has any inherent powers *vis a vis* the People. The Judiciary has absolutely no authority except or beyond what the People have donated to it. Second, that the People, being the sovereigns, could change or recall some or all the judicial powers at any time. The People of Kenya, do not have to act together in removing a matter from national courts. Any two persons can remove their own dispute from a national court so long as that removal is not expressly barred by the People in a legislation. That means that in matters of private or personal law, the People could as groups or as individuals remove certain matters from the purview of courts to private fora.

The third implication relates to the characterisation of courts and tribunals - some are created "by" CoK and others "under" CoK. The courts and all tribunals whether created directly "by" or indirectly "under" CoK through statutes. Arbitral tribunals are, generally, in the category of the tribunals which are created "under" a statute and not directly by CoK.

Do we, in the CoK era, give undue credit to Article 159. (2)(c)? In order to objectively test what effect, if any, the article 159. (2)(c) has on jurisprudence, one must ask 2 rather obvious independent questions. First, if there were precedents/jurisprudence prior and after CoK are the same, then we cannot ascribe post 2010 decision to a. 159.2.c.

Second is, if whether jurisdictions which do not have a constitutional provision similar to CoK Article 159. (2)(c) have similar decisions, then our recital of that article is only a matter or courtesy.

It could well be that counsel and courts end up in pathological logic, like that the sun rose this morning because the weather forecaster said so. The truth is that the sun would still have risen even if the weatherman or his favourite presidential candidate in the upcoming presidential election for that matter, had not said it would.

I believe that courts should apply contracts, covenants and statutes "as is" strictly and delve into the broad and amorphous power to "promote" arbitration and ADR generally under Article 159. (2(c) only in marginal cases or where the contract or statute are either unclear or deficient. For example, the constitutional provision can be a great help to courts is curing pathological arbitration clauses - but it must be said, that jurisdictions which do not have that or similar constitutional clause have been at the forefront of curing such clauses anyway. Madan decided *Nurani* some 28 years before CoK came into existence. And it is still good law, which can stand on its own with or without Article 159. (2)(c), which is now thrown around pleadings to crowd issues and confuse judges. It is easy to forget that Kenya had an arbitration legislation, and, I believe, pro-arbitration courts even before CoK 2010.

The significance of this is that the court in TSJ would, in all probability, have reached the same decision it did even if they did not have the benefit of Article 159.2. (c) of CoK.

Confidentiality

The right to privacy under Article 31. (c) of CoK does not come near the confidentiality of arbitration. Indeed, confidentiality is one of the characteristic features of arbitration. It is ensured unless the parties expose themselves in court.

Parties who refer their marriages to court for nullification lose their privacy. Incidentally, the head of the Ismailia community, His Royal Highness the Aga Khan, has divorced twice through secular courts and so the details are available to the public. Much or a lot of the details of his divorces[21] would still be under wraps if he and his former wives had subjected their disputes to inhouse arbitrations.

[21] For example, the story at *https://www.smh.com.au/entertainment/celebrity/the-aga-khan-the-alleged-affair-with-an-air-hostess-and-the-75-million-divorce-settlement-20120112-1pwjt.html*

Divorce by Consent

Under s. 31 of the Act, an arbitral tribunal is duty-bound to record an award on agreed terms. Neither the parties nor the tribunal are required to give reasons in a consent award. All this paves way for divorce by consent recorded by an arbitrator. This might be inconsistent with fault-based approach to divorce in some jurisdictions. Whatever the case, parties could, in court or arbitration, short-circuit the contemplated due process by the respondent simply not appearing.

Applicable Law

This article is limited to whether a party which wishes to have a divorce could refer the matter for determination by an arbitral tribunal instead of court and not a discourse of the circumstances, procedures or standards under which divorce would be granted or denied.

Whether divorce is permissible under the couple's faith(s) and whether it would be granted in the circumstances of the case are some of the issues to be determined by the arbitral tribunal. The tribunal would also decide whether the differences which have arisen in a marriage are reconcilable or not.

Religion and culture define marriage as well as the resultant rights and obligations of the married person to the spouse, relatives and society. Conjugal rights, as defined legally and not in *Kenya speak*, is also a function of religion and culture.

In Christianity, marriage is the exclusive union between one man and one woman for life. Various denominations either strongly discourage or completely prohibit divorce and remarriage while polygamy is accepted in some of the African-instituted churches.

Predictably, the treatment of marriage, divorce and custody of children with respect to a particular family will vary depending on whether the matter is referred to traditional elders, religious tribunal or court. The situation is

compounded if one partner has shifted to a different denomination or religion after getting married.

Doubts which had arisen in the interpretation of Mosai law were clarified by Jesus himself some 2,000 years ago by identifying adultery[22] as the only ground for divorce. On that occasion, the adultery discussed was that of a wife, not of a husband. That little detail, or distinction as a lawyer would call it, gains greater significance when one considers that the companion of the adulteress[23], through apparently caught red-handed, was charged alone. Her partner in crime was not produced or orders for his production sought. Indeed, the meeting ended abruptly when Jesus challenged the "anyone without sin" to cast the first stone. Christians consider adultery, for both men and women, as any other sin, which is forgivable upon repentance. However, there is great diversity on whether and in what circumstances divorce should be allowed.

Custody of Children

On the Council's jurisdiction to determine the custody of children, Madan JA does not mince his words in *Hirani*:

> *"It is incorrect statement of the law that the High Court has exclusive jurisdiction under the Guardianship of Infants Act…. The Council is empowered under the (its) constitution to entertain proceedings relating to custody of children. It is incorrect to argue that the Council cannot apply the provisions of the guardianship of Infants Act"*

Universal Application of *Hirani* and *TSJ*

The principle that marriages between Ismaili Muslims can be dissolved through arbitration has been firmly established. This article will now explore who else can have their marriage dissolved through arbitration provided that there is a valid agreement to refer such disputes to arbitration.

[22] Mathew 19: 3,9 NIV
[23] John 7:53–8:11 NIV

First, it should be obvious that the marriages of non-Ismaili Muslims can also be dissolved through arbitration.

Second, that couples of Christian, African traditional or any other faith can have their marriages dissolved through arbitration. Nothing in the two cases turned on the Ismaili religious practices while in *Wissanja* above, the issue of the couple's religion does not feature in the court proceedings. Furthermore, the Ismaili religion does not enjoy any special legal status in Kenya.

The third point arises from the second one above: that the same applies to people who do not subscribe to any religion.

Four, while the arbitral tribunals in *Hirani* and *TSJ* were religious council, party autonomy means that parties, whether they are religious or not, can refer their dispute to a non-religious or secular tribunal of their choice.

Five, the arbitral tribunal's qualifications and religious belief, if considered important, can be addressed by the parties by appointing professional arbitrators of their religion.

Six, the number of tribunal members does not matter. Parties could go to a presumably fairly large religious tribunal, a tribunal of three members or a sole arbitrator.

Seven, while the parties in *Hirani* and *TSJ* consented to arbitration at the start of the marriages, a couple could sign an arbitration clause any time later, even after the dispute has arisen, as in *Wissanja.* An arbitration agreement is equally valid whether entered into at the same time as the contract or later. Distinction of arbitration clauses entered when a dispute has arisen as "submission agreements" is purely academic and has absolutely no legal or practical effect. Indeed, the Kenyan, Ugandan and UNCITRAL Model law do not make any distinction whatsoever or acknowledge the semantic nuance.

Eight, Arbitral award issued elsewhere dissolving marriages or granting custody of children can be enforced in Kenya, which is a New York Convention state. Similarly, such awards, if issued in arbitrations which are seated in Kenya, can be enforced in any the New York Convention state. This is relevant particularly to Kenyans in diaspora and to expatriates who reside in Kenya.

Appeals Against Arbitral Awards

In *Hirani* and *TSJ* there is no issue of the tribunals having gotten the law wrong or disregarded the best interests of the minors or failing to understand the applicable laws on marriage, custody of children or maintenance.

Generally, arbitral awards are not appealable, while setting them aside is notoriously difficult. However, parties could consensually reserve their right to appeal under s. 39 of the Act. Such reservations are rare.

Lack/Neglect of Arbitration Agreements

Ismaili Muslims generally enforce their arbitration agreements with respect to marriage and businesses. The English Supreme Court overruled a judgement by the London Court of Appeal (*Javrai c. Hashwani [2010] EWCA Civ. 712*) and held that an arbitral agreement, under which parties provided the arbitrators to be chosen among the Ismaili community, would not be discriminatory at all, due to the fact that parties can choose arbitrators in whom they have confidence, and who have the technical expertise to resolve a dispute.

That some Christian marriages are not subject of an arbitration clause is probably a matter of choice or custom, not lack of institutions. Whatever the case, the Bible lays the necessary doctrinal foundation while the canon laws of the Roman Catholic and constitution of the Anglican have the provisions and mechanisms on the arbitration of all disputes between their members, who cannot blame anybody if they neglect the in house procedures in favour of state courts.

Epilogue

Arbitration has reached maturity and is now exploring the outer limits. The boundaries of what is arbitrable are being extended all the time. Divorce and child probably the last frontiers of arbitrability. Henceforth, the question will not be "is this dispute arbitrable" but "is this dispute, by any chance, un-arbitrable" in Kenya?

I apologise, most profusely, to all the arbitration students whom I taught, until recently, that nullification of marriage was not arbitrable. I was not aware, until recently, that it was.

Finally, thank you for asking. Yes, I am available to arbitrate as sole, wing or presiding arbitrator of disputes and to issue orders to nullify a marriage and on custody of children if such are warranted.

Transitional Justice and Human Rights

By: ***Kenneth Wyne Mutuma*** [*]

1.0 Introduction

Throughout history human beings have shown to have an incredible capacity for compassion, empathy and unity. When disaster, misery or grief has struck some members of society, others have pulled together and come to the aid of the affected parties. However, there have been some interludes when the ugly side of human nature has reared its head in the form of cruelty and barbarity towards each other. In the same way that man has shown his willingness to lend a helping hand or a shoulder to cry on, it is, sadly, with the same eagerness that some members of society have rushed to be repressive and oppressive towards others when an opportunity to do so has presented itself.[1] They have imposed systems that have repressed some sections of the community politically, economically and socially.[2] Innate and unchangeable human attributes such as skin colour, gender, race, tribe or age have all been used by such people as pretenses of superiority and therefore as a ground for repression of others.[3] Others have used religion or political inclination to oppress sections of the society with different views from their own.[4] Such repression has manifested itself in the form of slavery, colonization, apartheid or dictatorial regimes. The

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[1] Otomar J Bartos and Paul Wehr, Using Conflict Theory (Cambridge University Press 2002).
[2] Ibid.
[3] Salma AbdulMegied, 'Othering, Identity, and Recognition: The Social Exclusion of the Constructed "Other"' (2022) 1 Future Journal of Social Science 111.
[4] Ibid.

end result in many instances is war and armed conflict as the subjugated party fights tooth and nail for the restoration of their freedoms, dignity and human rights.[5] When good, as it tends to do, finally triumphs over evil, the society is left at a quagmire. The question of what to do with those who took part in the oppression and those who were oppressed becomes a clear and present ticking bomb that must be dealt with lest it explodes and plunges the society into an endless vicious cycle of war and terror. This is because, if not addressed, old grudges and grievances have a tendency to fester and stew until they finally expose themselves in the worst form of human motivation-revenge.

This is where transitional justice comes in. It addresses the need of a society to come to terms with the excesses of past large-scale conflict, oppression and violations and abuses of human rights and fundamental freedoms.[6] It is concerned with the mechanisms to be implemented in order to achieve accountability for the violators, ensure justice to those who suffered violations, achieve reconciliation for all and hopefully maintain a peaceful and harmonious coexistence. It may take the form of reparations, acknowledgement and apology or even to some extent retribution for those most culpable.[7] The most important thing is that the society heals and moves on and is now assured that there is a framework to ensure no new violations will not reoccur.

2.0 Definition of Transitional Justice

The late Chief Justice of the US Supreme Court, Warren Earl Burger, once opined that, "…*Concepts of justice must have hands and feet or they remain sterile abstractions. The hands and feet we need are efficient means and methods to carry out*

[5] Robert E Williams, 'Jus Post Bellum: Justice in the Aftermath of War' in Caron E Gentry and Amy E Eckert (eds), The Future of Just War (University of Georgia Press 2014) <*https://www.jstor.org/stable/j.ctt46nbn3.13*> accessed 24 January 2023

[6] Rojas, H., & Shaftoe, M. (2022). Human Rights and Transitional Justice. In Human Rights and Transitional Justice in Chile (pp. 1-28). Palgrave Macmillan, Cham.

[7] Emeziem, C. (2021). A Time for Just Reckoning? Temporality, Law, and Transitional Justice in Changing Societies. Loy. J. Pub. Int. L., 23, 66.

justice in the shortest possible time…."[8] His idea of justice serves as one of the fundamental elements of transitional justice.

This is because the concept always finds itself in the limelight after an especially brutal chapter of a nation's history. An entire population weary from the ravages of an ordeal such as prolonged armed conflict or repressive regime wants not just justice in the abstract but actual real-life machinations that will help everybody move forward feeling vindicated.

Professor Roht-Arriaza has described transitional justice as ''*…that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.*[9] They include the legal and institutional frameworks that the society sets up following a successful defeat of civil or political strife.[10] The transitional justice mechanisms aim to reconcile people and instil upon them a sense that justice will be done.[11] They include approaches by societies seeking to reform, heal and transit from illegitimate and repressive regimes and end cultures of impunity by entrenching the rule of law.[12] In this way it encourages as well as renews the citizens' efforts in reconstruction and restoration of their country.[13] The four pillars which have come to define transitional justice were described by Louis Joinet, a French jurist, to be: truth

[8] Ghani M A. (2021). Saluting Living Legends of Labour Judiciary.
[9] Haldemann, F. (2022). Transitional Justice for Foxes: Conflict, Pluralism and the Politics of Compromise. Cambridge University Press.
[10] Carey, S. C., González, B., & Gläßel, C. (2022). Divergent Perceptions of Peace in Post-Conflict Societies: Insights from Sri Lanka. Journal of Conflict Resolution, 00220027221104719.
[11]Ochieng, V., Inganga, F., & Ngala, C. Curriculum Reform and Transitional Justice.
[12] Carter, J., & Chen, C. L. Memory, symbols and rendering at the National Human Rights Museum in Taiwan: Activating cultural approaches to transitional justice. In Human Rights Museums (pp. 89-128). Routledge.
[13] Sesay, M. (2022). Decolonization of Postcolonial Africa: A Structural Justice Project More Radical than Transitional Justice. International Journal of Transitional Justice.

seeking, the right to justice, reparations, and guarantees of non-recurrence..[14] The import of these four pillars is that the nation, while acknowledging its past riddled with oppressive rule and/or conflict and impunity, looks forward to establishing the rule of law and democratic governance.[15] This underscores the necessity of TJ as an initial step in moving societies from experiences of pain and division to a future of development and shared prosperity. The transition combines judicial and non-judicial proceedings, such as prosecution of the most culpable parties and reparations for the most affected victims.[16] Certain mechanisms have been recommended to guard against the repetition of violations. These include reforms in the constitutional, legal and institutional framework as well the formal history education curriculum, preserving archives, launching initiatives for memorialization and strengthening non-governmental initiatives including those of civil societies.[17]

The United Nations on its part has defined transitional justice as, "…the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation…"[18] It has stated that the procedures are an important part of the UN framework for bolstering the rule

[14] Jamar, A. (2022). Accounting for which violent past? transitional justice, epistemic violence, and colonial durabilities in Burundi. *Critical African Studies*, *14*(1), 73-95.
[15] Salihu, A., & Omotoso, S. A. (2022). Gender, Power and The Politics of Memory: Weaving 'Just'Into Transitional Justice in Nigeria. Humanities Bulletin, 5(1), 242-255.
[16] Murithi, T. (2022). Justice and Reconciliation in Africa: The Emergence of the African Union Transitional Justice Policy. In Routledge Handbook of African Peacebuilding (pp. 84-99). Routledge.
[17] Klinkner, M., & Schwandner-Sievers, S. (2022). Transitional justice principles versus survivors' experience: Conflicting interpretations in Kosovo case study involving missing persons and their memorialisation. In Localising Memory in Transitional Justice (pp. 50-80). Routledge.
[18] Attrash-Najjar, A., & Katz, C. (2023). The social response to child sexual abuse: Examining parents, perpetrators, professionals and media responses as described in survivors' testimonies to the Israeli Independent Public Inquiry. Child Abuse & Neglect, 135, 105955.

of law.[19] The African Union has also issued a transitional justice policy, which was adopted by the AU Panel of the Wise in 2006.[20] In the policy transitional justice is defined as "*the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation.*"[21] The policy is part of the AU's Agenda 2063, dubbed, '*The Africa We Want*.'[22] It creates a transitional justice system for African nations that is indigenous to the continent, distinctive, full of cutting-edge techniques and ideas, and based on the common values, traditional justice systems, and experiences of Africans..[23] It advocates for both redistributive and restorative initiatives by identifying local state-actors, non-state actors, mediators, traditional and complementary justice mechanisms.[24] Traditional processes, such as cleansings and rituals, which African communities rely on for resolving disputes and restoring loss and damage are also included. The policy acknowledges well established community-based norms and practices used for conflict resolution in African settings.[25] They include traditional reconciliation initiatives like clan or customary courts systems and community-based

[19] Gómez-Moreno, J. P. (2022). Fear of Arbitration and Hope for Transition: Why Should We Care About the Interaction Between Investment Arbitration and Transitional Justice? *Athena–Critical Inquiries in Law, Philosophy and Globalization*, *2*(1), 152-203.

[20] Available at *https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf* last accessed on 8th November 2022.

[21] Available at *https://www.africaportal.org/publications/traditional-transitional-justice-mechanisms-lessons-africa/* accessed on 8th November 2022.

[22] van Norren, D. E. (2022). African Ubuntu and Sustainable Development Goals: seeking human mutual relations and service in development. Third World Quarterly, 1-20.

[23] Sharpe, M. (2022). UNHCR, the AU and the rhetoric and realities of 'Root Causes'. Routledge Handbook of African Peacebuilding.

[24] Ibid

[25] Kiyala, J. C. K. (2022). Indigenous Peacebuilding Approaches and the Accountability of Former Child Soldiers: African Case Studies. In Civil Society and Peacebuilding in Sub-Saharan Africa in the Anthropocene (pp. 423-464). Springer, Cham.

dialogue.[26] According to the AU, such mechanisms form an integral part of the policy's conception of transitional justice.[27] The policy does emphasize that in order to address transitional justice, informal channels must be employed in addition to and not as a substitute for formal mechanisms. African leadership, national and local ownership, inclusion, equity, and non-discrimination, as well as African shared values, have been regarded as its most crucial components, with adequate consideration for the gender and generational dimensions of infractions[28] The end result of these processes is reconciliation and social cohesion.

The policy has identified a number of the constituent elements that must be included in the transitional justice mechanisms. Reparations is one of the important ones. The restitution should involve effective and adequate financial and non-financial redress as well as redistributive justice. The second is memorialization, which is the public acknowledgment of victims aimed at institutionalizing non-impunity in national discourse as well as perpetuating society conversation across generations and... It goes beyond the transitional period and is an important necessity in truth, reconciliation and healing. Memorialization may be by commemorative activities such as monument and symbol erections, renaming roads, parks or public buildings. It may also include the restatement of artistic and cultural expressions together with the review of national symbols and days. The revision of history books and educational curricula is important to reflect the true history of the nation. Diversity Management is another integral part of transitional justice. The policy acknowledges that there are some cross cutting issues that may adversely transition justice and derail its long-term objective of being an inclusive process. As a result, a variety of vulnerable actors, including refugees, internally displaced people (IDPs), stateless people, people with disabilities, women,

[26]Kilonzo, S. M. (2021). Silent peacemakers: grass-roots transitional justice and peacebuilding by women in Kenya's North Rift conflicts. Journal of the British Academy, 9(s2), 53-74.
[27] Ibid
[28] Ibid

youth, and children, must actively participate in the process throughout time. These groups' legal and constitutional rights, which may have been violated during a conflict, should be reinstated. They should be represented and their participation at all stages of the transition justice processes guaranteed. Similarly, the investigation and prosecution of crimes related to sexual and gender-based violence should implement measures that shield victims from social and cultural shame and ease the procedural and evidentiary requirements that hinder their successful prosecution in order to achieve justice for the victims. Children, being the most vulnerable members of society are likely to be correspondingly affected by conflict, either directly as the target of the violence through killings, mutilation or torture, abductions and sexual violence or indirectly through forced recruitment and enrolment as child soldiers. The best interests of the child should always guide the measures that are adopted and should be paramount in the transitional justice process.

Justice and accountability is the fourth element. It includes bringing to book the perpetrators of the abuses and oppression during the conflict period. Those most culpable should be tried and if found guilty, convicted. The process serves to bring closure to the affected parties. However, the policy promotes sentence reductions, pardons, and alternate kinds of punishment in addition to plea bargains and plea agreements. Amnesty with the full participation and informed consent of affected parties such as communities and other victims should also be explored. The transitional justice and accountability mechanism should not allow for blanket, all-inclusive and unconditional amnesties. In order to avoid recurrence, the recovering state should enact comprehensive political and institutional reforms. This will secure democratic and socioeconomic development and stop new transgressions from emerging. It is important to incorporate marginalized groups in decision-making structures. A justiciable bill of rights should be developed and independent constitutional commissions such as a human rights commission and ombudsperson created. Disarmament of the security sector and judicial reforms should also be given a priority. The vetting and purging of culpable individual office holders should also be done.

Lastly, the mechanism should guarantee and uphold socio-economic and cultural rights. According to Amanda Cahill, the preoccupation with accountability after civil upheaval seems to sideline the real purpose of transitional justice which is to prevent reoccurrence.[29] According to her, reoccurrence can best be prevented by attending to systemic injustices such as economic, social and political injustices that fuel the causes that erupt into paroxysms of violence. Therefore, transitional justice should increasingly take account of economic, social and cultural rights violations while still focusing on violations of civil and political rights as the primary gravamen of human rights violations to be addressed when seeking justice for past atrocities.[30]

3.0 History of Transitional Justice in Kenya

Different political convulsions, campaigns for liberation, and socioeconomic revolutions have typified Kenya's history.[31] To examine the history of transitional justice in Kenya will be to examine the history of the country. The nation has engaged in numerous transformational efforts, including those against colonialism, for the implementation of democratic and participatory governance, human rights, constitutionalism, and the rule of law. The latter ones being dubbed as the second liberation struggle.[32] They had their own unique traditions, dialects, rituals, and mythologies, and they lived in their own particular territories. .[33] They lived in their own distinct territories with their

[29] Cahill-Ripley, A. (2014). Foregrounding socioeconomic rights in transitional justice: Realising justice for violations of economic and social rights. Netherlands Quarterly of Human Rights, 32(2), 183-213.

[30] Coakley, S., & McAuliffe, P. (2022). Picking up the pieces: Transitional justice responses to destruction of tangible cultural heritage. Netherlands Quarterly of Human Rights, 40(3), 311-332.

[31] Kariuki, P. (2022). Political Leadership in Kenya: In Transition or A Failed Political. Lessons from Political Leadership in Africa: Towards Inspirational and Transformational Leaders, 264.

[32] Munyao, M. (2021). 'New wine, old wineskins': a comparative study of interfaith engagement and transitional justice in Kenya and South Africa.

[33] Cooper, F. (1994). Conflict and connection: rethinking colonial African history. The American Historical Review, 99(5), 1516-1545.

own cultures, languages, customs and myths.[34] The communities were free from each other, save for some inter-communal and intra-communal conflicts over water and grazing fields.[35] Kenya was declared a British colony on July 23, 1920 before that it had been declared a British Protectorate. The minority British government started a system of repression and subjugation of native Africans almost immediately after they set foot in the country.[36] They committed massive atrocities, war crimes and human rights violations.[37]. Under the guise of taking care of the interests of Africans, the British had introduced the hut tax in 1902.[38] This meant that an African had to pay tax to the government for each hut a family owned. Non-compliance attracted a fine followed by forced labour. The native Kenyans, who had no other way to earn money, a concept foreign to them, had to work for the white settlers to earn their wages.

The colonial government then introduced a poll tax which was required of every citizen in the country. According to historians, the maximum amount that the government spent on services provided exclusively for the benefit of the native population was slightly over one-quarter of the taxes paid by them.[39] African Kenyans also had to work for 60 days a year for the government unless employed by British settlers.[40] In 1913, the government passed a land bill that

[34] Wane, N. N., Opondo, W., Alam, S., Kipkosgei, E., & Tarus, I. (2022). Indigenous Governance in Africa: A Decolonial Dialogue. In Decolonizing and Indigenizing Visions of Educational Leadership (pp. 151-173). Emerald Publishing Limited.
[35] Sana, O. (2019). Between the Borders and Internal Control: The Evolving Character of the Nation State in a Transnationalist Pastoralist Zone: A Case Study of the Turkana of Kenya and Karamojong of Uganda. Open Access Library Journal, 6(07), 1.
[36] Gordon, P. (1987). The killing machine: Britain and the international repression trade. Race & Class, 29(2), 31-52.
[37] Bennett, H., & Romijn, P. Accountability for Colonial Violence in the Dutch and British Metropoles.
[38] Mosala, S. J. (2021). The role of the Comprador Bourgeoisies in Post-Independent Africa: the case of South Africa and Kenya (Doctoral dissertation, North-West University (South Africa)).
[39] McGregor, R. W. (2012). Kenya from Within: a short political history. Routledge.
[40] Frankema, E. (2011). Colonial taxation and government spending in British Africa, 1880–1940: Maximizing revenue or minimizing effort? Explorations in economic history, 48(1), 136-149.

gave the white British settlers 999 year leases on the land, consequently, it reserved the White Highlands exclusively for Europeans, especially British war veterans and relocated an entire population inhabiting the highlands to less hospitable lands.[41]In 1919, the settlers also introduced the Kipande system which made it mandatory for all Kenyan men of African descent to wear identity discs.[42] A 1939 Ordinance allowed the settlers to demand 270 days' labour from any squatters on "their land".[43] These actions led to the settler government in Kenya being described as the most openly racist one in the British Empire, with an uncompromising determination to retain their grip on power.[44] The atrocities and oppression led to the Mau Mau uprising by native Africans demanding land and freedom.[45] In response, the white minority government declared a state of emergency where native Kenyans were taken to temporary barbed-wire enclosures. Those who were not Kikuyu, Embu or Meru were released with members of these communities being subjected to further screening.[46] More than 20,000 "suspects "were taken to Lang'ata, and 30,000 more were deported to the reserves.[47]

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[41] Berman, B. J., & Lonsdale, J. M. (1980). Crises of accumulation, coercion and the colonial state: the development of the labor control system in Kenya, 1919–1929. Canadian Journal of African Studies/La Revue canadienne des études africaines, 14(1), 55-81.

[42] Omachar, B. S., & Chang'ach, J. K. Is John Owalo the Miscalculated African Plato, Socrates or Unidentified Aristotle? Reconstructing History of Education in Africa.

[43] Nderitu, W. (2019). Mukami Kimathi: Mau Mau Woman Freedom Fighter. Mdahalo Bridging Divides.

[44] Hobhouse, E. A Mau Mau Mirror: Revising the British Imperialist Self-Image.

[45] Mwaruvie, J., Otieno, J., & Kanyingi, B. (2022). Retelling the Mau Mau Past from the Mbeere Perspective.

[46] Franklin, D. P. (1996). A Pied Cloak: Memoirs of a Colonial Police Officer (special Branch), Kenya, 1953-66, Bahrain, 1967-71, Lesotho, 1971-75, Botswana, 1976-81. Janus Publishing Company Lim.

[47] Christopher Paul and others, 'Kenya, 1952–1956: Case Outcome: COIN Win', Paths to Victory (RAND Corporation 2013) <*https://www.jstor.org/stable/10.7249/j.ctt5hhsjk.15*> accessed 24 January 2023

In the Kiambu, Nyeri, Murang'a, and Embu Districts, there was a full-scale forcible resettlement of natives in the reserves.[48] By 1955, 1,050,899 Kikuyu in the reserves were inside 804 villages consisting of some 230,000 huts dubbed "protected villages" but were little more than concentration camps in which hundreds of thousands were corralled, against their will. The concentration camps were behind barbed-wire fences and watch towers with armed guards. They were surrounded by deep, spike-bottomed trenches. Collective punishments like curfews were also implemented in large areas of the country.[49]Instances of starvation and malnutrition began being reported in these camps by 1955. At the end of the state of emergency in 1959, 11,000 deaths, including 1,090 executions, were reported among the Mau Mau and other freedom fighting forces, with some estimates higher.[50] The Mau Mau executions were largest wartime use of capital punishment by the British Empire.[51] Historians like David Anderson estimates 25,000 people died while demographer John Blacker's estimate is 50,000 deaths—half of them children aged ten or below due to malnutrition, starvation and disease. Caroline Elkins estimates that tens maybe hundreds of thousands died.[52] Those in the camps were faring better as detainees, if possible, were even worse off, hundreds of thousands were beaten or sexually assaulted to extract information about the Mau Mau.[53] They were subject to crimes against humanity in an attempt to force them to renounce their allegiance to Mau Mau and to obey commands. Their ears were sliced off and holes bored into their eardrums, some were flogged to

[48] Rana, K. A. A. (1990). Politics, underdevelopment, and social conflict: a study of class formation in Kenya. University of California, Los Angeles.
[49] Ibid
[50] Blacker, J. (2007). The demography of Mau Mau: fertility and mortality in Kenya in the 1950s: a demographer's viewpoint. African Affairs, 106(423), 205-227.
[51] Elkins, C. (2015). Looking beyond Mau Mau: archiving violence in the era of decolonization. The American Historical Review, 120(3), 852-868.
[52] Wright, T. J. (2022). 'Constituencies of Control'–Collective Punishments in Kenya's Mau Mau Emergency, 1952–55. The Journal of Imperial and Commonwealth History, 1-28.
[53] Bailey, T. (2022). Anglicanism, the Mau Mau Conflict, and Decolonisation in Kenya, 1952-1963 (Doctoral dissertation, University of Cambridge).

death, paraffin was poured over the suspects who were then set alight, and their eardrums were burnt with lit cigarettes.[54] Castration of detainees and denial of access to medical aid was also widespread and common.[55]

Independence from this repressive regime was attained in 1963. However instead of pursuing transitional justice, the new administration chose to implement a more forgiving policy with Jomo Kenyatta, Kenya first native African Prime Minister and later President, famously arguing that Kenya was for everybody and the British who wanted to remain could do so with no fear of reprisals.[56] The new regime continued with the atrocities against the population including detention without trial, police brutality, cronyism, corruption, tribalism, land grabbing, impunity and state plunder.[57] When the people of Kiambu constituency selected Mbiyu Koinange's opponent as M.P, Kenyatta is on record as having declared that his one vote for Koinange was enough. He also had his opponent imprisoned before nomination day on flimsy charges and released when the KANU nominations were concluded.[58] Since KANU was the only party, Koinange proceeded to be declared the M.P and represented Kiambu as such for the next five years.[59] Kenyatta also reportedly "forgave" Paul Ngei and pardoned him from a prison sentence after a 1966 maize scandal which led to a scarcity of the commodity in the country.[60] The independence Constitution had guaranteed a multiparty democracy with a

[54] Crook, M. (2013). The Mau Mau Genocide: A Neo-Lemkinian Analysis. Journal of Human Rights in the Commonwealth, 1(1), 18-37.
[55] Ordu, S., & Odukwu, B. (2022). THEATRE: Ngugi and Revolution in The Trial of Dedan Kimathi. Journal of Social, Humanity, and Education, 3(1), 17-27.
[56] Engle, K., Miller, Z., & Davis, D. M. (Eds.). (2016). *Anti-impunity and the human rights agenda*. Cambridge University Press.
[57] Shilaho, W. K. (2018). Autocracy, Big Man Politics, and Institutional Atrophy. In Political Power and Tribalism in Kenya (pp. 51-80). Palgrave Macmillan, Cham.
[58] Gimode, E. A. (2007). The role of the police in kenya's democratisation process. Kenya: The struggle for democracy, 227-a.
[59] Kanyinga, K. (1994). Ethnicity, Patronage and Class in a Local Arena:"High "and "Low "politics in Kiambu, Kenya, 1982–92. *The New Local Level Politics in East Africa*, *66*.
[60]Story available at *https://allafrica.com/stories/200209100795.html* last accessed on 8th November 2022

freely elected parliament and an independent Judiciary.[61] As such, there were two major parties: KADU and KANU. KANU was a party largely dominated by two tribes, the Kikuyu and the Luo. KADU on the other hand was a coalition of all the other small Kenyan tribes that feared being dominated by the Kikuyu and the Luo.[62].However, through political engineering and manipulation, President Jomo Kenyatta turned Kenya into a de facto one-party state[63]. He forced the opposition party KADU into a merger with KANU in 1964. The first general elections in post-independence Kenya were held in December 1969. In 1966, some members of KANU attempted to defect and establish an opposition party, KPU.[64] A constitutional amendment was passed outlawing the KPU forcing the MPs to seek re-election.[65] Therefore only KANU participated in the election. Since all other parties were banned, KANU won every seat in the elections of 1969, 1974, 1979, 1983 and 1988. With the legislature now firmly in the grip of the executive, KANU now concentrated on dismantling the judiciary.[66]

Several amendments were passed by the then parliament clipping the powers of judges and the extent of their jurisdiction[67]. In 1988, amendment was effected which removed judges' security of tenure .[68] All the members of the then JSC

[61] Mutua, Makau. "Justice under siege: the rule of law and judicial subservience in Kenya." *Human Rights Quarterly* 23.1 (2001): 96-118.
[62]Ong'Or, J. P. O. Religion, conflict, and politics: an analysis of Gramsci's concept of subaltern in Kenya (Doctoral dissertation).
[63]Tamarkin, Mordechai. "The roots of political instability in Kenya." *African Affairs* 77.308 (1978): 297-320
[64] Rwigema, P. C. (2022). The pros and cons of elections: Kenya general elections (August 2022). The Strategic Journal of Business & Change Management, 9(3), 397-446.
[65] Ibid n24 pg. 264.
[66] Kenny, C. (2022). Reimagining the Gendered Nation: Citizenship and Human Rights in Postcolonial Kenya (Vol. 55). Boydell & Brewer.
[67] Okafo Victor Oguejiofor. *A Roadmap for Understanding African Politics: Leadership and Political Integration Kenya*. Routledge, 2013.
[68] Bwire, B., Akech, M., & Meroka-Mutua, A. (2022). A Conceptual Framework for Assessing the Performance of Kenyan Courts Undertaking Judicial Review of Legislative Action. Strathmore Law Journal, 6(1), 107-133.

were presidential appointees. In addition, the president frequently hired expatriate judges on contract to act as his point men in the Judiciary in complete disregard of the constitution which had no provision for such.[69]

The end result was that the judiciary was more or less rubber stamping the wishes of the executive. The courts took on a complicit role in the executive branch's misuse of authority and disrespect for the law.[70] It detained detractors at the direction of the president. Disappearing files, delayed judgments and corrupt judges became the norm. The judiciary completely lost any perception of fairness the public had.[71] Trust and confidence in it as a guardian of democracy was virtually non-existent. It came to be viewed merely as an extension of the tyrant regime. Kenya became a de-jure one-party state in 1982 after a constitutional reform bill was approved by Parliament. The Wagalla massacre took place in 1984 where Kenya army forces detained and killed members of the Degoodi clan.[72] The troops had descended on the area allegedly with the purpose of defusing clan-related conflict. The death toll is estimated to be between 387-10,000 people.[73] In 1988, sham mlolongo elections were held in the country where supporters were required to line behind their candidates poster and then be counted. They have been described as the most massively rigged and corrupt elections in Kenya's history and served to entrench the Kanu rule.[74]

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[69] Mutua, M. (2001). Justice under siege: The rule of law and judicial subservience in Kenya. Hum. Rts. Q., 23, 96.
[70] Nyongesa, G. (2019). Normalization of Political Corruption in Africa with special reference to Kenya (Doctoral dissertation, University of Nairobi).
[71] Anassi, P. (2004). Corruption in Africa: The Kenyan experience: A handbook for civic education on corruption. Trafford publishing.
[72] ALIO, M. S. Kenyan NFD Muslim Communities: The Painful Past and Pending Justice.
[73] Purdeková, A. (2022). Memory as vulnerability: Reinhabiting sites of violence and the politics of triumphalist amnesia in Kenya's war on terror. Security Dialogue, 53(5), 385-401.
[74] Njogu, K. (Ed.). (2011). Defining moments: Reflections on citizenship, violence, and the 2007 General elections in Kenya. African Books Collective.

After a long struggle by activists and the civil society that included detention without trial, persecution and torture the Amendment Act No. 12 of 1991 was enacted, this repealed Section 2 (a) of the Constitution, returning Kenya to a multiparty democracy.[75] Finally, Kenya could hold multi-party elections. As a result, new parties such as FORD-Kenya and NARC were formed. They had the purpose of representing societal interest, accelerating pluralistic debates, and ultimately replacing the KANU government.[76] Accordingly, general elections were held in 1992 and 1997, where KANU continued to reign. There were fears that the gains made were eroded as the elections in this period were marred by instances of fraud, voter bribery and intimidation, violence and electoral offenses such as ballot box stuffing.[77] The 2002 elections saw Mwai Kibaki of the NARC alliance defeat KANU's Uhuru Kenyatta, who Moi had stood down for. On being sworn in, Kibaki promised wide ranging reforms including radical reforms in the judiciary and emboldening the war on corruption and enactment of a new constitutional dispensation within a hundred days of office.[78] While the Kibaki government is credited with some economic achievements in spurring growth it failed terribly in addressing historical injustice and restoring the rule of law and democracy. [79]A 2005 effort to adopt a new constitution through a referendum failed miserably. The general elections of 2007 saw Raila Odinga of ODM and Mwai Kibaki of PNU as the main contenders for the presidency. Kibaki was declared the winner. As a result of the opposition's refusal to recognize these results and allegations of widespread rigging and

[75] Mbugua, K. (2002). Transition politics and the challenges of democracy in Kenya. Conflict Trends, 2002(4), 29-33.
[76] Kamau, Lucy W. *Impact of election conflicts in Africa: a case study of Kenya's post-election violence recovery, 2000–2012*. Diss. University of Nairobi, 2013.
[77] Arusei, E. J. (2019). The Pattern of Electoral Management Practices Towards Kenya's 2007 Post-Election Violence in Uasin Gishu and Trans-Nzoia Counties.
[78] Kanyinga, K. (2019). Political Economy of Kenya & the 2017 General Elections.
[79] Carbone, G. (2019). Leaders for a new Africa: democrats, autocrats, and development. Leaders for a new Africa, 1-155.

other electoral irregularities, there were more than 1000 fatalities and several other casualties in the post-election unrest, among them displaced people .[80]

4.0 The 2007 Mediation

4.1 Background

The days preceding the 2007 election were calm and peaceful with voting proceeding orderly. However, confusion emerged after delays in announcing the presidential results.[81] This created an atmosphere of uneasiness. The situation was further exacerbated when the Chairman of the then electoral body, the Electoral and Boundaries Commission (ECK) publicly stated his lack of confidence in the figures provided by his authorities.[82] He also confessed that he could not communicate with some of his returning officers. This reinforced the opposition party's narrative (ODM-Orange Democratic Movement) that the election was rigged. In addition, the incumbent President, Mwai Kibaki had at the last minute appointed 18 out of 21 new commissioners of the ECK without consultations, thereby eroding confidence in the body.[83] The uneasiness quickly metamorphosed into tension when Kibaki was hurriedly sworn in at dusk on the same day the ECK announced him the presidential winner, despite the Chairman's misgivings on the veracity of the results.[84] The controversy surrounding the tallying of the presidential vote had also not been resolved. The tension turned to unrest, and eventually violence as the announcement became bitterly disputed. Violence rippled out across the country being

[80]Linke, A. M. (2022). Post-election violence in Kenya: leadership legacies, demography and motivations. Territory, Politics, Governance, 10(2), 180-199.
[81] Kigwiru, V. K. (2019). The Adoption of Technology in the Kenyan Electoral Process: Lessons from the 2013 and 2017 Presidential Election. Available at SSRN 3383987.
[82] Muriuki, S. (2022). Consolidating Electoral Democracy through Enhanced Electoral Management Body: A Case of Kenya, 1992-2017. Journal of Language, Technology & Entrepreneurship in Africa, 13(1), 176-193.
[83] Branch, D., & Cheeseman, N. (2009). Democratization, sequencing, and state failure in Africa: Lessons from Kenya. African Affairs, 108(430), 1-26.
[84] Mutizwa-Mangiza, S. P. (2013). Political party institutionalization: A case study of Kenya (Doctoral dissertation, Rhodes University).

spontaneous, organized and retaliatory. Riots and looting sprung up in the slums of Nairobi and Naivasha and a church with people inside was burned down in Kiambaa, Nakuru. Although there was unrest in the country, Kibaki and the then leader of the ODM, Raila Odinga, refused to meet.[85] The ODM refused to file a petition in accordance with the law and processes because they believed that the legal system could not settle the conflict. They claimed that because the Chief Justice had recently presided over Kibaki's inauguration, they had lost faith in the legal system.[86] In Kenya, petitions on elections have frequently been delayed significantly. By 2007, ten petitions related to the elections of 2002 were still pending. President Kibaki's own plea had been denied in 1997 on dubious grounds[87] including that, once a petition is filed and unless it falls within S.20 (2) of the Act cannot be amended, and that the legal regime set to cover election petitions does not envisage application of the Civil Procedure Act, Civil Procedure Rules or any other Act to apply in matters concerning election petitions.[88] They argued that the issue at hand required a political solution since it was a political issue. The Party of National Unity (PNU), on the other hand, believed that Kibaki had triumphed in a free and fair election. The international community urged Kofi Annan, Graça Machel, and Benjamin Mkapa to serve as mediators between the parties, establish a climate conducive to peace, and negotiate a political settlement as the violence grew out of hand.[89]

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[85] Oucho, J. (2010). Undercurrents of Post-election Violence in Kenya: Issues in the long-term agenda. In Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections (pp. 491-533).

[86] Opongo, E. O., & Murithi, T. (Eds.). (2022). Elections, Violence and Transitional Justice in Africa. Routledge.

[87] Azu, M. (2013). The role of the judiciary in strengthening democratic governance in Africa: an examination of the resolution of the recent presidential election disputes in Ghana and Kenya (Doctoral dissertation, University of Pretoria).

[88] *Stephen Kimani Gakenia v Francis Mwangi Kimani & 2 Others* [1998] eKLR.

[89] Khadiagala, G. M. (2008). Forty days and nights of peacemaking in Kenya. Journal of African Elections, 7(2), 4-32.

4.2 The Mediation Process

The mediators'' goal, under the direction of former UN Secretary General Kofi Anan, was to start a discourse to address long-term structural issues that were the source of the conflict and bring about a political resolution to put an end to the carnage.. [90]The mediation mechanism enjoyed legitimacy as the third party, being that the mediators were well respected and had the backing of the international community.[91] The mediators had no decision-making powers but were only there to help the parties involved reach an acceptable and mutually beneficial settlement.[92] The parties agreed to each second three people to the Kenya National Dialogue and Reconciliation team which was officially launched on 29th January 2008.[93] The team's terms of reference, which were accepted by both parties, called for implementing specific steps to halt violence and reinstate fundamental rights, address the humanitarian crisis, fostering reconciliation, healing, and re-establishing stability, as well as resolving the political turmoil and identifying long-term viable alternatives. [94]

The mediation panel led the team through interest-based negotiation and encouraged them to desist from taking into account their positions.[95] Kibaki's interests were to remain in a position that would allow him to continue his legacy of transforming the country, whereas Raila was interested in addressing historical, social and economic exclusion, corruption, as well as correcting the

[90] Ibid.
[91] Okonkwo, P., Ezeudu, L., & Anushiem, U. (2022). 'Alternative Electoral Dispute Resolution Mechanism'as a Panacea to Protracted Election Disputes. International Journal of Comparative Law and Legal Philosophy (Ijocllep), 4(1).
[92] Brett, E. A. (2022). Rebuilding public authority in Uganda dualist theory, hybrid social orders and democratic statehood. World Development, 159, 106055.
[93] Adar, P. A. (2022). Domestic accountability through strategic litigation: Towards redress and reparations for Kenya's 2007-2008 post-election sexual and gender-based violence. African Human Rights Law Journal, 22(1), 213-240.
[94] Sihanya, B., Okello, D., & Kanyinga, K. (2007). Mediating Kenya's Post-Election Crises: The politics and limits of power sharing agreement'. Tensions and reversals in democratic transitions: The Kenya, 653-709.
[95] Ibid.

winner-takes-all political nature of the country.[96] The necessity to address poverty and the unequal distribution of resources was acknowledged by both parties. . By separating the parties from the problem and validating their positions, the panel was able to make the two political parties agree to a power-sharing agreement on 28 February 2008. Additionally, the two parties established a coalition government and signed a cooperation agreement that designated Raila as prime minister while Kibaki remained president. The power to plan and manage the conduct of government business was delegated to the prime minister post. The agreement also stipulated that the two parties would divide the executive branch and the cabinet posts in accordance with the portfolio balance principle and in light of their respective legislative dominance. [97] On February 28, 2008, Kibaki and Odinga signed an agreement that adequately satisfied the interests of the two disputants... It was entrenched in the Constitution, and laid the basis for the reforms needed for sustainable peace in the country.

The nation could advance by addressing persistent racial disparities, social and economic marginalization, corruption, poverty, the unequal allocation of resources, and perceptions of past injustices... This effectively marked the end of one of the darkest chapters in Kenya's history. The country also commissioned two reports, being the Waki Commission- the Commission of Inquiry on Post-Election Violence (CIPEV), and the Kriegler Commission-The Independent Review Commission (IREC). The findings of these commissions led to wide ranging reforms in the Kenya legal institutional and legislative

[96] Hinga, A. W. (2018). Exploring the Feasibility of Restorative Justice as a Mechanism for Reconciliation Among the Survivors of Kenya's Ethno political Violence, 1992–2012 (Doctoral dissertation, United States International University-Africa).
[97] Truth, J., & Reconciliation Commission. (2009). South Consulting-1st Review Report-Agenda 3: Resolving the Political Crisis (Power Sharing).

regime.[98] One of which was the promulgation of a new constitution under the leadership of the grand coalition government.[99]

Due to its representative democracy and independent judiciary, the 2010 Constitution has been recognized as one of the most progressive in the entire globe.[100] In addition to its vast and legally binding Bill of Rights, it has also protected the independence of the parliament and the court and established the people's sovereignty as the foundation of the nation. The president no longer has the power to dissolve parliament and the security of tenure of judges and their remuneration is secured in the Constitution. Additionally, it has a set of national principles that serve as a guide for all actors in the nation, including state officials, and have prompted the creation of 47 county administrations, which have resulted in the devolution of authority and resources. Furthermore, the rights of marginalized groups like as young people, women, people with disabilities, and women are protected, and independent commissions and agencies have been established, such as the office of the director of public prosecutions and the ombudsman. This shows the effective use of an ADR mechanism to successfully resolve a political and major humanitarian crisis. The TJRC formed after the mediation, initiated community dialogues in some parts of Kenya by offering platforms to people where they could talk freely about historical injustices and tensions. This further highlights the importance of ADR in maintaining and sustaining peace in a post-transitional justice environment.

5.0 Subsequent Elections

The first general election under this constitution was conducted in 2013. The election turned out to be a two-horse race between CORD's Raila Odinga and

[98] Tostensen, A. (2010). Electoral mismanagement and post-election violence in Kenya–the Kriegler and Waki Commissions of Inquiry. Nordic Journal of Human Rights, 27(4), 427-451.

[99]Opongo, E. O. (2022). Democracy, Citizen Participation and Peace Economics in Kenya: Interrogating the Social Change Processes. *The Journal of Social Encounters*, *6*(1), 62-83.

[100] Bwana, R. (2021). Public Participation In Kenya. Dead Letter Law? *Dead Letter Law*.

Uhuru Kenyatta backed by the JUBILEE Alliance. Uhuru Kenyatta was announced victorious and was duly sworn in. Although the losing party disputed the results, this time no widespread violence occurred as the dispute was amicably resolved by the Supreme Court. The 2017 election was a contest between the incumbent President Uhuru and his former opponent Raila Odinga. Uhuru was declared the winner with Raila disputing the results. He disputed the results and contested them at the Supreme Court. This time the Supreme Court nullified the results and another presidential election was ordered to be held in 60 days as per the Constitution of Kenya 2010. The opposition led by Raila, boycotted the repeat elections. There were protests in Kisumu, Kibera and Mathare which led to violence some of it deadly. Raila had earlier published his own results, which had put him ahead. He subsequently swore himself in as the people's president and called for daily demonstrations.[101] These led to tensions in the country and a hostile business environment with vigilantes such as the Nairobi Business Community vowing to protect their property and fight off the protestors.[102] However, President Kenyatta and Raila amicably resolved their dispute through dialogue with a legendary "handshake," they formed a Building Bridges Task Force which came up with a report on moving the country forward.[103] Subsequently a Building Bridges Initiative Steering Committee was formed to evaluate national challenges. Its mandate was to propose sensible suggestions and reform ideas that promote long-term unification. It was also required to provide an overview of the proposed administrative reforms, implementation strategies, and policies for each identified issue area.[104] The steering committee came up with recommendations that included constitutional amendments. The process was

[101] Kanyinga, K., & Odote, C. (2019). Judicialisation of politics and Kenya's 2017 elections. Journal of Eastern African Studies, 13(2), 235-252.
[102] Mutahi, P., & Ruteere, M. (2019). Violence, security and the policing of Kenya's 2017 elections. Journal of Eastern African Studies, 13(2), 253-271.
[103] Benson, G. H. (2022). Electoral Dispute Resolution in Ghana since 1992: An Assessment of the Role of the Judiciary Arm of State. Journal of Advanced Research in Social Sciences, 5(4), 35-64.
[104] Obure, C. The Building Bridges Initiative (BBI)–silver bullet to national unity in kenya, or just another missed opportunity?

however halted by the courts which held that a sitting president could not initiate constitutional amendments.[105] This led to the holding of the 2022 election under the Constitution of Kenya 2010, where Dr. William Ruto was declared the President. The Supreme Court confirmed his victory despite the results being contested.[106] No widespread violence, protests or skirmishes were reported although the opposition announced that they did not agree with the findings of the Supreme Court.[107] The fact that Kenya has never experienced the of violence experienced during the colonial period, the second liberation and the 2007/2008 post-election crises after the mediation process in 2008 is perhaps the greatest testament to the potential of ADR to be used not only to bring to end a national crises but to be the actual bedrock from which the nation rebuilds and renews itself.

6.0 Legal Framework for Transitional Justice

Transitional justice includes aspects of both accountability and non-re-occurrence. The legal mechanisms will therefore be those that hold the most culpable parties accountable while at the same time ensuring that peaceful coexistence is permanently established. Since 160 governments ratified the Rome Statute in 2002, the International Criminal Court has operated as a permanent instrument of accountability on a global scale. The statute is the paramount legal document for international transitional justice.[108] It is a permanent deterrence against would be perpetrators or inciters of violence. The court acts as a fail-safe mechanism where local prosecution is insufficient or

[105] Akech, M. (2022). The Basic Structure'Doctrine'and the Politics of Constitutional Change in Kenya: A Case of Judicial Adventurism? Available at SSRN 4270138.
[106] Francis, L. (2022). Elections in Kenya: When All Roads in East Africa Lead to Nairobi. Journal of Public Policy and Administration, 7(1), 54-65.
[107] Washington Post. (2022). Kenya Supreme Court backs presidential election results, affirms Ruto's win accessed at *https://www.washingtonpost.com/world/2022/09/05/kenya-supreme-court-ruto/* last accessed on 8th November 2022
[108] Bracka, J. (2021). The Applicability of Transitional Justice to the Israeli–Palestinian Conflict. In Transitional Justice for Israel/Palestine (pp. 127-157). Springer, Cham.

unavailable.[109] Under international law, perpetrators can be prosecuted for crimes such as genocide, crimes against humanity, and war crimes. When atrocities are committed by a member of a state party, on the territory of a state party, or in a nation that has acknowledged the ICC's jurisdiction, or when the crimes are referred to the ICC Prosecutor by the UN Security Council (UNSC) in accordance with a resolution passed in accordance with chapter VII of the UN charter, the ICC may assume jurisdiction. The ICC can therefore assume jurisdiction where a party is not even a signatory to the Rome Statute.[110]The ICC prosecutor identified six individuals in the aftermath of the 2007/2008 post-election violence that he cited as the most responsible for the atrocities and referred them to the court.[111]

Prior to the ratification of the ICC Statute in 2002, the UNSC set up ad hoc international criminal tribunals in to prosecute those responsible for genocide, war crimes, and other atrocities and serious humanitarian violations conflicts.[112] They include the Nuremberg Trials, the International Criminal Tribunal for the former Yugoslavia (ICTY) set up in 1993, and the International Criminal Tribunal for Rwanda (ICTR) set up in 1994. The Rwandan government also used its national criminal justice system to try lower-level offenders who were not prosecuted at the ICTR. However, concerned with the slow pace, high expense, remoteness of the courts and their distance from the scenes of crime, the Rwandan Government decided to revive the Gacaca court system in June 2002.[113] The system is a modern version of the traditional Rwandese court

[109] Clark, P. (2018). Distant Justice: The Impact of the International Criminal Court on African Politics. Cambridge University Press.
[110] Part 2 of the 2002 Rome Statute of the International Criminal Court
[111] Lugano, G. (2022). Distance in the International Criminal Court's Relations with the 'Local'. International Journal of Transitional Justice, 16(3), 346-362.
[112] Meernik, J. (2022). The impacts of the International Criminal Tribunals on human security and human rights. In Research Handbook on International Law and Human Security (pp. 225-240). Edward Elgar Publishing.
[113] Carter, L. E., Ellis, M. S., & Jalloh, C. C. (2016). The important relationship between international criminal courts and national judicial proceedings. In The International Criminal Court in an Effective Global Justice System. Edward Elgar Publishing.

system which focuses on restorative justice. As a Traditional Dispute Resolution Method (TDRM), it is more efficient and effective as it does not aim to achieve justice by punishing the perpetrator, but to restore social order by finding communal, compromised solutions and by reintegrating the offender within the community.[114] The country also took into account the cultural incompetence of the ICTR as it was neither people owned nor home-grown. It therefore could not authentically offer reconciliation for the Rwandese. The ICTR is governed by its own statute, which makes no mention of reconciliation. The Gacaca system is meant to complement the domestic criminal courts. These courts are plagued by backlog attributed to the fact that many judges, prosecutors and lawyers were killed in the genocide with the lucky ones having fled the country. The Gacaca courts have reported that by 2012, they had tried approximately 1,951,388 cases in fewer than eight years, and the conviction rate was about 65%[115]

Compared to the national criminal justice system, this is phenomenal success as the courts had only resolved 10,026 cases in the same period.[116] The system has also been hailed for creating an enabling environment for proceedings that are less formal, less adversarial and more participatory. One of the system's best qualities has also been its ability to save money, since the ICTR completed 75 cases at a cost of almost 1.5 billion dollars, while the Gacaca system only cost 45 million dollars..[117] This increases the speed of dispute resolution, thereby helping the communities move forward. However, there are concerns over the legality of the Gacaca legislation as the parties are not allowed legal

[114] Clark, P. (2007). Hybridity, holism, and traditional justice: The case of the Gacaca courts in post-genocide Rwanda. Geo. Wash. Int'l L. Rev., 39, 765.
[115] Hobson, J. (2019). Prosecuting Lemkin's concept of genocide: successes and controversies. Genocide Studies and Prevention: an International Journal, 13(1), 19-32.
[116] Ibid.
[117] Galbraith, J. (2009). The pace of international criminal justice. Mich. J. Int'l L., 31, 79.

representation. Questions have also been raised regarding the competence of the Gacaca judges.[118]

Instruments of international law relating to human rights offer a foundation for transitional justice as well. Such instruments include: The Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention for the Protection of All Persons from Enforced Disappearance. They provide for rights and fundamental freedoms of the citizens of state parties. The rights guaranteed thereon are justiciable under national, regional and international courts. Some of these instruments also have punitive aspects. International customary law also provides a legal framework for transitional justice. Jus Cogen norms provide nations with prosecutorial jurisdiction even for citizens of states who commit certain crimes against humanity.[119]

After conflict, nations usually establish truth and reconciliation commissions. Their recommendations are the most important framework on transitional justice.[120]A good example is the Waki Commission-(CIPEV), and the Kriegler Commission - (IREC). These two reports highlighted the causes of Kenya's repeated cycles of electoral violence. The causes listed included: institutional inadequacies in electoral contentions, lack of trust, confidence and institutional inadequacies in the judiciary, competing identities leading to ethnicisation of electoral conflicts, politicization of the police service. Faith-Based Organisations (FBOs), and the clergy were also cited for incitement by advancing and

[118] Lakin, S. J., & Wibabara, C. (2022). The Contribution of Criminal Trials and Symbolic Reparations to Reconciliation in Rwanda. In the Shadow of Genocide: Justice and Memory within Rwanda.
[119] Prince, M. S. (2021). Building The Case for Jus Cogens Norm of Universal Jurisdiction in International Crimes; A Hope for Extra-Territorial Justice. Journal of Legal, Ethical and Regulatory Issues, 24, 1-9.
[120] Moreira da Silva Filho, J. C. (2022). Corporate Accountability for Involvement in Gross Human Rights Violations During the Brazilian Civil-Military Dictatorship–The Role of the Truth Commissions and the Case of Volkswagen Do Brasil. Journal of White Collar and Corporate Crime, 2631309X221079337.

defending biased political positions. Vernacular radio stations were also accused of perpetuating hate speech. The final culprit was the winner takes-all nature of the electoral process in Kenya.[121] The Constitution of Kenya (Amendment) Act, which created a formal framework for constitutional review, was passed as a result of the approval of the reports. With the adoption of the Kenyan Constitution in 2010, this signalled the start of a new era for the nation. The values of democracy and good government are incorporated into the Constitution. It has done this by establishing 47 counties with independent governors, allowing for the devolution of power. As national principles, human rights, equality, inclusivity, accountability, and openness are also ingrained in the constitution. The theories of institutionalism, rule of law, participation of the public, civil liberties, and sustainable development have also been incorporated. Also as a result of the reports, the Truth, Justice, and Reconciliation Commission was established. .[122] Soft law publications such as the African Union, a transitional justice policy, offer a reference guide to nations that want to implement transitional justice.

7.0 Challenges to Transitional Justice

Hierarchy of interests is the most pervasive challenge encountered in transitional justice.[123] Conflicts involve two main parties, namely, perpetrators and victims. These groups are part of the society and must move forward amicably. This involves a delicate balance between accountability and reconciliation. On the one hand, the victims need to feel that their oppressors have been punished to have a sense of closure while on the other hand the process of re-building the nation and peaceful co-existence needs to commence. In the African context, ADR and especially TDRMs can help in this regard. Transitional justice in Africa emphasizes home-grown solutions that integrate

[121] Ibid
[122] Lynch, G. (2018). Performances of Justice: The Politics of Truth, Justice and Reconciliation in Kenya. Cambridge University Press.
[123] Judy Barsalou, 'Trauma and Transitional Justice in Divided Societies.'

different cultural aspects, like cleansing ceremonies and compensation, thereby promoting reconciliation.[124]

It is also necessary to reconsider the punishment of perpetrators since it has a direct impact on harmonious coexistence within a community. Perpetrators represent not only their own interests but that of their communities.[125] They are in effect opinion shapers to their followers. As an illustration, consider Kenya, where Uhuru Kenyatta and William Ruto were named by the ICC's prosecution inquiry as part of those responsible for the post-election violence in 2007/2008, but their selection was viewed as unfair and discriminating by people of their communities. They were notably chosen to serve as President and Deputy President later on. The perpetrators must be included in order to make the procedure pertinent to the national context.

Another challenge is balancing the accountability and closure needs of the victims with the peaceful coexistence notion. Immanuel Kant observes that the idea of amnesty is inherent in the concept of peace..[126] One cannot condemn a large segment of society to retribution and expect a harmonious coexistence between the segment from which the condemned members come from and other segments of society. Thus, there are always concomitant conflicts of amnesty between the quest for justice and accountability and the quest for peace. Lastly, transitional justice may fail to address the underlying issues that led to conflict in the first place. The process may focus too much on resolving the immediate conflict and fail to address the root cause such as being socio-economically marginalized or subjugated by another. Violence is therefore likely to reoccur.

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[124] 'Study on Transitional Justice and Human and Peoples' Rights in Africa' (African Commission on Human and Peoples' Rights).
[125] Zvi D. Gabbay, 'Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices'.
[126] Hunter I, (2012). Kant and Vattel in Context: Cosmopolitan Philosophy and Diplomatic Casuistry. 477-502 | Published online: 19 Nov 2012

8.0 Reforms

The mechanisms adopted for transitional justice need to be context specific as no one size fits all approach can work. An optimized approach, taking into account the cultural and historical underpinnings of the society would be the most suitable. For example, in African societies cleansing ceremonies and dialogue between elders might have better results than a criminal justice led transitional justice mechanism. While investigations by the ICC did not lead to convictions and spurred division, an endorsement of Uhuru Kenyatta and William Ruto by Kikuyu and Kalenjin elders respectively has managed to achieve long lasting peace among the two communities.

The transitional justice process should also be victim-centric and concentrate more on restoration, rebuilding and reparations. As of 2021, internally displaced persons in Nakuru from the 2007/2008 post-election violence are yet to finalize on their resettlement and compensation.[127] The National Consultative Coordination Committee on Internally Displaced Persons (NCCCIDP) established by Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 which oversaw the resettlement, was disbanded in 2018. More concerted effort by leaders are required to ensure that the victims receive their reparations. Equally, the mechanisms for transitional justice should also include the social, economic and cultural rights of the victims as part of the conflict resolution. These will prevent the grievances of the victims from steaming under the surface and finally manifesting themselves in the form of new violence. Indeed, countries where violence and conflict have occurred are uniquely prone to the re-emergence of large-scale violence.[128]

[127] 'Daily Nation. (2021). Resettle Us Before Your Term Ends' - IDPs Appeal to Kenyatta accessed at *https://allafrica.com › stories › 202110200166* on 8th November 2022
19 Oct 2021 — The Nakuru County Int

[128] Manning, C. (2022). How does the inclusion of post-rebel parties shape democracy? Parties, elections, and peace in Mozambique, 1992–2018. In The Effects of Rebel Parties on Governance, Democracy and Stability after Civil Wars (pp. 105-121). Routledge.

9.0 Conclusion

Transitional justice enables a country to move forward after a period of social upheaval, war or conflict. Reparations, diversity management, justice, accountability, and the advancement of socioeconomic and cultural rights are all emphasized in this sort of justice. However, local and international mechanisms have failed in preventing the recurrence of the upheavals especially in Africa.[129] This can be attributed to a number of challenges, such as deficiencies by the local prosecution, case backlogs, and geographical and financial inaccessibility.[130]Further, the mechanisms are focused on resolving the immediate disputes without searching for long term solutions that would effectively address the conflicts. The mechanisms and processes therefore need to integrate long term peace initiatives and solutions to prevent the re-emergence of violence. This includes incorporating Alternative Dispute Resolution (ADR) mechanisms such as mediation, as evidenced by the 2007 general elections. By adopting a multidisciplinary approach to transitional justice, countries are guaranteed to enjoy long periods of peace.

[129] Hermanus Van der Merwe, International Criminal Justice in Africa: Issues, Challenges and Prospects (2015).
[130] Ibid.

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Zvi D. Gabbay, 'Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices'

Africanisation of International Dispute Resolution: Stock taking of African Construction and Engineering Disputes with Reference to the FIDIC Conditions of Contract for Construction

By: ***Bwalya Lumbwe*** *

1. Introduction

Why you may ask, have the FIDIC Conditions of Contract for Construction been chosen to discuss the theme Africanisation of the Dispute Resolution and the sub-theme stocktaking of African Construction Disputes? The answer lies below.

International construction and engineering has a reputation for disputes.[1] This is so because, in general, construction and engineering projects rarely run as planned or as budgeted resulting in claims with a good number turning into disputes.[2] Among the reason for this state of affairs are changes to scope, contract management and interpretation issues, unforeseen circumstances such as changes in anticipated foundation properties,[3] occurrence of epidemics,

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[1]Cyril Chern, *Chern on Dispute Boards* (4th edn, Informa Law 2020) 8; Bwalya Lumbwe, *Effective Dispute Settlement as a Catalyst for Infrastructure Development in the Construction and Energy Industry* (Alternative Dispute Resolution, Vol 8, Issue 2, 2020) 168.

[2] Philip Norman, Leanie van der Merwe. ''Introduction to the FIDIC Suite of Contracts.'' ''In *The Guide to Construction Arbitration*, 3rd edition, edited by Stavros Brekoulakis, David Thomas, 145-171. United Kingdom: Law Business Research Ltd.

[3] HKA.2022. *Crux Insight: Operating in Uncertain Times- A Regional Analysis of Claims and Dispute Causation 2021*, Foreword; Also see HKA interactive dashboard. accessed 11July

pandemics, hurricanes and cyclones. These are risks that are normally managed through contract provisions,[4] with standard contracts being a feature of construction and engineering works. Standard contracts have a long history in the construction and engineering sector developed not only to manage risks but also provide for lower transaction costs, clarity, and certainty of the contract terms. [5]

Almost certainly the most widely used standard forms of construction and engineering contracts internationally including Africa, are those published by Federation Internationale des Ingenieurs-Conseils (FIDIC),[6] more well known by the English equivalent as the International Federation of Consulting Engineers.[7] The forms are used by international development agencies, governments, and the private sector.[8]

2022. *https://www.hka.com/crux-interactive-dashboard:* Also see publications by Arcadis, *The Global Construction Dispute Report,* from 2011.

[4] Aisha Nadar. 2019. ''The Contract: The Foundation of Construction Projects.'' ''In *The Guide to Construction Arbitration*, 3rd edition, edited by Stavros Brekoulakis, David Thomas, 7-17. United Kingdom: Law Business Research Ltd.

[5] Aisha Nadar. 2019. ''The Contract: The Foundation of Construction Projects.'' ''In *The Guide to Construction Arbitration*, 3rd edition, edited by Stavros Brekoulakis, David Thomas, 7-17. United Kingdom: Law Business Research Ltd.

[6] See, about us<*https://fidic.org/about-us*> accessed 24th October 2022.

[7] Donald Charrett.2020. ''Introduction.'' ''*In The International Application of FIDIC Contracts- A Practical* Guide'' 1st edition, edited by Donald Charrett,1-21. United Kingdom and USA: Informa Law; Ellis Baker, Antony Lavers, and Rebecca Major.2019. ''Introduction to the FIDIC Suite of Contracts.'' ''In *The Guide to Construction Arbitration*, 3rd edition, edited by Stavros Brekoulakis, David Thomas, 54-73. United Kingdom: Law Business Research Ltd.

[8] Email to Author from FIDIC, Leva Liaugaude-International Client Manager, dated 25th October 2022; See also fidic.org; See for example Zambia in Bwalya Lumbwe, 'FIDIC Around the World: Zambia' IBA Construction Law International, Vol 15, Issue 4 (Dec 2020) 4.

Though the forms have an English common law origin they are intended to be used and are used non the less in common law, civil law, Islamic etc. jurisdictions as well in those jurisdictions with a combined legal system such as South Africa with a Roman-Dutch law and Ethiopia with common and civil law system.[9] The FIDIC 2017 suite of contracts have also been interpreted in different internationally used languages including French, Spanish, Portuguese and other languages such as Chinese and Russian.[10]

Major multilateral development banks and agencies (Development Agencies) have committed to the use of FIDIC standard contracts in projects they finance by signing agreements with FIDIC. This includes the World Bank and the African Development Bank,[11] two main banks that finance infrastructure projects in Africa. The World Bank was the first signatory in February 2019 with the agreement covering the following contracts:[12]

- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer ("Red book"), Second edition 2017
- Conditions of Contract for Plant & Design-Build for Electrical & Mechanical Plant & for Building & Engineering Works Designed by the Contractor ("Yellow book"), Second edition 2017

[9] See for the different types of legal systems in Africa, John Miles, Tunde Fagbohunlu, Kamal Shah, *An Introduction to Arbitration in Africa* (1st edn, Sweet and Maxwell) Appendix 1.

[10] Email to Author from FIDIC, Leva Liaugaude-International Client Manager, dated 25th October 2022; See also fidic.org.

[11] Other than the World Bank and AFDB others are IADB, Caribbean Development Bank, EBRD, Asian Infrastructure Investment Bank, Islamic Development bank, IFAD, Asian Development Bank and an MOU with EIB. Information as

[12] World Bank signs five-year agreement to use FIDIC standard contracts< *https*://fidic.org/node/23579>accessed**> 2 October 2022.**

- Conditions of Contract for EPC[13] Turnkey Projects ("Silver book"), Second Edition, 2017)
- Client/Consultant Model Services Agreement ("White book"), Fifth Edition 2017;
- Conditions of Contract for Design, Build and Operate Projects ("Gold book") First Edition 2008
- The Short Form of Contract ("Green book"), First Edition 1999.[14]

However earlier or other current editions of the contracts are still very much in use in many countries. These include:

- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer ("Red book"), 1st edition 1999
- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer ("Pink book"), 2010 and earlier editions (Multilateral Development Banks Harmonised Edition).
- Conditions of Contract for Plant & Design-Build for Electrical & Mechanical Plant & for Building & Engineering Works Designed by the Contractor ("Yellow book"), 1st edition 1999
- Conditions of Contract for EPC[15] / Turnkey Projects ("Silver book"), 1st edition 1999
- Client/Consultant Model Services Agreement ("White book"), Fifth Edition 2006.

As result of the development agencies agreement to use the FIDIC contracts, usage is thus bound to further increase worldwide and in Africa.

[13] Standing for Engineer, Procure and Construct.
[14] A new 2nd Edition Green Book was launched in 2021.
[15] EPC stands for Engineer, Procure and Construct

The article is limited to the Conditions of Contract for Construction 1999 and 2017 Red Books and the 2010 Pink Book being the most widely used and have similar dispute resolution clauses,[16] and hence generate the most disputes.

Owing to above, the chosen FIDIC Conditions of Contract for Construction are thus a good barometer for stocktaking of African disputes in the construction and engineering sector and to gauge the Africanisation of international dispute resolution.

2. Dispute Resolution Under the FIDIC Construction Contracts

Dispute Resolution under the FIDIC Conditions of Contract for Construction are two tiered. A dispute must first be referred to a Dispute Board, Dispute Adjudication Board or Dispute Avoidance and Adjudication Board as the first step in the resolution which name is depended on the contract in use. For the 1999 forms the referral is to a Dispute Adjudication Board, for the Pink Book this is to a Dispute Board while for the 2017 forms this is to a Dispute Avoidance and Adjudication Board. For the purposes of this article these will collectively be referred to as Dispute Board (DB) methods.

To note is that a DB will generally consist of one or three members who are generally appointed at the start of the project and who visit the site regularly to stay current with the status of the works. DBs are generally also empowered with issuing of non-binding opinions on any issues including a possible dispute but only if both parties agree to such an act.[17] Where there is a possible dispute, an opinion serves as a sounding board as to whether a party proceeds to declare disputes or not and can be used to settle or find a solution to the issue at hand.

[16] The Client/Consultant Model Services Agreement generate are not part of the article as they generate few disputes but also employ different dispute resolution methods to those in the construction contracts.

[17] Sub-Clause 20.2 Red Book 1999 and 2010 Pink Book, Sub- Clause 21.3 Red Book 2017.

Even more importantly DBs are required to act as dispute preventers as part of their mandate.[18]

The second tier is referral to arbitration where a party is dissatisfied with the decision of the DB. The referral to a DB is generally a precondition to commencement of arbitration.[19] However, the referring party must issue a valid notice of dissatisfaction as precondition to arbitration referral,[20] without which the DBs decision will become final and binding upon the parties.[21]

The FIDIC contracts impose another precondition to commencement of arbitration, in that they allow for a period of time in which parties may attempt amicable settlement on the DBs decision before commencement of arbitration.[22] Nevertheless, arbitration may be commenced 'even if no attempt at amicable settlement has been made,' on the day of expiry of that period or after.[23]

3. Dispute Board Membership

The FIDIC construction contracts do not provide for the qualifications of DB members. The Red and Pink Books simply state that the members must be suitably qualified.[24] However, FIDIC maintains the President's List of Approved Dispute Adjudicators (Presidents List). 'Members of the FIDIC President's List

[18] Sub-Clause 21.3 Red Book 2017 and the DB Dispute Rules in the Pink Book; See for procedure, Dispute Resolution Board Foundation, *Dispute Board Manual: A Guide to Best Practices and Procedures* (2019, Dispute Resolution Board Foundation.).

[19] Except under certain conditions such as the absence of a DB. See Red Book 1990 sub-clause 20.8; See Julian Bailey, *Construction Law* (2nd edn, Informa Law from Routledge) par 23.13; See Renato Nazzini.2018. '*In Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes,*' edited by Renato Nazzini, 25 -32.

[20] Sub-clause 20.4 1999 Red /Pink Book; Sub-clause 21.4 2017 Red Book.

[21] Sub-clause 20.4 1999 Red /Pink Book; Sub-clause 21.4 2017 Red Book.

[22] Sub-clause 20.5 1999 Red /Pink Book; Sub-clause 21.5 2017 Red Book.

[23] Sub-clause 20.5 1999 Red /Pink Book; Sub-clause 21.5 2017 Red Book.

[24] Sub-clause 20.2 1999 Red /Pink Book; Sub-clause 21.1 2017 Books.

are suitably qualified individuals holding a valid FIDIC Certified Adjudicator Certification issued by FIDIC's independent credentialing body, FCL…….'[25] The listed persons undergo a rigorous assessment and testing which upon passing are then accepted for listing on the President's List of Approved Dispute Adjudicators.[26]

The existence of the Presidents List does not mean that parties are bound to choose DB members from the list. The FIDIC construction contracts do not impose a condition for parties to select members from the Presidents List.[27] The decision as to who the parties chose and agree to be a DB member is left to parties.[28] It is off course advisable to choose members who are assessed by FIDIC to be qualified to run a DB.[29]

A problem that arises from this situation is that some African parties appoint people with no DB experience or those that are not on the President's List of Approved Dispute Adjudicators.[30]

From experience, this results from the users not appreciating the skill and training required to run a successful DB. Secondly this is because some of the parties are simply not aware of the existence of the Presidents List as a resource for appointments. In the FIDIC guidance notes for Red Book 1999 there is no

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[25] President's list of approved Adjudicators<*https://fidic.org/president-list*> accessed 7 October 2022.
[26] Adjudicator certification programme<*https://fcl.fidic.org/our-programmes/adjudicators/*> accessed 7 October 2022.
[27] Bwalya Lumbwe, *Constitution of Disputes Boards: What are the Salient Issues to Consider?* (Alternative Dispute Resolution, Vol 7, Issue 1, 2019) 291.
[28] Bwalya Lumbwe, *Constitution of Disputes Boards: What are the Salient Issues to Consider?* (Alternative Dispute Resolution, Vol 7, Issue 1, 2019) 291.
[29] Bwalya Lumbwe, *Constitution of Disputes Boards: What are the Salient Issues to Consider?* (Alternative Dispute Resolution, Vol 7, Issue 1, 2019) 291.
[30] Malawi and Kenya are cases in point for publicly procured projects.

mention of the existence of the President's List which a party can access and use to make DB appointments. In the 2017 version there is mention of this but gives the impression that the list is only usable in the case where circumstances permit an appointment of a DB member(s) has to be made by the FIDIC President.[31]

3.1. African Representation on the Presidents List and Dispute Boards

The Presidents List of Approved Dispute Adjudicators is the predominant list for sourcing DB members for both FIDIC and non FIDIC projects.[32]

As of the 6th of October 2022, there were a total of 109 names on the list. The number of Africans was 10, broken down as follows: South African-5, Zambia-3, Zimbabwe-1, and Kenya-1.[33] There are no West Africans or North African listed.[34]

In terms of domicile 9 of the Africans live in Africa, one in Thailand. There are also 4 listed people domiciled in various African countries who are not Africans.

There are no statistics available to show the number of Africans siting on African based DB's or the number of those DB's. A safe assumption though is that there are lot more DB positions in Africa than would satisfy the number of listed Africans as will be seen below. From that point view it can be concluded that

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[31] Clause 21, FIDIC Red Book 2017, Notes on the Preparation of Special Provisions.

[32] Bwalya Lumbwe, *Constitution of Disputes Boards: What are the Salient Issues to Consider?* (Alternative Dispute Resolution, Vol 7, Issue 1, 2019) 291.

[33] President's list of Approved Dispute Adjudicators <https://fidic.org/president-list> As at 6th October 2022.

[34]President's list of Approved Dispute Adjudicators <https://fidic.org/president-list> As at 6th October 2022; See another article 2019- Bwalya Lumbwe, *Constitution of Disputes Boards: What are the Salient Issues to Consider?* (Alternative Dispute Resolution, Vol 7, Issue 1, 2019) 291.

Africans are under-represented on African DBs.[35] If Africanisation of DB membership is going to be achieved, African professionals should step up, train and undertake the FIDIC assessment.

Secondly there has to be deliberate effort to educate African parties as to existence of the Presidents List with the advantage that listed individuals are equipped to run DBs successfully. This can quite easily be done by targeting African public procurement agencies who with development agencies proffer the conditions of contract to be used. For example, road agencies/departments in Botswana, Malawi, Ethiopia, Uganda and Zambia are known to be use FIDIC Contracts substantially.[36] An additional way of broadcasting the message as to the existence of the Presidents List is to include reference to the list in the guidance notes.

3.2. Performance and Usage of Dispute Boards

The success of DBs can be gauged with referral to a study and statistics by Smith and Grutters.[37] In this study, out of 512 Decisions studied based on 231 dispute boards constituted, only 32 were referred to arbitration, and only 7 of these were overturned in the process.[38] This indicates that 94% of decisions were accepted

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[35] Bwalya Lumbwe, *Constitution of Disputes Boards: What are the Salient Issues to Consider?* (Alternative Dispute Resolution, Vol 7, Issue 1, 2019) 291.

[36] Bwalya Lumbwe, *Constitution of Disputes Boards: What are the Salient Issues to Consider?* (Alternative Dispute Resolution, Vol 7, Issue 1, 2019) 291.

[37] Geoff Smith, Leo Grutters, *Update on the DRBF Survey*, Dispute Resolution Board Foundation DRBF 18th Annual International Conference, Tokyo, Japan, May 2018. Paper can be found at < http://www.drb.org/publications-data/library />

[37] Geoff Smith, Leo Grutters, *Update on the DRBF Survey* (Dispute Resolution Board Foundation DRBF 18th Annual International Conference, May 2018, Tokyo, Japan). Paper can be found at < *http://www.drb.org/publications-data/library* />.

[38] Geoff Smith, Leo Grutters, *Update on the DRBF Survey*, Dispute Resolution Board Foundation DRBF 18th Annual International Conference, Tokyo, Japan, May 2018. Paper can be found at < *http://www.drb.org/publications-data/library* />

by the Parties at first instance and voluntarily complied to with no enforcement proceedings required.[39] This, is thus a big advantage of DB's and shows that they are an effective means of dispute resolution in the construction and engineering sector worldwide and in Africa.

In an earlier study of 2016, it was reported that DBs are increasingly being viewed as an effective solution to dispute resolution, because between 72 per cent and 85 per cent of the cases, the parties accept the Decisions without resorting to arbitration.[40] Whichever statistics are considered, it is quite clear that DBs are a successful form of dispute resolution in construction.

DBs are also far much cheaper than arbitrations and resolve disputes in real time.[41] It therefore makes sense that Africa must include DBs in construction and engineering works contract as opposed to the current status as stated in the 2022 SOAS Arbitration in Africa Survey Report: African Connected Perspective on Major Global Issues, where arbitration is the most preferred dispute resolution method.[42]

In the Smith and Grutters study, the authors state that, from a sample size of 231 dispute boards constituted, 99 were in Africa, with 51 from Eastern Europe

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[39] Geoff Smith, Leo Grutters, *Update on the DRBF Survey* (Dispute Resolution Board Foundation DRBF 18th Annual International Conference, May 2018, Tokyo, Japan). Paper can be found at < *http://www.drb.org/publications-data/library />;* See also Bwalya Lumbwe, *The African Arbitration Association is Here, Now What?* (Alternative Dispute Resolution, Vol 7, Issue 2,2019) 35.

[40] Dante Figueroa, Dispute Boards for Infrastructure Projects in Latin America: A New Kid on the Block; See also Bwalya Lumbwe, *Constitution of Disputes Boards: What are the Salient Issues to Consider?* (Alternative Dispute Resolution, Vol 7, Issue 1, 2019) 291.

[41] Dispute Resolution Board Foundation, *Dispute Board Manual: A Guide to Best Practices and Procedures* (2019, Dispute Resolution Board Foundation).

[42] SOAS, SOAS Arbitration in Africa Survey Report: African Connected Perspective on Major Global Issues (2022, SOAS)

representing 43% and 22% respectively.[43] Smith and Grutters conclude that Africa and Asia are the predominant areas in which dispute boards are used.[44] From this sample size of 231 Projects, the FIDIC form of contract commands 70% of the usage which points toward its popularity in Africa and other jurisdictions.[45]

Of the 231 Projects, the FIDIC 1999 Red book has been used the most at 62 times or 27 % followed by bespoke contracts which take up 56 or 26%, then the FIDIC Pink book is next with 51 or 22 % and the Yellow Book with 35 or 15%.[46] According to FIDIC, the biggest users of their contracts in Africa are South Africa by far, Ethiopia and Kenya as of October 2018.[47] It is however likely that the total figures are suppressed due to illegal copying and the practice of Employers never supplying the actual contract as part of the tender/works but simply referring to it. [48]

The popularity of the FIDIC construction contracts in Africa is likely to hold and is most likely to increase due to Africa's infrastructure developmental needs and due the fact that major donors and development banks are committed to the use of FIDIC contracts.

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[43] Bwalya Lumbwe, *The African Arbitration Association is Here, Now What?* (Alternative Dispute Resolution, Vol 7, Issue 2,2019) 35.
[44] Bwalya Lumbwe, *The African Arbitration Association is Here, Now What?* (Alternative Dispute Resolution, Vol 7, Issue 2,2019) 35.
[45] Bwalya Lumbwe, *The African Arbitration Association is Here, Now What?* (Alternative Dispute Resolution, Vol 7, Issue 2,2019) 35.
[46] Bwalya Lumbwe, *Constitution of Disputes Boards: What are the Salient Issues to Consider?* (Alternative Dispute Resolution, Vol 7, Issue 1, 2019) 291
[47] Dr Nelson Ogunshakin, *Keynote Speech* (FIDIC Africa Contract Users' Conference, October 2018, Johannesburg).
[48] The public procurement authority in Zambia for example uses an illegal copy of the FIDIC Pink Book.

As already stated above if DBs are to be Africanised then there is a need to train and assess more Africans Engineers and other construction professionals to be listed on the Presidents List and thus close up the short fall.

3.3. Enforcement of Dispute Board Decisions

DB decisions become final and binding upon the parties where no notice of dissatisfaction is issued. A decision is binding till finally decided by amicable settlement or arbitration where a valid notice of dissatisfaction is issued.[49] In either case the parties are required to give effect immediately to the DB decision whether binding and final or binding and not yet final.[50]

A problem that often arises in many jurisdictions is the absence of a direct mechanism for the enforcement of decisions made by the DBs whether binding or final and binding.[51] A failure by a party to comply with any decision of the DB is itself referrable to arbitration.[52] Such a referral will likely result in an arbitral tribunal issuing an 'enforceable' interim award, or a final award depending on the circumstances[53] without consideration of the substance of the dispute.[54] In some jurisdictions an award issued as such will be enforceable

[49] Cyril Chern, *Chern on Dispute Boards* (4thedn, Informa Law from Routledge 2020) 431.
[50] Cyril Chern, *Chern on Dispute Boards* (4thedn, Informa Law from Routledge 2020) 431.
[51] Renato Nazzini.2018.''*In Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes*'', edited by Renato Nazzini, 1-24. United Kingdom and USA: Informa Law.
[52] Renato Nazzini.2018.''*In Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes*'', edited by Renato Nazzini, 1-24. United Kingdom and USA: Informa Law
[53] Refer to the existing Sub-Clause 20.7 in the Red, Sub-Clause 20.7 in Pink Book, replacement Sub-Clause 20.7 from the FIDIC Guidance Memorandum to Users of the 1999 Condition of Contract (April 2013) and Sub- Clause 21.7 in the 2017 forms; Jeremy Clover, Simon Hughes, Understanding the FIDIC Red Book and Yellow Books (3rd edn, Sweet and Maxwell) 546-547,
[54] Jeremy Clover, Simon Hughes, Understanding the FIDIC Red Book: A Clause-by-Clause Commentary (2nd edn, Sweet and Maxwell) 408; Jeremy Clover, Simon Hughes,

through the arbitration provisions. However, there are jurisdictions where an award resulting from such a non-final referral is not valid and thus not enforceable.[55]

Where a decision of the DB is turned in to an award, the advantage is that it may be enforceable in many countries worldwide and in Africa. This is because of the effect of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention). As of the 4th of March 2021, 42 of Africa's 54 countries are signed up to The New York Convention.[56]

There are no available statistics indicating which African countries have enforcement problems of DB decisions, but it is likely to be a good number. Having said that, in South Africa DB decisions are enforceable as matter of contract between the parties[57] and without the need for a party to apply for

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Understanding the FIDIC Red Book and Yellow Books (3rd edn, Sweet and Maxwell) 546-547.

[55] Romania as at 2017 is one such country. See Bwalya Lumbwe, DAAB's Role Under FIDIC Conditions: Current Practices and the New Rules (FIDIC Africa Contract Users' Conference, November 2019, Livingstone, Zambia).

[56] Enforcement of awards across Africa – 42 of Africa's 54 states have now acceded to the New York Convention<*https://www.nortonrosefulbright.com/en/inside-africa/blog/2021/03/enforcement-of-awards-across-africa--42-of-africas-54-states#:~:text=HomeBlogTeam-*,Enforcement%20of%20awards%20across%20Africa%20%E2%80%93%2042%20of%20Africa's%2054%20states,to%20the%20New%20York%20Convention&text=On%204%20March%2C%202021%2C%20Malawi,state%20party%20to%20the%20Convention.> accessed 4 October 2022.

[57] See *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* (06757/2013) [2013] ZAGPJH 155; Bwalya Lumbwe, DAAB's Role Under FIDIC Conditions: Current Practices and the New Rules (FIDIC Africa Contract Users' Conference, November 2019, Livingstone, Zambia).

enforcement through the court system.[58] Going to each jurisdiction's court is an option that is likely to be available in most African countries as a means of enforcement of DB decisions. The downside is that this is likely to take a long time[59] thus defeating the purpose of a DB which is partly to get quick and cheap interim decisions so that progress of the projects is not affected.[60]

4. Arbitration

Generally, only a dispute that has a valid notice of dissatisfaction[61] and has not been settled amicably[62] can be referred to arbitration.[63] FIDIC 1999 Red Book and 2017 forms provides for disputes to be settled by international arbitration under the Rules of Arbitration of the International Chamber of Commerce (ICC) unless both parties agree otherwise.

On the other hand, the Pink Book has various configurations. Where the contract is with a foreign contractor and financed by any participating bank, other than the Asian Development Bank international arbitration will be conducted '(1) with proceedings administered by the arbitration institution designated in the Contract Data, and conducted under the rules of arbitration of such institution; or, if so specified in the Contract Data,(2|) international arbitration in accordance with the arbitration rules of the United Nations Commission on International Trade Law(UNCITRAL); or (3) if neither an arbitration institution

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[58] Atkins Chambers, Hudson's Building and Engineering Contracts (14th edn, Sweet and Maxwell) par 11-85.

[59] Bwalya Lumbwe, *Constitution of Disputes Boards: What are the Salient Issues to Consider?* (Alternative Dispute Resolution, Vol 7, Issue 1, 2019) 291.

[60] Cyril Chern, *Chern on Dispute Boards* (4thedn, Informa Law from Routledge 2020) 8-32; See also Dispute Resolution Board Foundation, *Dispute Board Manual: A Guide to Best Practices and Procedures* (2019, Dispute Resolution Board Foundation).

[61] Sub Clause 20.4 in the Red and Pink Book. Sub-clause 21.4 in 2017 forms.

[62] Sub Clause 20.5 in the Red and Pink Book. Sub-clause 21.7 in 2017 forms.

[63] Save for instances where there is no DB in place. See Sub-clause 20.8 Red/Pink Book. Sub- clause 21.8 in 2017 forms.

nor UNCITRAL arbitration rules are specified in the Contract Data, with proceedings administered by the International Chamber of Commerce(ICC) and conducted under the ICC Rules of arbitration; by one or more arbitrators appointed in accordance with said arbitration rules.'[64] The provision specific to the Asia Development Bank are of no interest to Africa and therefore not discussed.[65]

Where the Contract is with a domestic contractor, arbitration will be 'with proceedings conducted in accordance with the laws of the Employer's country.[66] Under the 1999 Red Book the number of arbitrators is three while under the 2017 Red Book and the Pink Book the number is either one or three appointed under the provision of the applicable arbitration rules.[67]

Whereas the place of arbitration or the seat is to be specified under the Pink Book in the Contract Data, the other books are silent on the issue. The Pink Book also specifies that the place of arbitration shall be a neutral venue and specified in the Contract Data.[68] In other words, and specific to international arbitration, it should not be the country of the Employer or Contractor.

For the Red Books 2017 and 1999, the Guidance for the Preparation of Special Provisions or Guidance for the Preparation of Particular Conditions, respectively, recommends that for major projects tendered internationally, it is desirable that the place of arbitration be situated in a country other than that of the Employer or Contractor.[69] The country chosen should also have a modern

[64] Sub-clause 20.6(a)(i) the Pink Book.
[65] Sub-clause 20.6(a)(i) the Pink Book.
[66] Sub-clause 20.6(b) the Pink Book.
[67] Sub-clause 20.6 in the Red/Pink Book, Sub-clause 21.6 in 2017 forms.
[68] Sub-clause 20.6(b) the Pink Book.
[69] See for example the Red Book 2017 guidance under 21.6 or the 1999 Red Book Guidance under 20.6.

and liberal arbitration law and should have ratified some convention such as the New York Convention to facilitate the enforcement of awards in the states of the parties.[70] As already indicated above 42 of the Africa's 54 countries are signatories to the Convention.

There is no reason why Employers who proffer the standard conditions of contract should not chose a suitable neutral African jurisdiction and state that in the Contract Data or Special Condition as the seat.[71] In my experience the parties always chose a non-African seat.

By the same token there is no reason why the rules of arbitration should not be that of an African arbitral institution and stated in the standard contracts. There are many African arbitral institutions with perfectly good rules.[72] However, the international nature of the projects may favour the use of either UNICITRAL rules or ICC rules both of which are well known in Africa. For those countries

[70] See for example the Red Book 2017 guidance under 21.6 or the 1999 Red Book Guidance under 20.6.

[71] Emilia Onyema, 2020 Arbitration in Africa Survey Report: Top African Arbitral Centres and Seats (2020, Emilia Onyema).

[72] See Onyema <*https://cdn.arbitration-icca.org/s3fs-public/document/media_document/list_of_arbitration_institutions_in_africa_-_emilia_updated.pdf*> accessed 13 October 2022; Institutional arbitration in Africa: Opportunities and challenges<*https://www.whitecase.com/insight-our-thinking/institutional-arbitration-africa-opportunities-and-challenges*> accessed 13 October 2022.

who are signatories to UNCITRAL[73] and those firms who are members of ICC,[74] it makes sense to use the rules operated by these bodies.

5. African Representation in International Construction and Engineering Arbitration

As is the case with DBs, it is difficult to know the number of Africans appointed as arbitrators under the FIDIC contracts or any other construction contracts owing to lack of statistics.

However, the trend of things can be gotten by examining statics produced by various arbitral institutions. A popular international dispute resolution institution for construction and engineering disputes is the ICC.[75] In their 2021 release of Dispute Resolution 2020 Statistics publication, ICC states that 'Disputes arising from construction/engineering and energy historically generate the largest number of ICC cases. This trend was confirmed in 2020 with 194 and 167 cases respectively, accounting for approximately 38% of all cases.'[76] Under The International Centre for Settlement of Disputes (ICDS) construction accounted for 12% of disputes so far in 2022.[77] The London Centre for International Arbitration (LCIA) construction and infrastructure accounted for 7% of the case load in 2021.[78]

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[73] See Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status* accessed 13 October 2022.

[74]Member companies< *https://iccwbo.org/about-us/global-network/member-companies/*> accessed 13 October 2022.

[75] The differences among the various institutions may be due to the way the sector is classified.

[76] International Chamber of Commerce (ICC), Dispute Resolution 2020 Statistics (ICC).

[77] The International Centre for Settlement of Disputes, *The ICSID Caseload – Statistics Issue 2022-2* (ICSD)

[78] LCIA, *2021 Annual Casework Report* (LCIA).

None of the reports itemize the type of or standard construction contract that is under dispute. However, a closer examination of the ICC report may reveal a general trend that is likely to also apply in construction and engineering dispute appointments and seats with regards to African disputes. The ICC statistics have been chosen for no other reason than the belief that it is the most popular institution for international construction and engineering disputes.

In the 2020 Statistics 'the ICC International Court of Arbitration registered 929 filings, leading to the highest number of cases being administered under the ICC Arbitration Rules (1,833), number of parties involved (2,507) and number of appointments or confirmations of arbitrators (1,520). Other records include the geographical diversity of arbitrators (92 nationalities) and places of arbitration (65 countries).'[79] An examination of some of the statistics follows below.

5.1. ICC Parties by Region

The ICC breakdown of parties by region is as in the table below:

Table 1. Breakdown of Parties by Region

Region	**Breakdown Percentage**
North and West Europe	31.8%
Latin America and Caribbean	15.8%
South and East Asia and The Pacific	13.6%
Central and West Asia	12.5%

[79] International Chamber of Commerce (ICC), Dispute Resolution 2020 Statistics (ICC). Found at <*https://iccwbo.org/media-wall/news-speeches/icc-unveils-preliminary-dispute-resolution-figures-for 2021/#:~:text=In%202021%2C%20the%20Secretariat%20of,of%20filings%20reported%20in%202020.*>accessed 4th October 2022.

North America (USA and Canada)	10.8%
Central and East Europe	8.6%
Sub-Sahara Africa	5%
North Africa	1.8%

African parties only amounted to 6.8% of all the ICC disputes.

5.2. Arbitrators by Region

The breakdown of arbitrators handling the disputes in 2020 by region is as below:

Table 2. Breakdown of Arbitrators by Region

Region	**Breakdown Percentage**
North and West Europe	52.3%
Latin America and Caribbean	15.5%
North America (USA and Canada)	13.3%
South and East Asia and the Pacific	7.0%
Central and East Europe	4.9%
Central and West Asia	4.7%
Sub-Saharan Africa	1.2%
North Africa	1.1%

Africa contributed only 2.3% of arbitrators which could partly be explained by the low number of parties from Africa or parties choosing non-African arbitrators. For the record in 2020, 60% of the parties appointments were made by the parties, 25% by the ICC Court, 15% by co-arbitrators.[80]

[80] International Chamber of Commerce (ICC), Dispute Resolution 2020 Statistics (ICC).

Africa contributed 6.8% of the disputes but only 2.3% of arbitrators were African. In contrast North and West Europe contributed 31.8% of the disputes but 52.3% of the arbitrators.

5.3. Place of Arbitration by Region

Table 3. Breakdown of Places by Region

Region	**Breakdown Percentage**
North and West Europe	53.5%
North America (USA and Canada)	13.95
South and East Asia and the Pacific	9.7%
Latin America and Caribbean	9.7%
Central and West Asia	8.7%
Central and East Europe	3.1%
Sub-Saharan Africa	1.0%
North Africa	0.4%

1.4% of arbitrations in 2022 were seated in Africa. If you consider that African parties account for 6.8% of the parties one would expect a higher number of African seats to be in Africa. Again, by contrast North and West Europe with a contribution of 31.8% of the parties had 53.5% of the seats.

The low number of African seats may be explained by the low number of African parties or parties simply choosing another place other than an African one.

5.4. Applicable contract law

When it comes to selection the of the applicable law for deciding contract disputes, the most frequently selected was English law with 122 cases (13% of

all cases registered), the laws of a US state (104 cases),17 followed by Swiss law (66 cases), French law (56 cases), and the laws of Brazil (42 cases).

There is no record to show that any African law was selected.

5.5. Diversity

With regard to gender, the ICC provides statistics for gender diversification only. The number of women represented 23.4 % of all appointments of which, 42% were nominated by the parties, 40% were appointed by the ICC Court, and 18% were nominated by the co-arbitrators to act as chair of the arbitral tribunal. The report does not state how many of these women were Africans. Diversity should not just be about women but should include ethnicity. It would therefore be a welcome change to see a dedicated section showing ethnic diversity not only in ICC statistic reports but in others as well.

Perhaps in mitigation, the ICC Court has appointed a Regional Director for Africa with a view to developing ICC activities and raising awareness of ICC dispute resolution services within Sub-Saharan countries but also to help to expand the pool of qualified African practitioners who may act in the many ongoing and future disputes arising in the region.[81] This is therefore an admission that Africans are under-represented in African disputes.

6. Conclusion

Africans can increase the participation of its citizens in arbitration by stating African seats, African contract law, African arbitration law and use African rules of arbitration as much as possible. This is possible as the African Employers who proffer the FIDIC contracts can state these in the contract either by substitution of the stated positions or by statements in the Contract Data or Special Conditions.

[81] International Chamber of Commerce (ICC), Dispute Resolution 2020 Statistics (ICC).

Where each party has a right to make an appointment of a DB member or an arbitrator, they should use that right to appoint a qualified African. In case of co- DB members or co-arbitrators African must act to get an African to be the Chairperson.

With regard to arbitration this is line with the provisions of the African promise.[82] There is no reason why the provisions in the African Promise cannot be applied in the context of DB appointments. For that matter there is no reason why there should not be another African promise for DBs. Having used the African Promise successfully in an international arbitration, there is no reason why the same principles cannot be applied in DB appointments. Sadly, though I have yet to see other African apply it. Whatever the reasons are for Africans or other nationalities not appointing Africans in African based DB and arbitration work must come to the fore. The key though lies with African government procurement agencies and development agencies as getting African appointed is the first step towards getting more African seats using African rules etc. wherever this is best, possible or necessary.

With regard to statics from international arbitration institutions the statics should be streamlined to show direct comparison between African based disputes to seats, to the African involved as arbitrators, expert witness, tribunal secretaries and the number of African women involved etc.

It is my view as well that when it comes to construction and engineering disputes Africa does not have enough people schooled in construction and engineering law. This needs to change if the numbers of African arbitrators and

[82] Can be found at <*https://afas-global.org/files/promise/An%20African%20Promise%202019.pdf*> and <*https://onyema-arbitration.co.uk/the-african-promise/#:~:text=An%20African%20Promise%20seeks%20to,representation%20as%20soon%20practically%20possible.* > accessed 27 October 2022.

DB member is to be increased to handle international construction and engineering disputes whether the dispute involves a FIDIC contract or any other.

The Implied Promise to Honour an Arbitration Award and the Remedies for its Breach

By: ***Hazron Maira****

Abstract

This paper examines the principle of the implied contractual promise to honour an award and the remedies available to a successful claimant in an arbitration following a breach of that promise by the respondent. The paper establishes three principles, first, that an agreement to arbitrate disputes is enforceable because of the implied promise by the parties to perform any valid award contained in the arbitration agreement. Secondly, where an unsuccessful respondent in an arbitration is in breach of the implied promise to honour an award and the successful claimant seeks remedy by invoking the enforcement provisions in the legislation governing arbitration, the enforcement is a summary process, and the court must enter judgment in terms of the Award. Thirdly, in an ordinary action brought in court for the breach of the implied promise to perform an award, the court may exercise its jurisdiction and fashion an appropriate remedy chosen from the full range of remedies available in an ordinary common law action, to give effect to the award, which may be distinct from any remedy that might have been claimed in the arbitration.

1.0 Introduction

An arbitral tribunal determines a dispute between parties in accordance with the terms of their arbitration agreement, the rules of law and the legislation governing arbitration.[1] The final dispositive determination (or the award) could be declaratory in form i.e., decides some question as to the respective rights and

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[1] *Jivraj v Hashwani* (Rev 2) [2010] EWCA Civ 712 at para 16.

obligations of the parties,[2] or it could be coercive (or executory) in form i.e., where it orders a party to do or not to do something.[3] When an arbitral tribunal makes a valid final award on the merits, its jurisdiction is exhausted subject to any remission from the courts.[4] Once in possession of a valid final award, the unsuccessful party may decide to honour it, in which case, the matter comes to an end, but if the award is not honoured, the successful claimant is entitled to pursue enforcement proceedings in courts.

The policy of the law is to give effect to the presumed intention of the parties,[5] and in the enforcement of an arbitral award, the jurisdiction of the enforcement court is founded on the agreement that provided for resolution of disputes by arbitration.[6] It has long been recognised that an arbitration agreement is a contract in its own right, and by that contractual relationship, parties make legally binding promises,[7] for example, they implicitly make a binding promise to have any dispute arising out of the relationship into which they had entered should be decided by the same tribunal,[8] and they also implicitly make a binding promise to honour any valid award made by that tribunal.[9]

This paper examines why the principle of the implied promise to honour an award is the driving principle in the enforcement of the arbitration agreement and discusses the topic in four parts. Following this introduction, in the second

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[2] Hew R. Dundas, The West Tankers Saga Continues: A New Twist—Negative Declaratory Awards, (2012) 78 *Arbitration*, Issue 2, 213
[3] *Ibid*
[4] *Hussmann (Europe) Ltd. v Pharaon* [2003] EWCA Civ 266 at para 83
[5] *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48 at para 36
[6] See discussion in *The Bumbesti, Re* [1999] EWHC B6 (Admlty) where it was held that the jurisdiction of the Admiralty Court to arrest a vessel is to enforce a charterparty and not an arbitration award arising out of the charterparty.
[7] Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract*, Published in the Taylor & Francis e-Library, 2010 at p.15.
[8] *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40 at para 13
[9] *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich (Bermuda)* [2003] UKPC 11 at para 9

part, the paper briefly discusses the legal principles upon which the implied promise to honour an award is founded including a brief review of some early cases that followed the principle. The third part discusses the breach of the contractual promise to honour an award, the accrual of cause of action[10] and recognition and enforcement of an award, followed by a discussion in the fourth part of the remedies available to a successful claimant in an arbitration seeking enforcement of the award, before concluding in the fifth part.

2.0 The implied promise to honour an award

Under common law, enforcement of an arbitration award is founded upon a contractual promise by the parties to honour the award.[11] This principle originated when the only means of enforcement of awards was by an action on the award but in the modern times, that procedure has been largely superseded by the more summary methods contained in arbitration legislation laws and Articles in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[12]

There has been some debate as to whether the promise to honour a valid arbitration award is contained in the arbitration agreement in the parties' underlying contract or in a separate contract which comes into being when a dispute is submitted to arbitration. In *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain & Anor (M/T 'Prestige' Nos. 3 and 4)*[13], the English Court of Appeal held that it must be the former and gave an example of the case that was before it, where the respondent had played no part in submitting a dispute to arbitration and had even denied the arbitrability of the claim. The court said in such circumstances to say that a respondent makes

[10] See *Letang v Cooper* [1965] 1 QB 232, 242. "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person."
[11] *Agromet Motoimport v Maulden Engineering Co (Beds) Ltd* [1985] 1 WLR 762
[12] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain & Anor (M/T 'Prestige' Nos. 3 and 4)* [2021] EWCA Civ 1589 at para 108
[13] *Ibid*

a new promise to perform the award is artificial. The Court proceeded and said the better view is that such an obligation already exists because the parties have agreed to arbitration in the first place (or, when a conditional benefit analysis applies, when a party becomes bound by the arbitration clause by virtue of making a contractual claim).

The implied promise to honour an award can be inferred from the written arbitration laws, for example, s.32A of the Arbitration Act, 1995[14] (hereinafter referred to as "the Arbitration Act") provides that –

> "…. an arbitral award is final and binding upon the parties to it, ..."[15].

A provision with almost similar wordings is s.58 of the English Arbitration Act 1996 which provides that "... an award made by the tribunal pursuant to an arbitration agreement is final and binding ... on the parties ..." In *Associated Electric & Gas Insurance Services Ltd v. European Reinsurance Company of Zurich (Bermuda),*[16] Lord Hobhouse said that the foundation of arbitration is the determination of the parties' rights by the agreed arbitrators pursuant to the authority given to them by the parties. He then referred to s.58 cited above and said that it was an implied term of an arbitration agreement that the parties agree to perform the award. Based on this authority, it is therefore implicit the same principle applies to s.32A of the Arbitration Act.

In *National Ability SA v Tinna Oils & Chemicals Ltd,*[17] the English Court of Appeal said that an "arbitration agreement is in essence enforceable because of the

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[14] Revised Edition 2019 [1995]

[15] See *Shell Egypt West Manzala GmbH & Anor v Dana Gas Egypt* Ltd [2009] EWHC 2097 (Comm) at para 45; "An award can be said to be "binding" in that each party promises to abide by the award and to perform it; … An award is "final" in the sense that the successful claimant is precluded by the award from bringing the same claim again in a fresh arbitration or action."

[16] *supra* fn. 9 at para 9

[17] [2009] EWCA Civ 1330 at para 14

implied contractual promise to pay an arbitration award contained in the arbitration agreement; all measures of enforcement essentially rest upon the contract." The court then referred to s.26 of the English Arbitration Act of 1950 and s.66 of the 1996 Arbitration Act (with both sections containing enforcement provisions of arbitral awards) and said both must be seen in that context. They are simply procedural provisions enabling the award made in consensual arbitral proceedings to be enforced. Applying this authority to the Kenyan law, it follows that the enforcement provisions in s.36 of the Arbitration Act must be seen in the same context.

It has also been observed that there is at least a strong argument that enforcement of the New York Convention awards is founded upon the same principle.[18]

2.1 Some of the early cases that followed the principle of the implied promise to honour an award

The objective of briefly reviewing some of the earlier cases that followed the principle of the implied promise to honour an award is to note the finer details that govern it. One of the earliest cases on record was *Purslow v Bailey* (1704) 2 Ld Raym 1039[19] which was a case concerning an arbitral award requiring the defendant to provide the plaintiff with a couple of pullets to be eaten at the defendant's house in satisfaction of a trespass. In the judgment, the Chief Justice said:

> "as the law is now, the party might have an action upon the case for the breach of his promise in non-performance of the award. For the submission is an actual mutual promise to perform the award of the arbitrators; …"

[18] *Ministry of Defence & Support for Armed Forces of the Islamic Republic of Iran v International Military Services Ltd* [2020] EWCA Civ 145 at para 74
[19] Cited in *M/T 'Prestige' Nos. 3 and 4* (*supra* fn. 12) at para 109

The court did not to give judgment but "exhorted the parties to eat the pullets together, which they would have done at first, if they had had any brains". The reference to the term "non-performance" of the award implies that the award is one which can be performed,[20] and the terms "honour" or "perform" an award therefore mean the same thing.[21]

In modern times, the leading case is *Bremer Oeltransport GmbH v Drewry*[22] where a charterparty contract made in London provided for resolution of disputes by arbitration in Hamburg, Germany. The successful claimant sought to enforce the award by action and obtained permission to issue and serve a writ on the defendant out of the jurisdiction. The issue at the court of appeal was whether the action based on the award was for the enforcement of a contract made within the jurisdiction and the court held it was, rather than being an action on the award itself which had been made in Hamburg. Slesser LJ said that "in an action on the award the action is really founded upon the agreement to submit the difference of which the award is the result." The Court adopted the following statement from a passage in *Leake on Contracts*, 8th Edition:

> "A submission by consent ... implies an agreement to perform the award; upon which an action will lie for non- performance. "

The principle in *Bremer Oeltransport* case was adopted by the Privy Council in *F. J. Bloemen Pty Ltd v Council of the City of Gold Coast* [23] where the court said that the award of an arbitrator "cannot be viewed in isolation from the submission under which it was made" and it creates a fresh cause of action when it is made. Therefore, in order to enforce the award, the claimant has to prove not only the award, but also the submission to arbitration from which an award was made

[20] *Ibid* at para 111
[21] *Ibid* at para 123
[22] [1933] 1 KB 753
[23] [1973] AC 115

and which contained the implied term that the parties would perform any award.

3.0 Breach of the implied contractual promise to honour an award

For the period up to the first half of the twentieth century, parties in a commercial relationship chose arbitration because the mechanism facilitated resolution of disputes with minimal antagonism, the arbitrator would be someone they trusted and respected and whose decision they would honour as a matter of course because that was what they had agreed to do.[24] Thereafter, adoption of dilatory strategy especially by the respondents started creeping in many arbitrations and the tacit assumption that an award would be honoured ceased to be always present.[25] If the unsuccessful party in the arbitration defaults in fulfilling the obligations created by the award, that party would be in breach of the implied promise to perform an award, and a cause of action accrues.[26] The successful claimant would then have the option of seeking enforcement of the award pursuant to the applicable governing arbitration legislation or sue on the award as a cause of action.[27]

3.1 Enforcement of an award

As a general rule, any party seeking a cause of action on an award has to prove its validity because the doctrine *omnia praesumuntur rite esse acta* (everything is presumed to have been done properly) does not apply to arbitration proceedings. As Devlin J said in *Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer R GmbH* [28]*:*

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[24] The Rt. Hon. Lord Mustill, Comments on Fast-Track Arbitration, (1994) 60 *Arbitration*, Issue 4, 234/5

[25] *Ibid*

[26] *Good Challenger Navegante S.A. v Metalexportimport S.A*. [2003] EWHC 10 (Comm), at para 4.

[27] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 at para 79

[28] [1954] 1 QB 8 at p 12-13

> *"There is no presumption that merely because an Award has been made it is a valid Award. It has to be proved by the party who sues upon it that it was made by the arbitrators within the terms of their authority, that is, with jurisdiction. Jurisdiction has to be proved affirmatively."*

It is in the public interest that a valid arbitration award should be recognised and enforced[29] and in order for the court to exercise its supportive powers in enforcement of the award under the relevant arbitration law, a party seeking enforcement must comply with provisions formulated with intention of proving the validity of the award, for example, in the enforcement of an award under s.36 of the Arbitration Act, a party seeking enforcement must provide: (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.[30] By s.36(4), the award must be in English language and if not, a duly certified translation must be supplied. Provisions with almost similar wording are to be found in Article IV of the New York Convention, although at the recognition or enforcement proceedings of the Convention awards, a court may show some latitudes to these formal requirements.[31] Enforcement under s.36 of the Arbitration Act requires an application be made to the high court for the award to be enforced in the same

[29] *Minister of Finance (Incorporated) v 1Malaysia Development Berhad* [2019] EWCA Civ 2080 at para 45

[30] See *Kundan Singh Construction Ltd v Kenya Ports Authority* [2007] eKLR where the application seeking an order that the arbitral award be adopted and made a decree of the court was refused after the plaintiff submitted uncertified photocopies of both arbitral award and the arbitration agreement.

[31] See discussion in *Lombard-Knight & Anor v Rainstorm Pictures Inc* [2014] EWCA Civ 356 on some latitudes that have been shown by the courts to these formal requirements when a party is seeking the recognition or enforcement of a New York Convention award. See also: Lord Justice Tomlinson, The Enforcement of Foreign Arbitral Awards, Paper presented at the CIArb London Branch AGM on 27 April 2015, (2015) 81 *Arbitration,* Issue 4, 398-403. The Lord Justice confirmed that courts are required to construe narrowly the grounds for resisting enforcement of a New York Convention award compared to enforcement of domestic arbitrations and that this "pro-enforcement bias" should be done while respecting the parties' commercial intentions.

manner as a judgement or order of the court to the same effect, and if successful, judgement can be entered in terms of the award.[32] The judgment must not attempt to add or omit an item to the award as that would amount to an alteration by the court of the arbitrators' award.[33] This is essentially a summary process that is suitable where the award is for the payment of money or requires a party to do or refrain from doing something.

Leave to enforce the award as a judgment of the court should be available in all cases unless there is real doubt as to the validity of the award,[34] or there are matters which require a further investigation which could only appropriately be undertaken in an action on the award,[35] for example, resolution of a dispute as to whether the award was settled or varied by subsequent agreement.[36] Therefore, if the court refuses to allow summary enforcement on these grounds, that should not be construed to be a determination of the merits of the respondent's contention. If a successful party in an arbitration opts to seek enforcement by action on the award, that party would be required to prove; "first that there was a submission; secondly, that the arbitration was conducted in pursuance of the submission; and, thirdly, that the award is a valid award, made pursuant to the provisions of the submission, and valid according to the *lex fori* of the place where the arbitration was carried out and where the award was made."[37]

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[32] *Capture Solutions Limited v Nairobi City Water and Sewerage Company Limited* [2020] eKLR

[33] See *Walker v Rowe* [2000] 1 Lloyd's Rep.116 at para 17(5) and *Colliers International Property Consultants ("Cipc") & Anor v Colliers Jordan Lee Jafaar Sdn Bhd* [2008] EWHC 1524 (Comm) at para 15. "…. the court is not empowered to enter the judgment in different terms to those of the Award".

[34] *Middlemiss & Gould (A firm) v Hartlepool Corporation* [1972] 1 WLR 1643, 1647

[35] *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil* Co [1987] 2 Lloyd's Rep 246

[36] *A v B (Rev 1)* [2020] EWHC 2790 (Comm) at para 30

[37] *Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd* (1927) 28 LI L R 104 at 106-107 (cited in *Xiamen Xinjingdi Group Co Ltd v Eton Properties Limited and others* [2020] HKCFA 32, at para 90)

4.0 Remedies for breach of the contractual promise to honour an award

Following a failure to honour an award, a successful claimant has a choice of seeking summary enforcement in accordance with the provisions of s.36 of the Arbitration Act or by an ordinary common law action. It has already been established that by pursuing enforcement in accordance with the former, available remedies must be as a matter of principle strictly be in terms of the award. But that may not necessarily be the case if enforcement is sought in accordance with the latter. In *Agromet Motoimport v Maulden Engineering Co (Beds) Ltd*,[38] an English court approved the approach of Mustill and Boyd on Commercial Arbitration, 1982 Edition the range of remedies available in an ordinary common law action, expressed in the following terms:

> 'Parties to an arbitration agreement impliedly promise to perform a valid award. If the award is not performed the successful claimant can proceed by action in the ordinary courts for breach of this implied promise and obtain a judgment giving effect to the award. The court may give judgment for the amount of the award, or damages for failure to perform the award. It may also in appropriate cases, decree specific performance of the award, grant an injunction preventing the losing party from disobeying the award, or make a declaration that the award is valid, or as to its construction and effect'."[39]

In seeking remedies, different circumstances may apply depending on whether the award is declaratory in nature or is coercive.

[38] *supra* fn. 11
[39] *Ibid*

4.1 Declaratory Award

A declaratory award "imposes no obligation but only confirms the obligation which already exists,"[40] for example, giving confirmation of the principle that an arbitration agreement gives rise to a 'negative obligation' whereby both parties expressly or impliedly promise to refrain from pursuing their claims in any other forum including court proceedings.[41] In this context, it would be in order for a party to commence arbitral proceeding seeking for a declaration to that effect, and it would be correct for an arbitrator to issue an arbitral award declaring that parties are bound by an arbitration clause contained in their contract and all claims relating to that contract must be referred to arbitration.

The case of *West Tankers Inc v Allianz SPA & Anor*,[42] concerned the question of whether the Court had jurisdiction to give leave to enforce a declaratory award as a judgment under s.66 of the English Arbitration Act 1996. In that case, the court affirmed that enforcement can be extended to cover a declaratory award to other means of giving judicial force to the award by recognising it as creating an issue estoppel (such that neither party can re-litigate or arbitrate any issue determined by that award[43]), or as providing a shield against enforcement of an inconsistent foreign judgment. The Court also affirmed that at common law, a successful claimant in an arbitration with a declaratory award in his favour could bring an action on the award and the court, if it thought appropriate, could itself make a declaration in the same terms. In addition, the court noted

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[40] *Zavarco Plc v Nasir* [2021] EWCA Civ 1217, at para 37

[41] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, paras 21-25. See also Javier Pérez Font, *Recognition and Enforcement of Declaratory Awards under English Law as an effective method to protect the Arbitration Agreement*, Cuadernos de Derecho Transnacional (Octubre 2019), Vol. 11, Nº 2, pp. 306-325, DOI: *https://doi.org/10.20318/cdt.2019.4960*. "Thus, as it is well-known, the arbitration agreement is said to have a twofold effect: on one hand, it empowers the tribunal to resolve the disputes with a binding decision (the positive effect); and, on the other, it deprives the parties to the agreement of their right to bring in the disputes before a court (negative effect)."

[42] [2012] EWCA Civ 27, at para 37

[43] See *Fidelitas Shipping Company Ltd v. V/O Exportchleb* [1966] 1 QB 630, 641/4

that the purpose of arbitration legislation provisions is to provide a simpler alternative route to bringing an action on the award, and therefore could not see why the court may not give leave for an arbitral award to be enforced in the same manner as might be achieved by an action on the award and so give leave for judgment to be entered in the terms of the award. However, a declaratory award not being "executory" in form in that it does not formally order either party to do or to refrain from doing anything,[44] "[n]on-compliance with a declaration cannot be punished as a contempt of court, nor can a declaration be enforced by any normal form of execution, although exceptionally a writ of sequestration might be appropriate."[45]

In the *M/T 'Prestige' Nos. 3 and 4* case,[46] the Claimant, *London Steam-Ship Owners' Mutual Insurance Association Limited* (the Club) and the Defendant, *The Kingdom of Spain & Anor* (the States), one of the issues before the court concerned "Award Claims", described in Court as being "for breach of the Defendant's obligation to honour an arbitration award" declaring Spain was bound to pursue its claims in London arbitration. The declaratory awards ("the Awards") had declared; (1) the States are bound by the arbitration clause contained in the Club's Rules and their claims must be referred to arbitration in London, and (2) pursuant to the "pay to be paid" clause in the Club's Rules, the Club is not liable to the States in respect of such claims in the absence of any prior payment. The issue at the appellate court was whether a declaratory award creates any obligation to "honour" the award, breach of which gives rise to a cause of action for damages or equitable compensation.

The Claimant contended that the Award Claims are claims at common law to enforce the Awards which are founded on a well-recognised principle that an agreement to arbitrate (or perhaps the submission of a dispute to arbitration) carries with it an obligation to honour the arbitral tribunal's award; that this

[44] Hew R. Dundas, The West Tankers Saga Continues, (*supra* fn. 2)
[45] *Webster v Southwark London Borough Council* [1983] QB 698.
[46] *supra* fn. 12

principle applies even in the case of a declaratory award; and that in an action to enforce an award at common law, the court has flexibility to fashion an appropriate remedy, which may include a claim for damages or equitable compensation.

Dismissing the Claimant's case, the court noted that a declaratory award merely declares what the parties' rights and obligations are, and in that case, the Award did not order Spain to do or to refrain from doing anything, or to pay money, but merely declared what Spain's obligations (and the Club's rights) were under the Club Rules.[47] Having reviewed the authorities, the court held; (1) it does not make sense to speak of failing to "honour" or to "perform" an award which does not order the defendant to do anything. There is nothing to "honour" or "perform". Just as there can be no "breach" of a declaration amounting to a contempt of court, so there can be no breach of a declaration which merely declares the parties' rights, (2) a declaratory award or judgment does not create new obligations or extinguish existing obligations, but merely declares what those existing obligations are. To hold otherwise would be inconsistent with the nature of a declaration. (3) there is no need to imply any such obligation (which might itself be thought fatal to any obligation founded upon an implied promise). The existing obligations are not merged in the award and continue to exist and can be enforced, if necessary, by a claim for damages. In conclusion, it was held that the Award Claims were bad in law, there was, therefore, no serious issue to be tried and the English Court had no jurisdiction over them.

4.2 Coercive or executory award

A declaratory award is to be contrasted with a coercive or an executory award which can be enforced through the judicial process, and it is given coercive force

[47] *Ibid* at paras 99 & 101

once it is enforced by a court [48] as would any other judicial judgment.[49] In a coercive award, the arbitral tribunal determines the respective rights of the parties and then orders the unsuccessful party to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the claimant's rights.[50] If the order of a court giving effects to such an award is disregarded, it can be enforced by official action, usually by levying execution against the unsuccessful party's property or by imprisoning him for contempt of court.[51] Unlike an arbitral tribunal which has limited coercive powers for the simple reason that its authority is over the parties to the dispute,[52] a court can exercise its coercive powers over third parties when enforcing its judgments.[53]

It has already been established that an arbitrator has powers to issue an order for discretionary relief (such as an injunction or an order for specific performance),[54] and it might therefore be said that the implied promise to honour the award must also extend to honouring such an award.[55] However, any agreement by the parties as to the suitability of discretionary relief does not

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[48] Doug Jones, The Remedial Armoury of an Arbitral Tribunal: The Extent to Which Tribunals Can Look Beyond the Parties' Submissions, (2012) 78 *Arbitration*, Issue 2, 107
[49] Stavros Brekoulakis, The Effect of an Arbitral Award and Third Parties in International Arbitration: *Res Judicata* Revisited, The American Review of International Arbitration (Vol. 16). Available at: *https://www.international-arbitration-attorney.com/wp-content/uploads/res_Judicata_and_third_parties-libreinternational_arbitration.pdf*. [Accessed on 01 Dec 2021]
[50] *M/T 'Prestige' Nos. 3 and 4* (*supra* fn. 12) at para 106
[51] *Ibid* at para 104. See also Kariuki Muigua (2022), *Settling Disputes Through Arbitration In Kenya*, 4th Edition, Glenwood Publishers Limited at p. 231
[52] UNCTAD (2014), UNCTAD Series on Issues in International Investment Agreements II, Doc ref. UNCTAD/DIAE/IA/2013/2, 107. Available at: *https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf.* [Accessed on 01 December 2021]
[53] *Sterling v Rand & Anor* [2019] EWHC 2560 (Ch) at para 49 & 70; *Glamour Construction and Civil Engineering Company Limited v China Wu Yi Kenya Company Limited & another* [2020] eKLR at para 8.
[54] See para with fn. 39
[55] *Sodzawiczny v McNally* [2021] EWHC 3384 (Comm) at para 14

in general oust the court's discretion to determine whether to order or withhold such relief.[56]

4.2.1 The Hong Kong case of *Xiamen Xinjingdi Group Co Ltd v Eton Properties Limited and others.*[57]

The Hong Kong case of *Xiamen Xinjingdi Group Co Ltd v Eton Properties Limited and others* concerned a contract for sale of a property and had an arbitration clause. One of the main issues in the case was on the implied promise to honour a coercive award and the principles in both the Court of Appeal and Court of Final Appeal judgments give a good insight of the enforcement process, and the options available to the court in cases of an ordinary cause of action where there is a non-monetary award that has not been complied with. It is therefore considered appropriate to discuss it in more details.

In 2003, Eton Properties Limited and Eton Properties (Holdings) Limited, both incorporated in Hong Kong (hereinafter referred to jointly as "Eton") entered into an agreement with Xiamen Xinjingdi Group Co Ltd (XXG) whereby Eton declared that it owned the whole of Legend Properties (Xiamen) Company Ltd (Legend), another Hong Kong company. Legend owned another foreign-owned enterprise incorporated in the People's Republic of China (PRC) which in turn had the right to develop and use of a piece of land in Xiamen. In the agreement, Eton warranted that they had "absolute control" over Legend and its foreign-owned enterprise. XXG agreed to purchase the development in the piece of land at Xiamen by acquiring the shares in Legend and thus the foreign-owned enterprise. The agreement provided for payment of a deposit on signing which was duly paid, and payment of the balance of the transfer price by instalments. Delivery of the land was to take place within six months of the date of the agreement

[56] *Ibid*
[57] [2020] HKCFA 32, (2020) 23 HKCFAR 348

A dispute resolution clause in the agreement provided that any party had the right to submit the dispute to the China International Trade Arbitration Commission (CIETAC) in Beijing, and the Arbitration Commission arbitration rules applicable at the time when the dispute occurred were to apply. The agreement was governed by the laws of the PRC but the procedure and validity relating to the transfer of shares of Legend was to be governed by the laws of Hong Kong Special Administrative Region.

In November 2003, Eton wrote to XXG giving notice that performance of the agreement would be discontinued, alleging that issues of illegality had arisen and seeking to return the deposit. XXG declined to accept the termination or return of the deposit. After the expiry of the six months in January 2004, the agreement had not been performed. In August 2005, XXG commenced the CIETAC arbitration in Beijing against Eton and in November 2005, a week before that hearing, Eton commenced restructuring of the corporate shareholdings relating to the land in Xiamen. Following the restructuring, it followed that the promise contained in the agreement that Eton would, at completion of the development, transfer their shares in Legend to XXG could not be performed. Eton did not disclose the details of the restructuring of Legend until January 2008.

The CIETAC arbitration award and attempts at enforcements.

In the arbitral award issued in October 2006, the tribunal recorded that Eton had repudiated the agreement and that XXG refused to accept termination. The Tribunal also noted that Eton asserted that the agreement was illegal and invalid and claimed that even if it was valid, it had become impossible to perform. The tribunal decided that XXG's claim for continued performance of the agreement should be supported and dismissed Eton's counterclaim seeking confirmation that the agreement was invalid. XXG were awarded damages for breach of contract and Eton were ordered to continue performing the agreement. It was therefore a coercive award.

XXG applied *ex parte* to the Hong Kong Court for leave to enforce the award, invoking the statutory procedure provided by the Arbitration Ordinance. By order dated 31 October 2007, the court granted leave to enforce the award and entered judgment in its terms, ordering that Eton "shall continue to perform the [Agreement]…" In January 2008, Eton applied to set aside the aforesaid order and judgment and as the trial Judge noted, it was only in an affirmation filed on that date in support of Eton's application that it was first disclosed that the restructuring had taken place. It was also the first time that XXG had learnt that Eton divested themselves of their shareholding of Legend. With that realisation, in May 2008, XXG started a fresh action, a common law action to enforce the arbitration award.

The Court of Appeal decision

At the Court of Appeal, XXG was successful against the High Court's dismissal of the common law action on the award against Eton. The Appellate Court noted that an arbitration award might be enforced by invoking the statutory procedure or by bringing a common law action and then proceeded to examine the juridical nature of such an action. One principle that is of interest for this paper was the observation that the high court had entered judgment under the statutory procedure and that XXG had not made an informed irrevocable election since it had done so while material information concerning the restructuring had been withheld by Eton. The Court decided that the inconsistent remedies of ordering continued performance of the agreement on the one hand, and damages or equitable compensation on the other, could not stand together. In this regard, when in a position to make an informed choice, XXG was required to make an election which would determine what orders the Court might make as to the further conduct of the proceedings.[58] XXG notified the Court of its election, and the Court ordered that the statutory judgment be set aside, and that judgment be entered in favour of XXG for damages against Eton for breach of the implied promise to honour the Award.[59] Eton appealed.

[58] para 70
[59] para 75

The Court of Final Appeal decision

At the Court of Final Appeal, the basic contention by Eton was that the Court of Appeal was wrong because, in awarding XXG damages, it went beyond the relief that can properly be awarded in a common law action on the award. In support, Eton advanced three main arguments; (1) the "mechanistic argument"; (2) the "outflanking argument"; and (3) the "extant award argument." Having reviewed the parties' submissions and the authorities, the Final Court of Appeal dismissed the appeal, and the following principles can be distilled from the judgment.

1) The "mechanistic argument"

A party seeking to invoke statutory provisions may apply *ex parte* for leave to enforce the award and upon leave being granted, judgment is entered "in terms of the award". The process under statutory provisions is therefore summary in nature and the object of the exercise is for the enforcing court to endow the award with the status of a compulsorily executable judgment without itself scrutinising the merits of the arbitrators' award and only entertaining challenges within the limits laid down in the written governing law.[60] Giving an example of how the role of the court is confined to entering the judgment "in terms of the award", the court cited the principle in *Walker v Rome* [1999] 2 All ER (Comm) 961 at 968 where the award did not grant claimant post-award interest and it was held that under the summary procedure, the enforcing court could not enter judgment including such a sum of interest.[61] It is in that context that the court's task has been said to be "as mechanistic as possible".

However, under common law, an action on the award does not involve the plaintiff obtaining a judgment after an *ex parte* application. The plaintiff must

[60] paras 87/8

[61] at para 89. But the court noted that post-judgment interest stands on a different footing and cited *Gater Assets Ltd v Nak Naftogaz* (No 2) [2009] 1 All ER (Comm) 667.

sue on the award and prove his case.[62] Therefore, the rationale for restricting the court to entering judgment mechanistically does not apply to the common law action. In addition, in a common law action on the award, the Court is not constrained by the requirement that the judgment must be "in terms of the award". The "mechanistic argument" therefore failed.

2) The outflanking argument

Eton's outflanking argument had two versions, the first version was an argument in favour of a stay, contending that instead of awarding damages against it, the Court of Appeal ought to have stayed the Action to arbitration because the claim is in truth a claim to enforce the matrix agreement and is caught by the arbitration clause contained in the agreement. Eton advanced two reasons in support for this, first, suing for breach of an implied promise to perform the award is an action based on and arising out of the agreement and so is caught by the arbitration clause. Secondly, damages claimed by XXG in the Action are actually damages for loss of the profits of the development flowing from breach of the agreement and so that the claim comes within the arbitration clause, and to award XXG such damages would be to allow it to outflank the arbitral regime agreed to by the parties:

In dealing with the proposition that the Action falls within the arbitration clause because it is based on and arises out of the agreement, the Court noted that what the parties agreed was to refer to arbitration "disputes arising from the performance of the Agreement". On the question of whether an action to enforce the implied promise to honour the Award is a "dispute arising from the performance of the Agreement", the Court answer was "NO" and the language of Article 13 suggests that is the answer. The disputes referred to arbitral tribunal arose from Eton's renunciation of the Agreement in November 2003, their failure to deliver the land to XXG in January 2004 and their failure to

[62] para 90

transfer their shares in Legend to XXG. Those were the disputes that arose from Eton's refusal and failure to perform the Agreement. The Award issued in October 2006 represented the outcome of the arbitration. When Eton failed to comply with it, a fresh dispute giving rise to a fresh cause of action came into existence. But that was a dispute stemming from breach of the implied promise to comply with the Award, rather than a dispute "arising from the performance of the Agreement".[63]

Turning to Eton's proposition that the damages claimed in the Action should be viewed as damages for loss of the profits of the development flowing from breach of the Agreement and so caught by the arbitration clause, the Court noted it was a suggestion which failed to recognise the fundamental difference between proceedings at the arbitration as opposed to the enforcement phase, and the range of remedies open to the enforcing court.[64] The determination of the parties' mutual rights and liabilities are matters for the arbitrators, and enforcement of the award, being a matter for the court.[65]

The second version of the outflanking argument was that the judgment entered by the Court of Appeal usurped the function of the arbitrators, and if the Plaintiff wanted damages, it had to return to the tribunal and persuade it to make such an award. In the Court's view, the premise of that argument was untenable. It observed that the arbitral tribunal had rejected a submission that continued performance of the contract was impossible, thus re-affirming the relief awarded. The tribunal had also made it clear that it had fully adjudicated the case and the Award was final, thus recognising that the matter had reached the enforcement phase before the Hong Kong Court.

The Court concluded by holding that at the enforcement stage, in an action on the implied promise, the enforcing court may grant relief appropriate to the

[63] paras 99 - 101
[64] para 117
[65] para 119

award. If it is a monetary award for payment within the jurisdiction, it may simply be a judgment enforcing the award as a debt. If it is a non-monetary award which has not been complied with, the court may exercise its jurisdiction with a view of fashioning an appropriate remedy chosen from the full range of remedies available in an ordinary common law action,[66] to give effect to the award, which may be distinct from any remedy that might have been claimed in the arbitration.[67]

3) The "extant award" argument.

Eton contended that the Court of Appeal was wrong to award the Plaintiff damages because such relief "is fundamentally inconsistent with, and barred by, the extant Award (which requires parties to continue to perform the agreement)". In support of its argument, Eton contended that XXG did not comply with the principle in *Johnson Agnew* [1980] AC 367 because it never applied to the tribunal to give up any of its rights under the Award or for permission to treat the agreement as terminated. In the circumstances, the enforcing court should not award damages on the basis that the underlying contract was no longer subsisting when there was still an extant award for continued performance of such contract.

The Court rejected that argument and said it fails to recognise that the relief granted in the common law action falls within the enforcement jurisdiction of the Court and is neither a matter for the tribunal nor relief which in some way requires adjustment to achieve consistency with the terms of the award.[68] In any event, the court observed, Lord Wilberforce noted in *Johnson Agnew* case that

[66] para 122. At para 123, the Court cited the dictum from *Selby v Whitbread Co* [1917] 1 KB 736 that "... a decree of specific performance can in some cases appropriately be granted in order to carry out the terms of an award", but noted that in the instant case, such a decree should not be made because of difficulties of enforcement and because damages were an adequate remedy.
[67] para 126
[68] *Ibid* at para 148

the vendor may proceed against the defaulting purchaser by action for specific performance or damages in the alternative but would have to elect which remedy to pursue at trial, and that was essentially the course followed in the enforcement proceedings of the case.[69]

In the circumstances, the so-called "extant award" presented no obstacle to the Court enforcing the award by awarding the Plaintiff damages for breach of the implied promise to honour the Award.

5.0 Conclusion

An agreement to have a dispute or disputes resolved through arbitration is enforceable because of the implied contractual promise by the parties to perform an award contained in that agreement. Where the award is not honoured, a cause of action accrues, and the aggrieved party is entitled to commence enforcement proceedings through the courts by invoking the statutory enforcement provisions or by an action under common law. A declaratory award only declares what the parties' rights and obligations are and the existing rights and obligations are not merged in the award and continue to exist. Where an award is coercive and the relief granted in the arbitration is discretionary in form, for example, if the award requires the respondent to continue performance of the contract, it may be an onerous task or sometimes impossible for the successful claimant to enforce the obligations created in the award if it invokes statutory enforcement provisions. In such circumstances, the claimant has the option of electing to pursue enforcement by an action under common law for damages arising from the respondent's breach of the implied contractual promise to honour the award.

[69] *Ibid*, at para 149

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The Future of Environmental Conflict Management

By: ***Kariuki Muigua****

Abstract

With the ever growing human population, coupled with decreasing environmental resources due to degradation and climate change, environmental conflicts are bound to increase across the globe but with more serious effects on developing countries. This means that states and other stakeholders must continually come up with more effective approaches to address these conflicts in light of the spirit of sustainable development. This calls for both knowledge-based and practical solutions The author's main argument is that without continuous research and investment in environmental conflict management, sustainable development agenda may remain a mirage.

1. Introduction

Arguably, 'development policies should be an integral part of the peace-building agenda'.[1] In relation to this, it has also been observed that 'development has multiple dimensions from human rights to environmental sustainability, from economic growth to governance'.[2] Also notable is the assertion that 'the concept of security has gradually expanded from state security to human security and now includes a range of military as well as non-military threats that recognize no borders'.[3]

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[1] 'Understanding the Conflict-Development Nexus and the Contribution of Development Cooperation to Peacebuilding' (GSDRC) <*https://gsdrc.org/document-library/understanding-the-conflict-development-nexus-and-the-contribution-of-development-cooperation-to-peacebuilding/*> accessed 3 May 2022.

[2] International Peace Academy, 'The Security-Development Nexus: Research Findings and Policy Implications' (International Peace Institute 2006), 3 <*https://www.jstor.org/stable/resrep09516*> accessed 3 May 2022.

[3] Ibid, 3.

The United Nations 2030 Agenda for Sustainable Development (SDGs)[4] provides in its Preamble that 'the State Parties were "determined to foster peaceful, just and inclusive societies which are free from fear and violence" as "there can be no sustainable development without peace and no peace without sustainable development".[5] Notably, development and more so, sustainable development, is a multifaceted concept that requires achieving certain milestones in various sectors, such as social, political, environmental and economic spheres.[6] It is for this reason that 'the heads of state established five fields of critical importance, or the "five Ps" of the 2030 SDG Agenda, which are people, planet, prosperity, peace and partnerships (Emphasis added).[7] This paper offers some highlights on some of the main issues that must be addressed going forward as part of strengthening conflict management in environmental matters as well as part of achieving peaceful, just and inclusive societies as envisaged under the Sustainable Development Agenda.

2. Enhancing Effective Environmental Conflict Management

2.1. Addressing Socio-Economic Issues

Reduction in poverty and concrete improvements in basic education, gender equality, and basic health, all underpinned by improved governance and environmental sustainability are seen as important in building sustainably peaceful and inclusive societies.[8] It has been argued that development and

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[4] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

[5] Ibid, Preamble.

[6] 'Social Development for Sustainable Development | DISD' <*https://www.un.org/development/desa/dspd/2030agenda-sdgs.html/*> accessed 8 May 2022; Rodrigo Goyannes Gusmão Caiado and others, 'A Literature-Based Review on Potentials and Constraints in the Implementation of the Sustainable Development Goals' (2018) 198 Journal of cleaner production 1276.

[7] Rodrigo Goyannes Gusmão Caiado and others, 'A Literature-Based Review on Potentials and Constraints in the Implementation of the Sustainable Development Goals' (2018) 198 Journal of cleaner production 1276, 4.

[8] Bernard Wood, 'Development Dimensions of Conflict Prevention and Peace-Building' [2001] UNDP. (June).

peace-building must be integrated (not just linked) at an early stage – for example by including the political context in development policy and practice in conflict-affected fragile states and by addressing the structural causes of conflict.[9] In addition, it has been acknowledged that strengthening state institutions and enhancing their capacity to provide security and development based on principles of good governance are essential for sound conflict management.[10] In the same way, an effective, credible, and accountable security sector can provide a safe and secure environment in which to entrench other programming initiatives, all embedded in a predictable legal environment supported by culturally appropriate rule of law programs.[11]

The worldwide community now supports the sustainable development agenda as a result of taking an integrated approach to development concerns and environmental conservation and protection. All development endeavours must be mindful of environmental preservation and protection in order to be considered sustainable.

There is a need for effective natural resources and environmental governance for fighting poverty, through accelerated economic growth and social empowerment of the people, effective and practical management of conflicts for peace-building, without which development cannot take place and ensuring that the right of access to justice is available to all regardless of their social, economic or political standing in the society.

The sustainable development agenda covers more than just environmental issues. This is because both anthropocentric and ecocentric viewpoints are used.

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[9] Thania Paffenholz, '19 Understanding the Conflict–Development Nexus and the Contribution of Development Cooperation to Peacebuilding1' [2008] Handbook of conflict analysis and resolution 272.

[10] Flavius Stan, 'The Security-Development Nexus: Conflict, Peace and Security in the 21st Century' (International Peace Institute, 14 October 2004) <*https://www.ipinst.org/2004/10/the-security-development-nexus-conflict-peace-and-security-in-the-21st-century*> accessed 8 May 2022.

[11] Ibid.

Thus, it is necessary to promote sustainable development utilising the two approaches: Poverty eradication, food security, environmental democracy, environmental justice, environmental security, public participation, gender equity, access to information, and conflict resolution are just a few of the recurring themes that are influenced by the anthropocentric approach to environmental management. All of these topics are related to the larger topic of human rights while highlighting the unique connection between those topics and the environment. Conflicts caused by the environment and limited resources might quickly arise if these issues are not addressed. This is crucial given the new constitutional provisions on governance and the fact that the Bill of Rights contains Articles of the Constitution that address the environment and natural resources.[12]

Environmental health, environmental conservation for Mother Nature's sake, and discussions on the effects of resource extraction are all influenced by ecocentric ideas. However, advancing rights like the one to a clean, healthy environment has advantages from both an anthropocentric and an ecocentric perspective, thus it should be promoted.[13]

2.2. Enhancing Meaningful Participation in Environmental Management and Governance Issues

Environmental justice and democracy is also important for fighting climate change, environmental degradation and meaningful participation in environmental management and governance issues. The link between Alternative Dispute Resolution (ADR)and Traditional Dispute Resolution (TDR) Mechanisms should be explored continually and how the same can be used in enhancing access to justice for the Kenyan people and Africa in general as far as environmental conflicts are concerned. It is obvious that managing many current environmental and natural resource concerns involves collaboration among all impacted parties given the complexity of social-

[12] Muigua, K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers, Nairobi – 2016, pp. xi-xii.
[13] Ibid, p. xii.

ecological systems. This is especially true when taking into account the fact that no one stakeholder, or sub-group of impacted stakeholders, has the expertise, authority, resources, or competencies to handle such challenges on their own.[14] As a result, the sustainable development agenda promotes a coordinated strategy for addressing both environmental management issues and societal social issues.[15] This is consistent with the strategy taken by the United Nations Development Programme (UNDP), which has argued for inclusivity, long-term political commitment, and national ownership in addition to the necessity of gender equality, integrated planning, budgeting, and monitoring as part of the 2030 Sustainable Development Goals (SDGs) agenda.[16] There have also been proposals for an integrated strategy to execute sustainable development, with the argument that several SDGs are interrelated with one another. An integrated strategy entails managing trade-offs and maximising synergies across objectives.[17]

In terms of the rule of law and sustainable development for a brighter future for Kenyan children, there is need for embracing and implementing SDG 16 which calls on State Parties to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. This will be important in addressing the

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[14] Fisher, Joshua. "Managing environmental conflict." The handbook of conflict resolution: theory and practice (2014): 3, p.9.

[15] See also Hussein Abaza and Andrea Baranzini, Implementing Sustainable Development: Integrated Assessment and Participatory Decision-Making Processes (Edward Elgar Publishing 2002).

[16] United Nations Development Programme, "Implementation of 2030 Agenda has to be inclusive, participatory and bottom-up," Jul 18, 2017. Available at *https://www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/07/18/implementation-of-2030-agenda-has-to-be-inclusive-participatory-and-bottom-up.html* [Accessed on 6 August 2022]; See also Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019) <*https://aer.eu/integrated-approach-sdgs/*> accessed 6 August 2022.

[17] Rizza Ambra, 'An Integrated Approach to the Sustainable Development Goals' (Assembly of European Regions, 4 March 2019) <*https://aer.eu/integrated-approach-sdgs/*> accessed 6 August 2022.

issues that have a direct or indirect influence on the origin or management of environmental conflicts. Notably, this should be entwined with Kenya's experience in terms of establishing effectiveness in the frameworks for managing conflicts and the environment in order to realise the sustainable development objectives.

There will certainly be varying levels of complexity in each manifestation of environmental conflict with regard to each of the characteristics of environmental conflicts. This also calls for different approaches in their management, whether formal or informal, based on their nature.[18] It has also been suggested that since social and ecological systems are intertwined, it is challenging to totally and permanently resolve an environmental issue. This is partly because each action has unanticipated and unforeseen effects on the dynamics of the broader system. Therefore, it may be preferable to create solutions that aim to manage disputes in a productive way rather than trying to resolve them.[19]

Some of the main reasons why environmental conflicts ought to be resolved expeditiously are that they greatly affect the livelihoods of people and also have the potential to overflow to other sectors of a country's framework. It is worth pointing out that environment-related or natural resource use conflicts are not only political conflicts, although most of them are connected to public policies, policy programs, political controversies and political actors, unequal exchange and various forms of conflict resolution. The conflicts may originate in everyday practices of resource users, private persons or organisations that act in the institutionally channelled and regulated forms of cultural, political, economic and other specific forms of social systems.

[18] Fisher, J., "Managing environmental conflict." *The handbook of conflict resolution: theory and practice* (2014): 3.
[19] Ibid, p.9.

2.3. Need for Inter- and Transdisciplinary Knowledge Syntheses

It has also been rightly pointed out that 'political or governmental structures or actions are not always necessary for conflict mitigation. Many conflicts involving the use of resources take the form of multi-sectorial, multi-dimensional, and multi-scale conflicts that are concurrently economic, political, social, cultural, and ethnically charged. They can also be conflicts involving values, interests, user and property rights, and conflicts involving the requirements and needs of both human and non-human resource users. They demonstrate how many social realms, social systems, and ecological systems are interconnected due to their multidimensionality'.[20]

In order to effectively manage and resolve conflicts, it is necessary to analyse the social, economic, and ecological systems and environments in which disputes and conflicts arise. These must transcend the existing widely accepted notions of sustainability or sustainable development in environmental science, environmental law, and international environmental governance.[21]

There is a need for inter- and transdisciplinary knowledge syntheses to demonstrate the necessity and the forms of new development perspectives and improved conflict resolution procedures, given the likelihood of additional and intensifying conflicts as a result of global environmental change and the already present difficulties of conflict resolution. This must be done while keeping in mind the interconnectedness of conflict resolution and sustainable transformation in the context of global social and environmental change.[22]

Particularly, the social and natural sciences are needed for multidisciplinary knowledge syntheses. Learning how to integrate empirical research, theories, and practical application, as well as how to combine information from social and natural scientific research, are the two main components of the overall

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[20] Olsson, E. Gunilla Almered, and Pernille Gooch, eds. *Natural resource conflicts and sustainable development*. Routledge, 2019, p. 195.
[21] Ibid, p. 191.
[22] Ibid, p. 195.

socio-ecological transformative process. Both types of knowledge integration require methodological direction, critical analysis, evaluation, and the ability to learn from previous research and policy models, as well as from their successes and mistakes.[23]

Notably, Article 11 of the Constitution of Kenya 2010 recognises the place of science and cultural knowledge in the development of the nation. There is a need for exploring the indigenous knowledge and environment and conflict management alongside the scientific knowledge in the quest for more effective conflict management and resolution approaches backed by empirical research, theories, and practical application by and from researchers and target communities. Thus, any existing or new approaches developed to address environmental conflicts must facilitate the active and meaningful participation of affected groups of persons or communities if the same are to bear lasting outcomes. The aggrieved persons must be made to feel that they have accessed justice and have also been part of the process for them to appreciate and embrace the outcome(s) of such processes.

3. Conclusion

This paper offers a discussion on how state agencies and other stakeholders can invest in conflict management in environmental matters through engaging all the stakeholders as well as investing in research and multi-sectoral knowledge in order to appreciate and make use of this knowledge in identifying and addressing the conflicts. The author argues that unless there is continuous engagement with stakeholders and appreciation of the past, current, future and all the contemporary issues surrounding environmental conflicts, finding lasting solutions may not be possible. Addressing these conflicts effectively is a fundamental requirement of achieving sustainable development agenda. The future of Environmental Conflict Management is in clearly in our hands.

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Absolute Immunity of Arbitrators: *Fact, Fallacy or Fantasy?*

By: ***Paul Ngotho HSC*** *

Background

"Arbitrators getting sued. Most of us presume we're safe in our quasi-judicial cocoon. Has anyone got stories where unhappy parties have gone after the arbitrator?" That was a query from an international arbitrator on LinkedIn on 24th February 2014. My response was that we had experienced very robust, even vicious challenges to arbitrators in Kenya but not direct suits against the arbitrators, yet.

A Kenyan court, in September 2020, ordered the International Chamber of Commerce to disclose documents in a fraud case against an arbitrator, who was facing cases in both Kenyan and French courts by Kenyan mobile phone repair company Technoservice Ltd for breach of contract, fraud and breach of trust.* Krystal[1] opines that the fact that the Kenyan court compelled the handover of documents shows that the court is at least willing to entertain the possibility of arbitrator liability.

This begs several questions: Do arbitrators in arbitrations seated in Kenya have immunity from prosecution in all civil and criminal proceedings for all actions and decisions made in arbitral proceedings? If so, is that immunity, if any, limited to acts done in good faith, as suggested by a simple reading of the Arbitration Act 1995, or is it absolute? What remedies are available to the parties

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[1] Krystal L., *The Arbitration Vaccine: Immunity of Arbitrators.* At *http://arbitrationblog.practicallaw.com/the-arbitration-vaccine-immunity-of-arbitrators/* accessed on 27th August 2021

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who are aggrieved by an arbitrator's actions? This article attempts to answer those questions. It will first consider the state of affairs in other jurisdictions.

UK, US, Nigeria, France and China

In Floyd & Barker case of 1608, an English case quoted in Randall v. Brigham[2] *in the US Supreme Court in 1868:*

> "The reason and cause why a judge, for anything done by him as judge, by the authority which the king hath committed to him, and as sitting in the seat of the king (concerning his justice), shall not be drawn in question before any other judge, for any surmise of corruption, except before the king himself, is for this: the king himself is de jure to deliver justice to all his subjects; and for this, that he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the king's oath. And forasmuch as this concerns the honor and conscience of the king, there is great reason that the king himself shall take account of it, and no other" (Emphases added.)

The reason captured above is that a judge cannot be sued since he is an agent of the king. Suing the judge would be like suing the king. That reasoning resonates with Article 159. (1) of the Constitution of Kenya 2010 that all judicial authority comes from the people or the public, who have vested or donated it in the courts and tribunals. The king, being sovereign could, of course, dismiss the judge from the bench. Dismissal of a judge for misconduct is a completely different remedy from prosecution.

In *Randall v. Brigham* itself, the court helpfully added that:

> "This general doctrine is especially applicable in America, where, by our National and State constitutions, judicial power is vested exclusively in

[2] *https://www.law.cornell.edu/supremecourt/text/74/523#fn17*

> the courts. The duties of a judge are public duties imposed by law. He must perform them. If he acts corruptly or incompetently, he may be impeached. And in Massachusetts, he may be removed by the governor, with consent of the council, upon the address of both houses of the legislature.

It is inconsistent with the nature and true theory of the judicial functions, that an action should lie against a superior judge, for any judicial act, even though in excess of his jurisdiction.

The very foundation of this principle is to protect judges *when they have erred*… To secure the maximum of impartiality, a judge must be protected from personal responsibility for his errors, if he happens to make any...

Accordingly, for more than five hundred years, by a uniform series of decisions, judges have been held exempt from personal responsibility for their judicial words and acts." (Emphases added.)

The two cases say that judges require immunity because they perform public duties and should be shielded from litigation in order to dispense justice without fear. Arbitrators perform similar public duties, but privately. They also, of course, require protection to work without fear.

Oyekunle and Ojo[3] believe that "it would be inappropriate to expose an arbitrator to the nuances of a recalcitrant party who will sue him if he loses or if he intends to delay the proceedings or the execution of the award… It is generally considered that the reasons for providing immunity are the same as those that apply to judges in the courts… immunity is necessary to enable a third party to properly perform an impartial decision-making function."

[3] Handbook of Arbitration and ADR Practice in Nigeria, Lexis Nexis p. 79-81.

Under French law[4] generally, the liability of an arbitrator to the parties is contractual by nature, as the arbitrator is related to the parties by virtue of a contract. The law allows civil claims to be brought against arbitrators on the grounds of contractual responsibility. Such claims could arise if, for instance, the arbitrator does not implement the arbitral procedural rules, resigns without a good reason or breaches the duty to disclose any fact which might lead to his or her removal.

An arbitrator's immunity is not absolute in French law and does not cover all acts and omissions included in the scope of the arbitrator's mandate. In particular, the arbitrator remains liable for fraud, gross negligence and willful misconduct. French law provides that an arbitrator is not liable for errors committed in the adjudication of the claim or the contents of the award. Therefore, a party which is not satisfied with an award first challenge the award itself instead of suing the arbitrator.

This is typical of civil law jurisdictions. For example[5], an arbitrator may be liable for damages in the event of committing gross negligence in the Netherlands, without any requirement for the arbitrator to have acted in bad faith. The position in the Middle East is much less sanguine. Qatar and Tunisia both apply strong civil liability regimes. Criminal liability was only repealed in the UAE in 2018.

Articles 34, 38 and 58 of the Arbitration Law of the People's Republic of China provide that an arbitrator is in serious violation and shall bear the legal liabilities if he or she is involved in prohibited activities like meeting the parties concerned

[4]Source:*https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/france* accessed on 12th December 2022.
[5]Source:*http://arbitrationblog.practicallaw.com/the-arbitration-vaccine-immunity-of-arbitrators/* last accessed on 12th December 2022.

or their attorneys in private or accepts gifts or hospitality from the parties or their counsel[6].

Arbitration Act of Kenya 1995

The above perspectives give the general global picture. The presence and extent of arbitrator immunity is primarily a matter of domestic law and, to some extent, the applicable arbitration rules and the contract between the tribunal and the parties if the legislation leaves such leeway.

Arbitrator immunity was not originally provided for in the current arbitration statute, which is dated 1995. It was introduced in the 2010 amendment, which predates the Constitution of Kenya 2010 by close to a year. It became S. 16B of the Arbitration Act of 1995, which states that:

"(1) An arbitrator shall not be liable for anything done or omitted to be done in good faith in the **discharge or purported discharge** of his functions as an arbitrator.

(2) Subsection (1) shall extend to apply to a servant or agent of an arbitrator in respect of the discharge or purported discharge by such a servant or agent, with due authority and in good faith, of the functions of the arbitrator.

(3) Nothing in this section affects any liability incurred by an arbitrator by reason of his resignation or withdrawal" (Emphases added.)

The text is similar to that in Article 160 (5) of the Constitution except for three significant differences. First, "lawful performance" is not required for the

[6] Tao, J Prof. "Salient Issues in Arbitration in China" p 816 accessible at *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiSlNSascz8AhXRif0HHRMTAXsQFnoECBIQAQ&url=https%3A%2F%2Fdigitalcommons.law.scu.edu%2Fcgi%2Fviewcontent.cgi%3Freferer%3D%26httpsredir%3D1%26article%3D1777%26context%3Dfacpubs&usg=AOvVaw02Zzh7-spKUGWE57IGNvBE*

arbitrator to get protection. Second, the immunity is not available to an arbitrator who resigns or withdraws. Third and most significant is that the immunity of arbitrators, unlike that of judges, extends to acts and omissions "purportedly done" in the course of his work. This means that the arbitrator is, by statute, immune for acts committed beyond and without jurisdiction.

Resignation and Withdrawal

S. 16B (3), which is cited above, exposes an arbitrator to proceedings after resignation or withdrawal. While the meaning of the text is clear, this author is unable to grasp the purpose of that provision or how it would apply. Given that the arbitrator is immune for acts prior to resignation or withdrawal, how he or she could, after resigning or withdrawing, be held liable for prosecution for actions taken while he or she was lawfully in office is beyond comprehension.

The risk of prosecution could easily be counterproductive to the administration of justice by motivating arbitrators to hold on even when they should let go due to ill health or other considerations.

Arbitration Rules Commonly used in Kenya

I must disclose that I was involved one way or other in the preparation of the Nairobi Centre for International Arbitration (NCIA) as well as the Chartered Institute of Arbitrators Kenya Branch (CIArb(K) Arbitration Rules of 2012 and 2020. The views I have expressed here are mine and mine alone.

Rule 17 in the CIArbK 2012 Rules is worth commenting on because many arbitrations started before 2020 are still being carried out under those rules except where the parties have shifted to the later rules. It stipulates that "Neither the Branch, its officers nor any Arbitral Tribunal is liable to any party for any act or omission in connection with any arbitration conducted under these Rules".

That rule gives, or so it purports, absolute immunity to arbitrators. It conveniently leaves out the statutory rider about actions done by an arbitrator

in bad faith. Would such *arbitratorspeak* survive judicial scrutiny? A simple reading gives the impression that the rule extends arbitrator immunity beyond the statutory provision. The 2020 rules are silent on arbitrator immunity. It is just as well since that has been fully addressed in the Act.

CIArbK, incidentally, still requires its arbitrators, prior to appointment, to confirm that they had adequate professional indemnity cover (PI). It has no guidelines on what such a cover would entail. CIArbK's members belong to other professions like law, valuation, engineering etc. in which PI covers are required. Whether boilerplate PI covers in those professions cover arbitration practice is another discussion altogether.

Rule 35.(1) of the NCIA Rules (Rev. 2019)[7] stipulates that:

"The members of Board, the staff of the Centre, the Arbitral Court, the Registrar, the arbitrators or the experts to the Arbitral Tribunal shall not be liable to any party for any act or omission in connection with any arbitration conducted pursuant to these Rules, except where the act or omission is proved by that party to constitute intentional act or omission committed by the body or person alleged to be liable to that party." (Emphasis added.)

The above rule excludes deliberate acts or omissions of the arbitrator from immunity. It also extends immunity to "experts of the tribunal", who would definitely be expert witnesses engaged by the arbitral tribunal and probably also those appointed by the parties.

Judicial scrutiny of the apparent truncation or extension of the statutory arbitrator immunity through the above NCIA and CIArbK rules would have to address whether s. 16B of the Act leaves any room for innovation or intervention by arbitrators, parties or arbitral institutions.

[7] *https://ncia.or.ke/wp-content/uploads/2021/02/Final-NCIA-Revised-Rules-2019.pdf*

The *Bellevue* Case[8]

A recent Supreme Court judgment by D. K. Maraga, P.M. Mwilu, M.K. Ibrahim, S.C Wanjala and I. Lenaola SCJJ in *Bellevue* thoroughly interrogates the extent of the immunity which Kenyan judges enjoy. The court ventures into propositions which, by extension, are applicable to arbitrators thereby giving insight into arbitrator immunity neatly concealed somewhere in the works.

The sole arbitrator, who is named as the third respondent, has stopped arbitrating disputes following his recent appointment as a judge of the Court of Appeal. That is incidental. He could as well have been listed as an interested party or left out altogether as no orders were sought against him. Furthermore, naming an arbitrator is a respondent or as an interested party in an application merely for his or her disqualification is not, for the purpose of this article, considered to be a suit against the arbitrator. However, if the prayers sought go beyond removal then that will be considered a suit against the arbitrator.

Incidentally, the arbitrator's final award of 17th December 2014 in arbitral proceedings was adopted by court on 8th April 2016. The petitioner had boycotted the arbitration because it believed that the earlier arbitral proceedings under a different arbitrator had been effectively terminated, or were eligible for eminent termination, under s. 26 of the Arbitration Act 1995 due to a court order that the earlier arbitrator had done something which robbed him of jurisdiction. It did not defend the enforcement proceedings or apply to court to set aside the *ex parte* arbitral award.

The 1st and 2nd Respondents are judges of the High Court of Kenya. They were sued in their personal capacities following certain orders they issued with respect to the arbitration. According to M'Inoti JA, all that the two judges did to aggrieve the petitioner so much was that they, in the petitioner's view,

[8] Bellevue Development Company Limited v. Hon. Justice Gikonyo, Hon Justice Kariuki, Paul Mwaniki Gachoka and Vinayak Builders Ltd Supreme Court of Kenya Petition No. 42 of 2018 accessible at *http://kenyalaw.org/caselaw/cases/view/195064/*

"misinterpreted and misapplied" a statute. The key issue for determination in both the Court of Appeal (Waki, M'Inoti and Kiage JJA)[9] and the Supreme Court was whether judges in Kenya had absolute immunity under the Constitution of Kenya article 160.(5), which stipulates that:

> "A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function." (Emphases added.)

The petitioner argued in both courts that the answer to the question of whether judicial immunity was absolute was in the negative. To it, Article 160(5) of the Constitution of Kenya 2010 unambiguously declares a qualified immunity, such that a suit could properly be instituted against a judge if either or both of the two elements of *good faith* and *lawfulness* are lacking from the act or omission complained of.

The only comfort to the petitioner can be gleaned from M'Inoti JA, who nevertheless dismissed the petition for being filed in the wrong forum, but took the view that:

> "Where a judge acts in bad faith or omits to act in good faith in the lawful performance of his or her judicial function, that fundamentally raises questions of his or her integrity and fidelity to the judicial oath of office, and in my view, the remedy under the Constitution is not an action or suit against such judge… Article 168, a specific and elaborate procedure for dealing with that kind of judge. I would accordingly read Article 160(5) to be saying that judicial immunity is not available to a judge who acts in bad faith or omits to act in good faith in the lawful performance of his or her judicial function." (Emphasis added.)

[9] *http://kenyalaw.org/caselaw/cases/view/158767/* last accessed on 28th May 2020.

When the Court of Appeal asked the petitioner where the line was to be drawn between gross errors of law and ill-will, the answer was that the ill will was to be inferred from the "fact" that the two judges went against the clear provisions of statute. And when the court inquired whether any authority was available to buttress what was "clearly a novel proposition", the equally unhelpful, indeed rather evasive answer, was that "*we have the Constitution which is unambiguous*."

Thus, in the petitioner's view, every error or misinterpretation of law exposes a judge to personal litigation. The courts thought that such an approach would open an "intolerable deluge of litigation, each unhappy litigant suing Judges left, right and center as wounded pride dictates".

The reasoning of both courts is clear, although M'Inoti JA's decision is easiest to read because it is about a page long. First, they admit that judges are not infallible. Second, that the Constitution does not condone judicial misconduct. Third, that a judge who misbehaves himself or herself is answerable, but in the Judicial Service Commission not in a court suit against the judge. Fourth, that an appeal mechanism exists to right any wrong a party might suffer due to a judge's judicial errors and mischief – obviously, such a remedy is not available in the cases where appeals are not allowed or possible like in Supreme Court decisions. Fifth, that the underlying public policy concerns are that judges should have the liberty to decide cases before them without the fear of expensive personal suits from every sour loser and the possibility of courts being clogged with cases against judges.

The Supreme Court's answer is in para 70 of their judgment, where they endorse Mativo J's statement in *Maina Gitonga v. Catherine Nyawira Maina & Another* that:

> 'It is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from criminal and civil suit arising from acts taken within or even in excess of his jurisdiction" (Emphasis added.)

They deal with the words "good faith" and "lawful" by endorsing Kiage JA's "rendition of that absoluteness" by citing part of his judgement:

> "I have no difficulty whatsoever in holding that judicial officers are under Article 160. (5) immunized from any action or suit on account of their performance of a judicial function. I do not apprehend that the words "good faith" and "lawful" in sub-Article are a qualification or limitation of the immunity for the rather obvious reason than so long as a judge is acting in a judicial capacity and exercising his usual jurisdiction, there is the commonsensical presumption that he is acting lawfully and in good faith… to hold otherwise would lead to the absurd position of good faith bases of judges' actions being debatable points and open to intolerable deluge of litigation, each unhappy litigant suing Judges left, right and center as wounded pride dictates." (Emphases added.)

The Supreme Court is categorical in paras 75 and 83, read together:

"Under our law, the remedy for a litigant making allegations of fraud, dishonesty and/or perversity lies, not in a suit against such a Judge but in a petition to the Judicial Service Commission for removal from office under Article 168 of the Constitution…. the Petitioner ignored the express route of a petition under Article 168 of the Constitution if he thought the Judges misconducted themselves and instead chose the unacceptable route of a suit against the Judges. We therefore reiterate that immunity of a Judge can only be stripped in our realm, by proceedings through the Judicial Service Commission and not by a civil suit as argued by the Petitioner."

Absolute immunity of judges from prosecution in court has been established. The courts' treatment of the words "good faith" and "lawful" in the interpretation of Article 160 (5) applies, and must apply, to the interpretation of 16B of the Act. Identical legal text cannot be interpreted differently just because one is in the constitution while the other one is in a statute. If anything, the Act

gives arbitrator more immunity than the judges because it only refers to "good faith" and is unconcerned about "unlawful" decisions.

The Grain Bulk Cases

The two High Court of Kenya cases arose from the same parties, the same dispute, the same contract and the same project. They involve grave complaints about the sole arbitrators. In both cases, a party had demanded a refund of the fees it had paid to the arbitrator.

In *Mistry Javda Parbat Company Ltd v. Grain Bulk Handlers Ltd (Miscellaneous Civil Application 506 of 2011 at High Court at Nairobi (Milimani Commercial Courts)*[10], the court removed the arbitrator for admitting one party's belated witness statement, which was served on the eve of the oral hearing and rejecting the other party's application the following morning to adjourn the hearing in order to file a rejoinder. Significantly, the Applicant's prayer for the arbitrator to refund the fees it had paid to him was dismissed.

In *Grain Bulk Handlers Ltd. v. Mistry Javda Parbat Company Ltd v. (Miscellaneous Civil Application 538 of 2015 at High Court of Kenya, Milimani Commercial & Admiralty Division)*[11], the court said that:

"the Arbitrator, having so incompetently handled the said arbitration, and having delivered no award, and having wasted the time of the parties herein, ought not to be remunerated for there is no valid consideration for such remuneration. However, this court will allow the Arbitrator to keep one half of the total fees and expenses already paid to him by the parties…. the Arbitrator shall refund one half of total fees and expenses paid to him by GBH in the arbitration"

This is one of the very few cases in which a court has ordered an arbitrator to return any part of fees received from the parties. One would need to read the

[10] *http://kenyalaw.org/caselaw/cases/view/85719*
[11] *http://kenyalaw.org/caselaw/cases/view/130579/*

whole judgment in order to appreciate why the judge took that position. An application for the court to review the decision was unsuccessful but apparently there are pending appeals.

The arbitrators in the two cases above were not named as parties in any of the cases. However, the arbitrator in the first case filed a replying affidavit and was represented by counsel. It is worth noting that in both cases, the court did not expressly address the issue of arbitrator immunity under either Article 160 (5) of the Constitution of Kenya generally or under s. 16B of the Act in particular.

Majanja J's ruling dated 21st December 2022 in *Misc. Appl. No. 538 of 2015 in Grain Bulk Handlers Ltd v. Phillip Bliss Aliker,* as reported in the print media[12], went viral in various arbitrator social media. Yet it merely clarified Ogola J's substantive earlier order by stating how much, in Ksh., the arbitrator should pay to the applicant.

Justice Ogola's ruling stood out singly for about five years. Then came *Kenya Ports Authority v Base Titanium Limited [2021] eKLR* where on 26th February 2021 the court found that the arbitrator, a retired judge at that, had charged exorbitant fee and removed him from the proceedings without ordering a refund. It was followed by *George Arunga Sino t/a Maywood Auctioneers v NCBA (Formerly NIC Bank Limited) [2022] eKLR* where the High Court removed the sole arbitrator and ordered him to refund some of the fees he had received from one party. the costs appear to me to be exorbitant and excessive.

[12] "Judge orders arbitrator to refund grain bulk sh 2.9m fees", Business Daily, 6th January 2023 accessible at *https://www.businessdailyafrica.com/bd/corporate/companies/judge-orders-arbitrator-to-refund-grain-bulk-sh2-9m-fees--4076852*

Kenyan Statutory Tribunals

Incidentally, statutory immunity to dispute resolvers under Kenyan law is not limited to arbitrators. Two examples will suffice.

The Political Parties Disputes Tribunal members are employees of the Judicial Service Commission and therefore "members of the Judiciary". They fall squarely under Article 160. (5) of the Constitution of Kenya 2010 and the other relevant statutes. As if that is not enough, s. 41. (1) of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 provides that: "A member of the Tribunal is not liable to be sued in any civil court or Tribunal for any act done or ordered to be done by him or her in the discharge of judicial functions"

S. 178.(1) of the Public Procurement and Asset Disposal Act Rev. 2016[13] stipulates that: "A person shall not, in his personal capacity, be liable in civil or criminal proceedings in respect of any act or omissions done in good faith in the performance of his duties under this Act."

Remedy Against Errant Arbitrators and Arbitral Institutions

Absolute immunity from prosecution does not make judges and arbitrators above the law. It is just that a different law and procedures are applicable in order to safeguard those officers, their offices and the justice systems from disruption and ridicule.

Every jurisdiction has mechanisms for dealing with errant judges. The practice in Massachusetts as at 1868 is stated in *Randall v. Brigham* above. In Kenya the first port of call is the Judicial Service Commission, which, like its equivalent in other countries, is not perfect but acts as a deterrent and keeps the most notorious offenders in check. That some rotten apples among judges and arbitrators is undisputed, but that is the cost the parties and public generally has to accept. It is a trade-off.

[13] *file:///C:/Users/Paul/AppData/Local/Temp/PPADARevisedEdition%202016.pdf* accessed on 27th August 2021.

The Arbitration Act of Kenya 1995 provides for various court interventions through the removal of arbitrators or setting aside the arbitral awards. In addition, arbitral institutions presumably punish arbitrators by not appointing them again. The arbitrator's professional body should also have a disciplinary mechanism. However, as demonstrated elsewhere, the current self-regulatory and/or statutory controls of professionals at national[14] and international[15] levels are weak, dysfunctional or lacking altogether.

The Arbitration Act 1995 does not grant any immunity to arbitral institutions. The institutional rules grant the respective institutions immunity from prosecution.

Epilogue

Would a party which has suffered mistrial, bias or gross injustice in court be entitled to recover its from court the filing fees etc.? Of course not. It is also inconceivable that a judge's salary (the equivalent is arbitrator's fees and institutional charges like the appointment fees and the administering institution's fees and disbursements) would be "recalled" either as a punishment to the judge or a compensation to the complainant.

The position in Kenya, as captured in the *Bellevue* judgements is that judges have absolute immunity from prosecution in court for acts, omissions and decisions made in the course of their judicial work. Anyone still in doubt should consider the mood of the Supreme Court when awarding costs in *Bellevue*:

"What of costs? The Petitioner was represented throughout the judicial proceedings. It certainly ought to have been properly guided on the risks it was taking when it launched itself upon a most unorthodox path. It must now reap the consequences of that risky venture. It must be ordered to pay costs to all the Respondents both in the Courts below and in this Court."

[14] *https://youtu.be/_uRyaw0cpxM*
[15] *https://youtu.be/4Quc-xiWcwo*

The court did not make a passing reference, or even pretend to apply the cardinal rule on costs yet that would have sufficed. Instead, it indirectly suggested that the petitioner had been misguided by his counsel in pursuing that "most unorthodox path" and "risky venture", for which it must reap the consequences.

Kiagi JA was less charitable to *Bellevue's* advocate:

"I find it strangely curious that counsel for the appellants pressed on with the plea in intrepid fashion even when it was rather obvious that absent any authority to the contrary, the weight of all learning and judicial pronouncements presented is for the upholding of judicial immunity. I should hope that the Law Society and our country's Law Schools are not propounding and propagating a philosophy, cynical in its conception and Kafkesque[16] in its consequences, that when a lawyer loses a case, his recourse is to sue the judge."

In the beginning of *Bellevue* cases was Justice Fred Ochieng, whose decision in the High Court[17] precipitated the cases in the Court of Appeal and the Supreme Court, He cited Lord Tenderden C J[18]:

"This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgement, as all who are to administer justice ought to be".

[16] "having a nightmarishly complex, bizarre, or illogical quality" according to Meriam-Webster English online dictionary at *https://www.merriam-webster.com/dictionary/Kafkaesque*

[17] *http://kenyalaw.org/caselaw/cases/view/135363*

[18] GARNETT Vs. FERRAND [1824 - 1834] ALL.E.R 244, at page 246

The reasons which justify the granting of such immunity to judges apply to arbitrators. The same constitutional immunity which covers judges are applicable to arbitrators, who also carry out judicial function. The immunity of arbitrators is further safeguarded in the Arbitration Act of Kenya 1995. Therefore, arbitrators in arbitrations seated in Kenya enjoy absolute immunity. In other words, absolute arbitrator immunity from prosecution in court is a fact, not fallacy or fantasy.

Tracing the Confines and Boundaries of the Arbitrator's Immunity: Kenyan Context

By: ***Eunice Lumallas*** *

"By stating that he did not expect either party to take up this offer what the Arbitrator is saying in effect is that this was a mere bluff on his part. This is not the behaviour of an honest conscientious and unbiased competent arbitrator. The Arbitrator appeared to have been making some very serious jokes. His "*without prejudice*" ruling, his declaration that he was *functus officio*, and now his joke about refunding fees do not make him appear as a serious professional. There is a lot of what, for the lack of appropriate words, one may call comic relief in the entire proceedings soon after he took parties' evidence. Arbitration is a serious issue. It is meant to solve parties' disputes. If one accepts to be an Arbitrator, one is professionally expected to deliver results. That is why one is paid. In the absence of any results, an Arbitrator would not expect to be paid professional fees"

Hon. Justice Eric Ogola, in ***Mistry Jadva Parbat & Company Limited v Grain Bulk Handlers Limited [2016] eKLR, para 184***

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It is settled, in Kenya, Arbitrators do not enjoy infinite, carte blanche immunity[1] from prosecution. The cryptic quote was made by Hon. Ogola in a land mark ruling which saw orders voiding an arbitral award, removing an Arbitrator and ordering him to refund part of the costs expended by the applying party in the arbitration proceedings which the Arbitrator presided over. This was the first time for an Arbitrator to be ordered to refund part of the proceeding's charges in Kenyan soil.

Arising from the ***Mistry Javda Parbat case*** above, two deductions are easily distinguishable, one is that successful legal action against an Arbitrator for personal liability is rare a most rare occurrence, not just in Kenya, but world over and secondly, that the majority of Arbitrators overall, undertake their mandate as is expected of them. Still, this decision came as a shock to a cross section of the Arbitration community that believed that the immunity of an Arbitrator is absolute and that such an order attaching personal liability or refund of Tribunal fees can only be issued the day the sky falls over!

Arbitrator immunity is prescribed by statute and immunity serves as an insulation for Arbitrators against prosecution with respect to anything they say or do while undertaking their mandate. This legal immunity is essential for the effective administration of justice and necessary on grounds of public policy[2] as it ultimately enhances the rule of law and good order; two necessary ingredients for general good governance of the Arbitration process.

Arbitral immunity is premised upon the quest to create and nurture an environment conducive for making independent decisions through

[1] Insulation or protection, an individual or entity entity cannot be held liable for a violation of the law, in order to facilitate societal aims that outweigh the value of imposing liability in such cases. Such legal immunity may be from criminal prosecution, or from civil liability or both; Cambridge law journal,42(2) November 1983,GB *https://www.jstor.org/stable/4506559*

2 *Arenson v. Casson Beckman Rutley & Co., [1977] A.C. 405 et seq*

autonomous decision-making processes, unhinged by the threat of legal action by dissatisfied disputants. There is always a margin of error where any human is concerned thus wisdom dictates that miniscule mistakes that do not go to the core of a decision on merit are curtailed from immobilising the entire dispute resolution process.

This immunity of an Arbitrator exists legally unless it is demonstrated that an Arbitrator has committed acts intentionally, or arbitrarily to the detriment of a party or is otherwise fraudulent.[3]

Similarly, an Arbitrators immunity is *limited* by the confines of the law and ought to be understood to cover acts done within lawful mandate. For the school of thought advocating for absolute immunity of Arbitrator's from prosecution for acts and omissions during the execution of their mandate, the danger for such absolute insulation is the public that consumes the services and the breakdown in public confidence in the process; respectfully, I believe that the minute it is understood that Arbitrators are ***the absolute untouchables*** for *all and any acts or omissions* ***qua*** *Arbitrator,* it will be inimical to beginning of the end of public confidence in the practice of arbitration.

At the very least, one can found the need for exceptions in immunity to St Augustine's[4] treatise on the nature of man; that human nature is corrupt and that everyone has a tendency to sin; invariably, even in the best of environments, scarcely ever, this sinful nature is bound to spring up, and influence man's actions. Secondly, it is now a matter of international common law that no man

[3] *Prof. Dr. Klaus Peter Berger, LL.M.*The Lex Mercatoria (Old and New) and the TransLex-Principles, No. XIII.2.7 - Immunity of arbitrator, *https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8*

[4] St. Augustine, also called Saint Augustine of Hippo, original Latin name **Aurelius Augustinus**, (born November 13, 354, Tagaste, Numidia [now Souk Ahras, Algeria]—died August 28, 430, Hippo Regius [now Annaba, Algeria]; feast day August 28), bishop of Hippo from 396 to 430, one of the Latin Fathers of the Church and a significant Christian thinker

is above the law and none is below it[5]; a concept that is carried with much pride and that has proved useful for proponents of qualified immunity globally.

It ought to be remembered that Arbitration is an important practice and a Tribunal is appointed for its capacity and skill. Arbitrators sit at a high pedestal, a respectable seat, a position of honour, a class in history reserved for nobles; they are repositories and dispensers of justice and central to keeping the peace through ensuring adherence to the rule of law.

Arbitrators, just like judges are expected to have high integrity standards, be seen and understood to be competent in their work and most importantly, be men and women with ***moral courage***. But as human, the very same law, must intervene to ensure that their impulses and biases are weighed against their duties and obligations to parties that bring their disputes to Arbitration, to them.

In light of the foregoing, the centrality of ethics in Arbitration as a restraint upon the ***Tribunal's conduct***, is apparent; accordingly, Arbitrators must be ready to place integrity at the heart of their practice. If this is not something one is prepared for, then there undoubtedly awaits a pitfall for such Arbitrators not long in the horizon.

It is similarly ethical considerations that are tied to the immunity of Arbitrators; the manner in which an Arbitrator executes his[6] duties determines whether or not he will be clothed with immunity.

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[5] Theodore Roosevelt "*No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it.*""*Obedience to the law is demanded as a right; not asked as a favor.*"
Third Annual Message to Congress, December 7, 1903

[6] The use of he here includes she

The foundation of arbitrator conduct and immunity

The Relationship between parties to an Arbitration and an Arbitrator is contractual; consequently, the Arbitrator is under obligation to follow contractual terms as spelt out by the parties and agreed upon. The Arbitrator contracts to resolve a dispute in return for remuneration[7] This agreement defines the parties' obligations and those of arbitrators between themselves where more than one Arbitrator is involved.

Arbitrators are often referred to as ***masters of procedure*** and take charge of the Arbitration proceedings particularly in all matters not agreed upon by the parties. An illustration of this concept is the provisions of Section 20 of the Kenyan Arbitration Act, 1995 which provides at 20 (I) ***that Subject to the provisions of this Act***, the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings.

Sub, section 2 of the section 20 states that failing an agreement under subsection (1) by the parties, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, having regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases.

Further, often times, Arbitrators are often called upon to make decisions as ***amiable compositeurs,*** that is, in accordance with considerations of what, in circumstances of the case, is just, right and fair and not strictly in accordance with applicable laws. This mandate is captured in the Latin phrase ***ex aequo et bono***.

On the other hand, the duties of an arbitrator originate from three potential sources; the agreement of parties, legislation and from the ethics of individual

[7] Born, G, International Commercial Arbitration, Kluwer Law International, 2nd Ed, 2014

Arbitrators.[8] Duties in law include those contained in Arbitration legislation, those that have emerged from Common law, see for instance commercial arbitration and ***lex marcatoria***, [9] and from principles of Natural Justice which parties in Arbitration cannot contract out of and from decisions of Courts interpreting the law. Duties arising from the Agreement of parties are guided by the principle of ***party autonomy*** by which parties are free to decide how the process to follow in resolving their duties and even agree to exclude certain provisions of the law from their process.

Other duties arise from ethical persuasions of individual Arbitrators.[10] The sine qua non of arbitration is that the parties trust and that the Arbitrator is neither biased nor appears to be biased. Most Arbitration Laws and Rules as well as codes of conduct expressly provide this. [11]Most Arbitral Institutions have accordingly developed codes of conduct and ethics which Arbitrators undertake to abide by, the codes are meant to increase public confidence in the process.

The Arbitrator has a duty to be independent and Impartial, to be competent and match any qualification requirements for the specific arbitration, to make prior agreement on remuneration with the parties and to be diligent. [12] Further, there

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[8] The Role of Arbitrator Ethics, Robert A. Holtzman, De Paul Business and Commercial Journal, Article 6, Vol 7

[9] In Lex Marcatoria, *Max Planck Encyclopedias of International Law [MPIL], Stephan W Schill*

The term lex mercatoria or law merchant is used to designate the concept of an a-national body of legal rules and principles, which are developed primarily by the international business community itself based on custom, industry practice, and general principles of law that are applied in commercial transactions and arbitrations between private parties, as well as between private parties and States, in transborder trade, commerce, and finance in medieval Europe.

[10] Supra, note 9, Role of Arbitrator Ethics, page 2

[11] See for instance the Arbitration Act Kenya sections 12 and 13 on removal of Arbitrator and grounds for challenge of a Tribunal, it is expected that the Arbitrator is impartial and Independent and appears so as well.

[12] See section 13 of the Arbitration Act 1995 and part (IV) on conduct of Arbitral Proceedings

exists a duty of care with respect to how he or she applies procedure and finally, produces a final, binding and enforceable award.[13]

Immunity and Sanctions for Breach of an Arbitrators Duties

Personal prosecution may arise where an Arbitrator breaches his duties[14] it is for this reason that most Arbitral laws and rules make room for this personal liability for an arbitrator's acts of bad faith.

Under the law of Merchants, applicable in mediaeval Europe, improved and codified as *Lex marcatoria Principles on International Commercial Arbitration*, and widely adopted across the globe, at principle No. XIII.2.7 on arbitrator immunity, it is provided thus; -

> *"An arbitrator enjoys immunity from liability for all acts or omissions performed in the exercise of his judicial decision-making UNLESS he has acted intentionally, or arbitrarily, or has committed a fraudulent act"*

The terms ***unless***, negatives the immunity where one has acted intentionally, arbitrarily or committed an act of fraud to the detriment of a party. The evidence of this will be as much factual as it will be circumstantial.

Under the Kenyan Arbitration Act 1995, the Immunity of an Arbitrator is secured under section 16B which provides that an arbitrator shall not be liable for anything done or omitted to be done ***in good faith*** in the discharge or purported discharge of his functions as an arbitrator. The immunity extends in

[13] Gunther J. Horvath, Duty to render and enforceable award, Journal of International Arbitration, Vol. 18, Issue 2, (2001) p.135-158

[14] See Ad Hoc Commission, *The Arbitrator's Liability*, Le Club des Juristes, 2017 and Guzman, A.T., *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, Duke Law Journal, 2000, pp. 1279-1334.

a similar manner to the arbitrator's agents and servants. The Guiding word here is good faith. It is proper at this juncture to understand bad and good faith.

Bad faith is a term that generally describes **dishonest dealing**. Depending on the exact setting, bad faith may mean a dishonest belief or purpose, untrustworthy performance of duties, neglect of fair dealing standards, or a fraudulent intent. **bad faith** is also described as an intentional dishonest act arising by not fulfilling legal or contractual obligations, misleading another, entering into an agreement without the intention or means to fulfil it, or violating basic standards of honesty in dealing with others. Most states recognize what is called ***"implied covenant of good faith and fair dealing"*** which is breached by acts of bad faith, for which a lawsuit may be brought for the breach, just as one might sue for breach of contract.[15]

According to the Black's Law Dictionary, Ninth Edition at pg. 713, '*good faith*' is defined as;

> *"A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligations, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."*

The converse to acting in *good faith is* to act in bad faith, with a willful intent to act dishonestly or unfaithfully in the performance of judicial acts.

In ***Public Protector v South African Reserve Bank*** [16] Mogoeng, CJ defined bad faith as including malicious or "*fraudulent, dishonest or perverse conduct … [as well as] gross illegality*." In other words, he added, "*bad faith exists only when the office-bearer acted with the specific intent to deceive, harm or prejudice another person or by proof of serious or gross recklessness that reveals a breakdown of the orderly exercise of*

[15] From the law dictionary; *https://dictionary.law.com/Default.aspx?selected=21*
[16] [2019] ZACC 29

authority so fundamental that absence of good faith can be reasonably inferred and bad faith presumed."

Rule 35 of the Nairobi Centre for International Arbitration (NCIA) Arbitration Rules 2015, provides for exclusion of liability and states that there would be no liability *to any party for any act or omission in connection with any arbitration conducted pursuant to the Rules*, **EXCEPT** *where the act or omission is proved by that party* ***to constitute intentional act or omission committed by the body or person alleged to be liable to that party***.

Under Article 21 Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), it is provided that the Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52,and the officers and employees of the Secretariat shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, **EXCEPT** when the Centre waives this immunity; The fact that there is a window for waiver of the immunity illustrates that the fact that the immunity granted is not unfettered!

The London Court of Arbitration Rules, LCIA provides in Article 31 (1) that "*no arbitrator shall be liable to any party whatsoever for any act or omission in connection with any arbitration conducted under its auspices*". It goes further to defines circumstances where immunity is waived, thus "*the arbitral tribunal shall be liable in case the act or omission constitute conscious and deliberate wrongdoing in connection with any arbitration*".

Article 16 of the **UNCITRAL Arbitration Rules** adopts a position similar to that under the LCIA Rules and confers partial immunity on arbitrators, so that if parties prove that there is intentional misconduct by arbitrators during the arbitral process, the immunity from prosecution is lost.

Comparative review

Same kind of exceptions exist under Article 21 Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention).

The Organisation formalization of Business Law in Africa (OHADA) uniform Act on Arbitration which provides that the arbitrator ***enjoys full exercise of his civil rights*** and is expected to remain independent and impartial vis-à-vis the parties. Section 29 of the English Arbitration Act 1996 which provides that arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator **UNLESS** the act or omission is shown to have been in bad faith and under section 28 of the Australian Arbitration Act 1974 which excludes acts done in Bad faith from the Arbitrator's immunity and so does the Scottish Arbitration Act 2010.

The position in the USA offers a more water tight protection to Arbitrators. Under the USA uniform Arbitration code 2010, an arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

Invariably, it follows that an Arbitrator may be personally liable for any financial loss, and this was illustrated in the Kenyan Case ***of Mistry Jadva Parbat & Company Limited v Grain Bulk Handlers (GBH) Limited [2016] eKLR.***

In the Mistry Case, the Applicant, GBH sough the Court to uphold its challenge before the Arbitrator, Philip Bliss Aliker, on 21st October, 2015 and remove the Arbitrator from the arbitration between Mistry Jadva Parbat & Company Limited and itself. Other orders sought included that the Court declares the Award of 30th September 2015 void, that it directs that the Arbitrator refund fees and expenses paid and that costs be granted to the Applicant. The court found that the Arbitrator had exhibited bias in favour of one party, failed to treat parties equally contrary to section 16 of the Kenyan Arbitration Act 1995, failed

to allow parties to present their case fully, failed to adhere to the procedure agreed to by the parties and failed to show ability to determine the matter in circumstances that parties lost confidence in his ability to fairly determine the dispute.

The Court agreed with the Applicant, declared the Award void, ordered half a refund of the fee paid to the Arbitrator and removed the Arbitrator. In arriving at its decision, -the Court stated as follows; -

> *"the arbitrator, having so incompetently handled the said arbitration, and having delivered no award, and having wasted the time of the parties herein, ought not to be remunerated for there is no valid consideration for such remuneration" …*

From the Mistry precedent, there is nothing stopping parties from suing an arbitrator for acting in circumstances that can be deduced as bad faith and funds paid can be, and have been, reimbursed.

Courts in intervening in Arbitrations have now established that the Lack of confidence in an arbitrator brings into question not just the arbitral proceedings, but any decision made in respect thereof. In the case of ***Fox and Others v P.G. Wellfair Ltd [1981] 19 BLR 59,*** it was held that, **"***In any event, in view of the misconduct in relation to the main arbitration, I do not think that the award in Mr. Fisher's arbitration can stand either. Mr. Fisher must have lost confidence in the arbitrator by reasons of his misconduct to the main arbitration***".**

Three forms of damages may be recovered once proof of bad faith is established against an Arbitrator; these are the ***contract damages***, that is, a claim of what is due to you, then ***extra contractual damages,*** which may include representation fees, economic loss and emotional distress and ***punitive damages***.[17] Punitive

[17] Linda Curtis, Damage measurements for bad faith in breach of Contract, Stanford Law Review, Vol 18, issue 2 (2001) Vol 39/161-185

damages are exemplary, aimed at punishing the Arbitrator for the wrongful conduct and are generally meant to deter the behaviour by serving as an example to others[18]

Trends in Arbitrator Immunity and Future Outlook

Undoubtedly, it is important to grant immunity to arbitrators otherwise it will be difficult to guarantee that decisions will be made without being influenced by the likely reaction of parties. Accordingly, Arbitrator immunity exists to provide certainty to the arbitration environment and finality of Arbitral awards; however as highlighted above, immunity is not unlimited.

The International Chamber of Commerce (ICC) Arbitration Rules 2021 and the Permanent Court of Arbitration rules 2012 have been criticised for providing blanket and generalised protections for arbitrators. These broad protections have been argued as a means of combating competition by these Institutions from the growing number of Arbitration Institutions around the word.

Article 41 of the ICC Rules 2021 provides that arbitrators and all employees and persons acting on behalf of the ICC shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law. Article 16 of the PCA Rules provides that *the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.* Consequently, one must therefore carefully select the applicable law to ensure that Arbitrator impunity is not without remedy.

The Paris Court of Appeal has had the opportunity to interpret the Arbitrator's immunity under the ICC rules 2021 in light of an arbitrator's alleged misconduct and stated that his misconduct was independent from the performance of their

[18] Daniel Liberto, what are punitive damages? Purpose, gap, calculation and example, 2022. *https://www.investopedia.com/terms/p/punitive-damages.asp*

judicial mission, the Court considered that Article 34 of the ICC Rules, which provides that arbitrators are not liable for any act or omission in connection with arbitration, and decided that this immunity is only applicable to the immunity arbitrators enjoy in the performance of their judicial function. Accordingly, the 'acts' performed must be in line with lawful mandate.

Aside from limits within the rules, one must be careful in choosing the seat of arbitration and applicable laws since immunity can be sanctioned by mandatory laws of the seat of arbitration[19]. A good example is under the Swiss law where complete exclusions of liability are void and cannot be reduced to an acceptable standard of exclusion[20]. Under the Swiss code of obligations, *any agreement purporting to exclude liability for unlawful intent or gross negligence in advance is void*[21]. This is similar position with that in the German Civil code that provides that *acts that are grossly negligent or any intentional wrongdoing cannot be excluded by contractual agreement under the German Civil Code*[22]

Under the Italian law on the other hand, one must conclude with any application for setting aside an arbitral award before taking civil action against an arbitrator.[23]

According to Gary Born[24], an arbitrator is entitled to various immunities from civil claims by the parties arising out of his or her conduct of the arbitration[25] The nature and scope of these immunities varies depending upon the parties' agreement, any applicable institutional rules and applicable national

[19] *The lex arbitri*
[20] The Scope, the Validity and the Effect of Advanced Liability Waivers: Investment and Commercial Arbitration Perspective, *Stéphanie Papazoglou/April 26, 2020*
[21] Article 100 (1)
[22] Section 276 (3) GCC
[23] Article 829 n.6 of the Italian Cod of Civil Procedure
[24] 24 Born, Gary B., International Commercial Arbitration, Volume I (2009)
[25] Redfern, *The Immunity of Arbitrators*, in ICC, *The Status of the Arbitrator* 121 (ICC Ct. Bull. Spec. Supp. 1955)

law. As noted above, these immunities are only available to *"arbitrators"* engaged in "*arbitration,*" and not to others such as meditators or experts in an expert determination.[26]

According to Berger, Klaus Peter, writing on International Economic Arbitration, in spite the broad wording of the immunity clause and the broad liability granted under American law, general contract law in the US forbids to extend this waiver to liability for grossly negligent or wilful acts or omissions in the decision-making process[27]. Even if neither the applicable arbitration law, nor the arbitration rules, or *the receptum arbitri*[28] contain special exclusion of liability provisions, the contract between parties and each arbitrator contains an implied limitation of liability. As the Florida Task Force on International Arbitration has noted that:

> *There is little doubt left regarding the position on immunity of Arbitrators today; if it were understood traditionally to be absolute, even in countries like the USA, the situation no longer obtains, for instance, the second district appellate court in Baar v. Tigerman*[29] *denied such arbitral immunity to an arbitrator who failed to make a timely award, and permitted a cause of action in breach of contract directly against him*[30]

Finally, even though traditionally arbitrators have been granted an immunity similar to the absolute judicial immunity given to judges in the decision making process and have not been held personally liable for acts and conduct associated

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[26] This may include agents, employees working for the arbitrator and arbitrator institutions depending rules applicable

[27] Berger, Klaus Peter, writing on International Economic Arbitration Deventer Boaton, 1993

[28] This refers to the arbitrator's appointment contract

[29] *Baar v. Tigerman140 Cal. App. 3d 979, 189 Cal. Rptr,Cal: Court of Appeal, 2nd D, 1983*

[30] *Olesen, Elvi J., Baar v. Tigerman: An Attack on Absolute Immunity for Arbitrators, California Western Law Review Vol. 21 at Page 564 et seq.*

with arbitration proceedings, the spectrum is changing and this can be seen in the Californian case of ***Baar v. Tigerman*** highlighted above where direct action against an Arbitrator based on breach of contract was upheld.

Consequently, Arbitrators must continuously be aware of the sanctity of their duty and carry themselves with integrity making sure that by their very actions, they focus on delivering final and enforceable award using procedures that ensure fairness, expedition and cost effectiveness!

The words of Justice Thommen, T.K. come to mind as we reflect on Tribunal immunity,

> "*The arbitrator cannot act arbitrarily, irrationally capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract*".
>
> *Associated Engineering Co v Government of Anhra Pradesh and Anor [1992] AIR 232*

In conclusion, the writer proposes strong internal disciplinary mechanisms within Arbitral institutions as an absolute defence from court prosecution of Arbitrators. Such a mechanism can be an absolute defence from court room prosecution, this can be Anchored in Arbitration laws.

Under the Mechanism, aggrieved parties may file official complaints to the appointing authority to investigate and take action against 'errant' Arbitrators. It is expected that appointing Authorities, ought to have effective internal complaints handling mechanism. Unfortunately, this is an area of great weakness in most Arbitral appointing institutions and may be a topic for the next publication.

Energy Disputes Arbitration: A Focus on Independent Power Producers' (IPPs)

By: ***Austin Ouko*** *

Abstract

Energy projects are capital-intensive, long-term and complicated ventures as they often involve multiple parties from multiple jurisdictions and often new technologies. Independent Power Producers (IPPs) are private investors who finance, build and operate new energy generating projects and sell the electricity under a long-term contract to the off taker, the state-owned electric utility company, the Kenya Power and Lighting Company Plc. Normally, there is potential for many issues to arise that may result in a dispute during the life cycle of an energy project. Energy related disputes involving IPPs often have a very high monetary value, a strong public interest and a cross-border character, due to the origin of the parties involved. This paper finds that arbitration is the best suited dispute resolution mechanism to resolve such disputes as it offers important advantages. In such highly technical disputes, the ability to select arbitrators with specialised technical expertise or specific industry knowledge can be of great value to all parties. Also, party-appointed experts can be integrated into the proceedings at an early stage and help move the case along.

Introduction

The energy sector plays a critical role towards achievement of the Kenya's Vision 2030 and is a critical component of the Kenyan economy.[1] Access to

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[1]Report of the Presidential Taskforce, 'On the Review of Power Purchase Agreements (PPAs)' (29 September 2021) Government Printer. The PPA Taskforce Chaired by John Ngumi & comprising of 16 other members was appointed by HE President Uhuru Kenyatta on 29th March 2021 against the backdrop of a sustained public outcry from

adequate, affordable, and reliable energy supply is necessary in reducing the cost of doing business, spurring growth of enterprises and industries, and a critical in raising the standards of living.[2]

Electricity can be generated by renewable resources (such as solar, wind, hydro-electric, biomass, and geothermal resources) or from non-renewable resources (such as natural gas, coal, petroleum, and nuclear). [3] Power plants that generate electricity from non-renewable fuels (other than nuclear power plants) are generally referred to as thermal power plants. The power producer or generator is the owner of the power project and the seller of power. This party is also sometimes referred to as the Independent Power Producer (IPP) or project company.[4]

The classic IPP is a privately sponsored power plant that sells electricity under a long-term contract.[5] Normally, the off taker is the state-owned electric utility company, the Kenya Power and Lighting Company Plc (Kplc). The plant is generally financed on a project basis, with a project-specific company established for the purpose. The company can draw equity from a number of foreign and domestic investors and at times secures debt from a syndicate of

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consumers, businesses and individual Kenyans alike, about the high cost of power supplied by Kplc, especially when compared to the cost of power in neighbouring countries and in peer economies.

[2]See Trevor Omondi Oduor & Muskaan Aggarwal, 'Energy Arbitration in Kenya', 17 January 2022, IJPIEL, *https://ijpiel.com/index.php/2022/01/17/energy-arbitration-in -kenya/.* The policy aims to achieve various objectives including to make energy affordable, competitive and reliable, and for the promotion of energy conservation and efficiency, and to promote diverse energy supply sources in the Kenyan region, to ensure the safety of such supply

[3]Power Africa, *Understanding Power Purchase Agreements, Power Africa Understanding Series* (Vol. 1. open-source Creative Commons License)

[4]Ibid.

[5]Erik J. Woodhouse, The Experience with Independent Power Projects in Developing Countries: Interim Report, Working Paper #39 February 2005 Program on Energy and Sustainable Development, Stanford University, *https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/WP39%2C_14_Feb_2005.pdf*

banks on the basis of expected revenues. Most projects are highly leveraged, with debt accounting for as large a share of project finance as the bank syndicate will tolerate.[6] Typically, the projects are capital-intensive, long-term and complicated ventures as they often involve multiple parties from multiple jurisdictions and often new technologies.[7]

The global IPP market was built in the 1990s, in part, on the logic that private investors—notably foreign investors—were essential to financing, building and operating new generating capacity.[8] The dependence on foreign investment reflected the sheer inability of the state system to maintain sufficient investment of its own, the immature development of domestic capital markets, and often an interest in foreign technology and management practices.[9]

Consequently, energy related disputes often have a very high monetary value, a strong public interest and a cross-border character, due to the origin of the parties involved.[10] The emerging supply and value chains required to support these new technologies in the projects with raw materials and components also add to the possibility of disputes arising.[11] Disputes can arise at any stage of the project, from the initial concept phase, through the design and engineering, construction and operational phases up to decommissioning.[12] This makes energy related disputes to be very complex cases, and thus much better resolved the under arbitration, than domestic litigation. Arbitration tribunals tend to

[6]Ibid.
[7]Marily Paralika, Arbitration: An answer to disputes in the renewable energy sector?, 20 January 2022, *https://www.fieldfisher.com/en/insights/arbitration-an-answer-to-disputes-in-the-renewable*
[8]Woodhouse, *supra* note 5.
[9]Ibid.
[10]International Centre for Energy Arbitration, Dispute Resolution in the Energy Sector Initial Report,
http://scottisharbitrationcentre-org.stackstaging.com/wp-content/uploads/2015/05/ICEA-Dispute-Resolution-in-the-Energy-Sector-Initial-Report-Square-Booklet-Web-version.pdf
[11]Paralika, *supra* note 7.
[12]Ibid.

have independence, experience, and more so competence in complex energy and economic issues, as they usually do not have political pressures from any countries. Therefore, energy disputes form a significant part in many international arbitration cases, both in terms of investment arbitration and commercial arbitration.[13]

It is against this backdrop, that this paper focuses on the Arbitration of Energy related disputes with a specific focus on Independent Power Producers in Kenya. The paper is divided into five parts. Part II will discuss in detail the background of IPPs as to why they exist. Part III will discuss the Kenya IPPs experience. Part IV will discuss why arbitration is the preferred mode of resolving disputes relating to IPPs. Part V concludes.

II. Background of Independent Power Producers

There are several reasons, which make a country to adopt the IPPs model in the generation segment of the electricity value chain.[14] The process and model of introducing IPPs in a country's power generation system may differ among different jurisdictions but the objectives tend to be similar.[15] Vertically integrated, state owned electric power utilities have enormous institutional inertia as they are important sources of political patronage, closely tied to critical constituencies such as labour unions, financially both massive and costly, and offering services critical to the entire population. Introducing any reform in this system is normally extremely difficult, if not impossible; the difficulties compound where institutions are weak and the ability of policy makers to pursue massive reforms is blocked by myriad political interests. In such a climate, the path of least resistance is often followed. [16]

[13]Lilia Beznis, Energy Disputes Arbitration: Legal Issues, (Masters Thesis submitted to Mykolas Romeris University School of Law Institute of Private Law, 2022).
[14]Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1 at 6.
[15]Ibid.
[16]Woodhouse, *supra* note 5.

Therefore, politicians carve out a specific legal space for private investment such as IPPs. Such projects promise lower generation costs, the prospect of limited competition (or at least a competitive benchmark) in the sector, and they ease the burden on governments that, in the absence of IPPs, would be expected to finance new capacity through usually cash-poor (often bankrupt) state-controlled power corporations.[17] For their part, investors, justifiably nervous about the unstable investment climate and poorly managed electricity sector in developing countries, require a range of concessions, including sovereign guarantees and other incentives, before responding favourably to government invitations for IPP investment. Thus, both government officials and investors (for different reasons) take steps to insulate the project from country risk. [18]

Some jurisdictions prefer to have IPP participation through joint ownership. There are countries that opt to make all generation competitive and have subsequently sold all existing generation to IPPs.[19] The selected IPP programme in a country must fit with the nature of a country's overall electricity sector restructuring plans. In some countries, the restructuring results in new power generation being constructed by IPPs whilst in other jurisdictions, only some generation plants will be undertaken by IPPs. In Kenya, IPPs have invested in diverse technologies and accelerated the rate of power generation.[20]

The single buyer model is the one which exists in Kenya whereby a single off-taker (Kplc) buys all the power generated by the various generators.[21] The single buyer has monopoly over the transmission network and over sales to customers. Generation is subject to competitive bidding and is sold to the single buyer under a long-term contract. Customers remain captive and an

[17]Ibid.
[18]Ibid.
[19]Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1 at 6.
[20]Ibid at 7.
[21]Ibid.

independent regulatory authority is important for purposes of balancing the investor and the consumer interests.[22] The risk allocation criteria are critical, and regulators are required to ensure that the same are properly allocated among the parties. The model relies on the financial viability of the underlying Power Purchase Agreements (PPA).[23] And the creditworthiness of the off-taker is key, with different forms of credit enhancements being used as support. [24]

The next paper of the paper will dovetail into the history and experience of IPP in Kenya.

III Kenya's IPPs Experience

As stated above, the IPP market was built in the 1990s, in part, on the logic that private investors—notably foreign investors—were essential to financing, building and operating new generating capacity. [25] The dependence on foreign investment reflected the sheer inability of the state system to maintain sufficient investment of its own, the immature development of domestic capital markets, and often an interest in foreign technology and management practices.[26]

Prior to the introduction of IPPs, Kenya relied mostly on concessionary funding from multilateral and bilateral agencies to finance new investments in energy.[27]

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[22]Ibid. The Energy and Petroleum Regulatory Authority (EPRA) is established as the successor to the Energy Regulatory Commission (ERC) under the Energy Act, 2019 with an expanded mandate of *inter alia* regulation of upstream petroleum and coal. The functions of the Authority as provided in Section 10 of the Energy Act 2019.

[23]A PPA is generally the primary contract between the off-taker and a power producer. Parties come together and agree to buy and sell an amount of power to be generated from a renewable or non-renewable source.

[24]Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1 at 7.

[25]Woodhouse, *supra* note 5.

[26]Ibid.

[27]Eberhard, A., and K. Gratwick, 'Take 4: The Contribution and Evolution of Independent Power Projects in Kenya' MIR Working Paper 2007, Management

However, in the 1990s global donor trends shifted toward encouraging private sector participation in infrastructure with concessionary funding being targeted at health and social services.[28] This move away from almost exclusive reliance on development finance for energy projects was aggravated by a general aid embargo, imposed on Kenya throughout the early and mid-1990s, for reasons linked to corruption and lack of advancement in the creation of a multi-party state. This affected all sectors, including the energy sector. Thus, a platform of reform for opening up the country's generation sector to private participation gradually emerged in the mid-1990s, paving the way for contracting the first set of IPPs in 1996.[29]

In 1996, GoK in collaboration with the World bank and the International Monetary Fund, developed the Economic Reforms for 1996 -1998 Policy Framework to turn around the economy.[30] The energy sector had stagnated due to lack of financing and, with the shift in donor trends towards private participation in infrastructure financing, injection of new investment from the private sector became a necessity. As a result, the Government prepared a rolling five-year least cost investment programme to attract urgent investments in power generation, transmission, and distribution as well as investments in other energy sector areas.[31]

In July 1996, the Government floated an international tender for a contract to Build, Own and Operate (BOO) geothermal power facility using geothermal resources.[32] This geothermal plant, Olkaria III, was an addition to two other geothermal facilities Olkaria I and Olkaria II which are owned and operated by

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Programme for Infrastructure Reform and Regulation, Cape Town. *http://www.gsb.uct.ac.za/files/Kenya_10_10_2007_23512.pdf.*

[28]Ibid.

[29]Ibid.

[30] Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1 at 8.

[31] Ibid.

[32] Ibid.

Kenya Electricity Generating Company (KenGen).[33] Injection of new investment from the private sector other than being a necessity, also became an urgent need. In 1997, through enactment of the Electric Power Act[34], an independent regulator for the electricity sector was created. [35] In November 1998, Kplc signed the first IPP with Orpower 4 Inc. for an 8MW geothermal plant.[36] The World Bank then released and supported the Country to tender and negotiate for the first emergency interim IPPs- Ibeafrica a 56 MW Heavy Fuel Oil plant in Nairobi and a 40 MW barge mounted gas fired power plant - Westmont in Kipevu. [37] These were both for seven years and in 2004, Westmont was retired but Ibeafrica's PPA was restructured and extended.

With a huge power generation gap resulting from low hydrology as a result of the drought caused by the La Nina event that lasted from October 1998 to May 2000, encompassing four consecutive rainy seasons.[38] Further exacerbated by years of underinvestment in the electricity generation by the state at the time, the IPPs stepped in to plug the power generation gap. Kenyans remember that in 1999 and 2000, the country was plunged into devastating darkness. This was a result of the above stated two-year drought that instigated the low levels in the main hydropower dams.[39]

In order to cope with high demand and limited supply of electricity, the Government was left with no choice but to ration electricity as the electricity

[33] Ibid.
[34] Electric Power Act, No. 11 of 1997.
[35] Vincent Ombajo, The genesis of IPPs and their role in Kenya's power sector, *The Star Newspaper*, (Nairobi, 25 January 2022).
[36] Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1 at 8.
[37] Ombajo, *supra* note 35.
[38] Kenya Electricity Generating Company PLC, From Paper Company to an Iconic Power Utility, A history of Kengen, Published by KenGen, 2022.
[39] Ombajo, *supra* note 35.

supply could not keep up with demand particularly during peak demand.[40] The rationing ranged from 97.5 megawatts in the morning to 178.5 megawatts in the evening during weekdays for about six months. Notably, 70 per cent of the country's energy supply was from hydropower, with the Tana River being the main capacity yet the dams were dry, a situation that pointed to lack of diversification in power supply. In March/April 2000, for 12 hours a day, six days a week, domestic and commercial consumers did without grid power.[41] With the rationing not achieving the anticipated water saving levels, a decision was made to import emergency power generation capacity regardless of its impact on the economy.[42] Meanwhile, another rationing programe was introduced on 15 May 2000 where domestic consumers received power supply for about 15 hours per day and industrial consumers for eight hours on alternate days. Again, the long rains failed to push the hydrological cycle to a record low in 40 years. The system was supplying 8 GWh against a demand of 13 GWh. Another more intensified power rationing programme was released in July 2000. [43]

Overall, there was an electricity supply shortfall of 45 per cent during the day and 19 per cent at night.[44] The implication was that there were times when domestic consumers received power at inconveniencing times; for example, when power was supplied from late at night till the early hours of the morning when there was little use for it. This resulted in a public outcry to the effect that power should have been made available atleast between 5.00 p.m. and 11 p.m. and between 5.00 a.m. and 8.00 a.m. so that the school-going children could do homework and have their breakfast prepared. [45]

[40] Ibid.
[41] Ibid.
[42] KenGen, supra note 38.
[43] Ibid.
[44] Ibid.
[45] Ibid.

In May 2000, the situation had escalated to the extent that the government issued a paper entitled "Kenya Government Appeal for Local and International Assistance to Combat the Current Drought Stress" in which it sought support for its proposed recovery plan targeting food assistance, water supply, preventive and curative health care and provision of essential agricultural inputs.[46] In June, the appeal was upscaled to include support to address the impact of the drought on the power crisis. To mitigate the problems, the Country secured a USD 100 million emergency power credit from the World Bank to bring in 110 MW of additional temporary thermal generating capacity. It was hoped that the intervention would prevent a sever contraction of the economy and consequential job losses, which would result in increased poverty levels. [47]

Based on stated objectives, the scope of the credit involved three main areas. The first consisting of about 38 per cent of the credit, was for capacity purchases from the IPPs with whom the government had signed contracts. [48] Specifically, the government would purchase electricity and associated fuel from the short-term IPPs and fuel suppliers for the six-month duration stipulated in the contracts. The credit for the IPP component had been calculated as the difference between the total cost of the electricity to be supplied from the emergency plants and the net revenue collections from final consumers. The second area comprised fuel purchases for the IPP plants, this was to take up 52 per cent of the credit. The third area was fuel purchases for the existing plants and consisting of 10% of the credit.[49] The increase of power supply from IPPs as well as KenGen facilities helped to ease the power rationing. The programme was discontinued in December 2000. [50] Outcomes of the prolonged period of power rationing varied in significance, magnitude and perception. At the national

[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Ibid.

level, the economy was severely affected. Damage to the economy was estimated at USD 660 million. The GDP contracted by 0.2 per cent in 2000.[51]

The power rationing in 1999-2000 served as a wakeup call for the stakeholders for the energy sector. The possibility of ever experiencing such power inadequacy was a dreadful thought among the policymakers. Subsequent government policy provided for the enhancement of power generation, specifically the Energy Sector Reform Project (1998 – 2004) and the Energy Sector Recovery Project (2004 – 2010) which noted that the extension and upgrading of power generation capacity were critical in the provision of a stable supply of electricity. [52]

This over reliance on one source of energy is now a thing of the past, thanks to IPPs who not only have merited capability to access latest technology compared to public institutions, but also improve energy mix and overall security by investing in diverse sources of energy like geothermal, solar and wind among others in different locations.[53] Since then, IPPs have increased their investments in various technologies ranging from thermal, solar, wind, cogeneration, hydro among others.[54] As at 2022, The IPPs market share had risen and accounted for 35.95 percent of the generation capacity up from 33.58 percent in 2021.[55]

Recent announcements of impending droughts, due to climate change and unpredictable weather patterns points to a greater urgency of engaging investors to adopt climate resilient technologies to avert a power crisis.[56] Some

[51] Ibid.
[52] Ibid.
[53] Ombajo, *supra* note 35.
[54] Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1.
[55]Power Africa, Development of Kenya's Power Sector, *https://www.usaid.gov/sites/default/files/documents/1860/Kenya_Power_Sector_report.pdf*
[56] Ombajo, *supra* note 35.

of the other advantages of having IPPs worth mention are that include they facilitate resource mobilisation particularly funding from private investors.[57] They are deemed to have high levels of efficiency geared to maximising their returns as they can only plan for 20 years as renewal of the Power Purchase Agreements beyond 20 years is not assured unlike the public owned utilities, which are here for unlimited period.[58] Their diversification in different technologies improves the energy mix and overall energy security. They assist in enhancing local capacity and expertise in certain technologies. And they are able to be deployed within a short period particularly where a country is experiencing power shortages.[59]

However, the introduction of IPPs in a country's power generation system provides not only benefits but also has had resultant challenges.[60] Some of the cited challenges associated with IPPs include; forex risk disadvantages both to the Government and the off-taker as most of the IPPs are denominated in foreign currencies, while off-taker revenue is in local currency. High costs associated with IPPs result in increased tariffs to end consumers. Guarantees required by investors and lenders in the form of Government support Measures increases Government indebtedness. Due to their relatively strong financial positions, there are IPPs which tend to capture both the off-taker and associated government authorities, thus gaining the ability to extract certain favours. There are some IPPs which are incorporated and domiciled in certain jurisdictions to avoid tax obligations. Some IPPs have been involved in corruption and other malpractices.[61]

[57] Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1.
[58] Ombajo, *supra* note 35.
[59] Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1.
[60] Ibid.
[61] Ibid.

Furthermore, in the recent past, a lot has been said about the high cost of electricity in Kenya, with much of the blame attributed to IPPs and even in some instances declarations made that IPPs is a failed experiment in Kenya.[62] The IPPs have generally been perceived as more expensive than the state owned KenGen.[63] Owners have also been portrayed as opportunistic, profiting from Kenya's drought situation and poor investment climate. References to IPPs as being enemies of Kenya have even been made by public stakeholders.[64] To date, Kenya Power has signed at least 42 PPAs with IPPs.[65] Currently, 21 IPPs are active.[66] But apart from some basic information, very little detail is available to the public regarding how each contract was procured, its cost structure and resulting electricity price, or the impacts on Kenya's broader power system.[67] The often-quoted statistic is that KenGen is paid on average Sh 5.3 per unit of electricity sold, while IPPs were on average paid Sh 15.3 and the contradiction that IPPs account for 47 per cent of procurement costs and 25 per cent of energy sold, while KenGen accounts for 48 per cent of cost but 72 per cent of energy sold.[68]

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[62] Ombajo, *supra* note 35.

[63] See Macharia Kamau, MPs shine light on independent power firms for high charges, The Standard Newspaper, (Nairobi 21 August 2021).

[64] Eberhard & Gratwick, *supra* note 27.

[65] EPRA register of licences and permits for electric power undertakings as at November 2019, Kenya Power reports, press releases, and the Least Cost Power Development Plans (LCPDP)

[66] Columnists, How Power Tariff duel hits economy investments, Business Daily, Wednesday 31 August 2022.

[67] Murefu Barasa, Enhancing Public Participation in Kenya's Power Purchase Agreement Process, Energy for Growth Hub, 26 October 2021, *https://www.energyforgrowth.org/report/enhancing-public-participation-in-kenyas-power-purchase-agreement-process/*. Kenya has some of the highest electricity tariffs in East Africa— at US¢ 22/kWh, Kenya's average residential tariff is higher than Uganda, Ethiopia, Tanzania, and South Africa, as well as in OECD countries including Canada, Sweden, and the Netherlands.

[68] George Aluru, Measuring IPPs' tariffs to KenGen is to compare oranges to apples, The Star (Nairobi 29 November 2021).

Moreover, public disapproval of IPPs has been widespread, focusing on a range of concerns—from suspicions of corruption due to unclear and onerous rules in solicitation, award and close of IPP contracts, and power purchase agreements negotiations. Their pass-through costs are laden with inflated risk premia, to objections to high prices or perceived levels of profit, to environmental concerns (including siting, fuel choice, population displacement, and others).[69] Even a Presidential Taskforce that was formed to review Power Purchase Agreements struggled to get information on PPAs and data on IPPs from Kplc management and required intervention by the Kplc Board of Directors to get some information.[70] Two alternative conclusions can be drawn from this inability or refusal to provide information. The first is that Kplc does not have the information. The second conclusion the Taskforce drew was that Kplc had the information but refused to release it. An immediate recommendation of the Taskforce in response to this state of entropy was for a forensic audit into how existing PPAs were entered into, and how they are monitored.[71]

Government officials also report mixed feelings with the IPP experience, mainly citing the adverse impact on the balance sheet of Kplc.[72] This concerns are what

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[69] Woodhouse, *supra* note 5; see also Reda Bousba & Yves Albouy., *The impact of IPPs in developing countries: out of the crisis and into the future (English).* Public policy for the private sector, Note no. 162 Washington, D.C.: World Bank Group. http://documents.worldbank.org/curated/en/297511468764107939/The-impact-of-IPPs-in-developing-countries-out-of-the-crisis-and-into-the-future. Specific requests for information on IPPs' that were made by a Presidential Taskforce that was set up to review Power Purchase Agreements their compliance with laws and regulations, any breach or misrepresentation on the part of Kplc the offtaker and/or the IPPs, or fraud on the part of IPPs, elicited curt answers without adequate supporting evidence. Critical agreements that must accompany PPAs such as direct agreements, EPC agreements, lease agreements, O&M agreements, PISSA, fuel supply agreements among others were not supplied to the Taskforce.

[70]Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1.

[71]Cheboite Kigen, carefully manage Kenya Power's role when using task force report, Business Daily, (Nairobi, 29 October 2021).

[72] Woodhouse, *supra* note 5.

led to the setting up of the Presidential Taskforce.[73] The primary term of reference of the Taskforce was to undertake a comprehensive review and analysis of the terms of all PPAs entered into by Kplc.[74] To probe the compliance of the PPAs and all associated agreements with Government policies, and statutes and identify what appropriate actions should be taken, including the termination or renegotiation of the PPAs. It was also tasked with reviewing the sustainability and viability of all independent power generation projects that had been proposed, or were under implementation, or in operation, and make appropriate recommendations.[75]

The IPPs, for their part, argue that first-of-a-kind projects are often costly, and that state owned plants are inappropriate benchmarks. While evaluations of cost are, of course, different from project to project, the debate is often strikingly similar.[76] Further, this debate is not easily resolved, even in particular cases. Hard comparisons of plant cost in the absence of standardized indicators (such as bids into a merit-based system) are difficult to make in the absence of objective financial and performance data. Project costs for private developers reflect an array of site-specific expenses that are difficult to compare. IPPs also argue that their prices are affected government decisions in many fundamental ways including fuel and siting choice, and dispatch levels. By contrast, state-owned power plants often operate on extremely loose terms relative to their private counterparts—with limited offtake requirements, flexible payment schedules, and often poor accounting of cost and revenue. Determining the cost benchmark for state owned plants is often impossible—indeed, many countries looked to IPPs as a potential means of introducing a competitive benchmark to the industry.[77]

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[73]Gazette Notice 3076 of 26th March 2021.
[74]Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1.
[75]Ibid
[76] Woodhouse, *supra* note 5.
[77] Woodhouse, *supra* note 5.

One of the recommendations of the Presidential Taskforce that was presented to H.E. President on 29 March 2021, was a proposal that IPP tariffs should be benchmarked against the state-owned KenGen tariffs for technologies where KenGen is present.[78] The Taskforce also recommended immediate cancellation of all ongoing but un-concluded PPA negotiations.[79] At risk of cancellation were a total of 92 projects capable of generating 2,345.07MW that were unsigned. Out of the 92 projects, 58 were awaiting PPA renegotiation while 28 were under negotiation with no commitment.[80] However, it was not clear whether such cancellation would extend to those PPAs that were signed but not yet effective due to unfulfilled conditions precedent, such as letters of support and legal opinions pending issuance by the Attorney General. This would no doubt have affected the various sponsors and project developers who had invested considerable time and resources undertaking the PPA preliminaries including acquiring land rights, seeking social buy-in from local communities, and obtaining licences in the hope of setting up power plants in Kenya.[81]

It further recommended the review and renegotiation of power purchase agreement tariffs that IPPs were charging.[82] As at August 2022 only three IPPs had accepted tariff reduction despite the Taskforce recommending that the same should have been done within four months of presenting its report.[83]

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[78] Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1.
[79] Ibid.
[80]Columnists, *supra* note 66.
[81]Binti Shah and Nkatha Murungi Omondi, ENSafrica, A Snapshot of The Recommendations of The Presidential Task Force On Review Of Power Purchase Agreements In Kenya, 12 October 2021, *https://www.mondaq.com/government-contracts-procurement-ppp/1120030/a-snapshot-of-the-recommendations-of-the-presidential-task-force-on-review-of-power-purchase-agreements-in-kenya*
[82] Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1.
[83] Herald Aloo and John Otini, State to shun IPPs in new power plan, the People Daily (Nairobi, 12 August 2022).

Consequently, the Energy Ministry indicated that it will turn to buy cheaper power from KenGen and Ethiopia Electric Power. [84]

On their part IPPs have argued that KenGen, as a majority public sector institution, is able to access much cheaper financing on-lent by the Government. KenGen's cost of capital is significantly lower than that of the IPPs.[85] According to KenGen's 2020 financial statements, the weighted average interest rate of the company's Sh145 billion debt was two per cent. The borrowing cost from IPPs is more comparable to KenGen's direct borrowing at 7.5 per cent. Some of these loans have a grace period of ten years and repayment periods of up to 30 years compared to one year and 15 years for IPPs. Therefore, IPPs tariffs will be higher due to a higher cost of financing.[86] This fact was also well corroborated in the Taskforce report. The cheaper financing for KenGen may reduce the cost of the power sold but adds to the overall debt of the state. This is not the case with IPPs which do not benefit from sovereign-backed loans. Given the strong pressure on Kenya's sovereign debt and the need for public funding in numerous sectors, it is not sustainable for Kenya to keep dedicating large volumes of its debt capacity to future power generation when competitive private alternatives are available through IPPs and PPPs. [87] Furthermore, KenGen's power plants are mainly focused on renewable sources and thus lower generation costs and most of KenGen's power generation assets, more so the hydro-generation assets, have been fully paid down and are able to charge lower tariffs.[88]

Another argument offered as to why KenGen had lower tariffs is the shorter development process that KenGen goes through compared to IPPs.[89] KenGen

[84] Ibid.
[85] George Aluru, Measuring IPPs' tariffs to KenGen is to compare oranges to apples, The Star (29 November 2021).
[86] Ibid.
[87] Ibid.
[88] Columnists, *supra* note 66.
[89] Aluru, *supra* note 85.

projects take on average 2-3 years from conception to start of construction as compared to an IPP average of 6-8 years. KenGen, for example, accesses land and licenses much more easily than private-sector entities due to state backing and often operates outside of dates of commissioning as foreseen by Kplc.[90] A good example of this is noted in the Taskforce report, where KenGen is alleged to have built two power plants without a signed PPA, and that these PPAs were then signed after the plants were completed. The normal process followed by IPPs involves negotiating a PPA with Kplc and receiving approval from EPRA, well before any financing is raised or construction commences. [91]

This process, in addition to the licensing and permitting process, can take over eight years for IPPs which has a serious implication on the costs of these projects and therefore the tariffs required to recover these costs once the projects are operational.[92] IPPs concurred with the Taskforce's recommendation that all projects must adhere to one process regardless of the origin, otherwise planning becomes further complicated and competition, which should ultimately lead to lower prices for consumers becomes a mirage. [93]

Further, IPPs have a defined 20-year lifespan during which they must recover their investment and make a return. [94] On the other hand, KenGen in most of its plants is not limited by time in their operations and can, therefore, spread the recovery of their investments over a much longer period than the IPPs allowing the generator to achieve lower tariffs. Finally, KenGen plants are allowed to supply more energy as per the economic merit order and are used more as baseload plants, while a significant percentage of the IPP plants are used to supply power during the peak demand periods thus running for shorter

[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.

periods, supplying less energy.[95] Without the IPPs, state-owned utilities would have been able to finance and build less capacity, and valuable demand would have gone unmet.[96] After all, it must be understood that for the economy, no power at all is more costly than availability of expensive power. [97]

All the above issues together with the recommendations of the Taskforce on the downward renegotiation of PPA tariffs has created uncertainty opening a window for tension and potential disputes. Various concerns were raised about the implications of the Taskforce's mandate and recommendations on power purchase agreements, and in particular the Government's commitment to honoring its obligations.[98] Some of the contractual agreements between IPPs and the Government are solid, and any alteration could trigger a legal dispute. As stated above, energy related disputes tend to be very complex cases, and thus much better resolved the under arbitration, than domestic litigation. Arbitration tribunals tend to have more competence, independence, experience, and competence in complex energy and economic issues, as it is assumed that they do not suffer from political pressures.

The next part of the paper will discuss key features of energy related disputes and the role of arbitration in resolving energy related disputes.

IV Arbitrating Energy Related Disputes Relating to IPPs

a. Energy related disputes

It is impossible to exhaustively catalogue the variety of disputes that might arise during the life-cycle of an energy project, particularly where projects are

[95] Ibid.
[96] Bousba & Albouy, *supra* note 69.
[97] Ombajo, *supra* note 35.
[98]Report of the Presidential Taskforce on the Review of Power Purchase Agreements (PPAs), *supra* note 1.

complex, high value and taking place across a multiplicity of jurisdictions.[99] However, it is possible to identify some of the main areas where disputes may arise in connection with renewable energy projects. These may include claims arising where new technologies fail to perform to expectations leading to parties facing claims of misrepresentation, breach of contracts, even negligence.[100] Managing and resolving such disputes is difficult largely because of the exceptionally technical nature of the underlying issues. Discerning what caused the problem is often a matter of complex scientific or engineering expertise, sometimes in very niche or nascent areas. It is no surprise then that one of the most effective strategies for dealing with such disputes is obtaining relevant expert input as early as possible.[101] Also there may be disputes as to the ownership of the intellectual property and licensing rights.[102] Other disputes that may arise are construction disputes, such as claims relating to delay, scope changes, cost overruns, defects claims, breach of contract or defects.[103]

Investor-state claims under multilateral or bilateral investment treaties brought by foreign investors for breach of investment protections such as the fair and equitable treatment standard.[104] Over the past decade states have implemented subsidies and financial incentives for the energy industry bringing down the cost of energy.[105] Factors such as the Covid-19 pandemic have pushed

[99]Norton Rose Fulbright, Renewable energy project disputes, Navigating the dark side of the energy transition, 16 – June 2021 International arbitration report issue. *https://www.nortonrosefulbright.com/en/knowledge/publications/af84f6b1/renewable-energy-project-disputes*

[100]See, for example, *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd and another* [2017] UKSC 59.

[101] Ashurst, the top 5 disputes on renewable energy projects and how to avoid or manage them, 7 December 2021. *https://www.ashurst.com/en/news-and-insights/legal-updates/the-top-5-disputes-on-renewable-energy-projects-and-how-to-avoid-or-manage-them/*

[102]Mark Mcmahon, The rise of renewable energy disputes, *https://www.stewartslaw.com/news/rise-of-renewable-energy-disputes/*

[103]Norton Rose Fulbright, *supra* note 98.

[104]Norton Rose Fulbright, *supra* note 98.

[105]Mcmahon, *supra* note 101.

Governments to pursue economic recovery policies that involve reducing and cutting down on subsidies or financial incentives. Where states have changed subsidies or financial cuts on renewable energy investment, this will often lead to foreign investors bringing claims under their bilateral or multilateral treaties. Their claims will be directly against the state for breaching the investment protection enjoyed by the "fair and equitable treatment" standard.[106] The wave of investor claims against states such as Spain and Italy under the Energy Charter Treaty following changes to those states' energy regulatory frameworks is an example of these types of disputes.[107]

Joint venture and other contractual disputes between stakeholders, where multiple parties are involved in the development and financing of large renewable energy projects.[108] Claims arising out of delay in the commencement of supply from energy projects, including where grid integration issues delay projects. Regulatory enforcement action where renewable energy is dispatched and sold in highly regulated markets.[109]

Despite these risks and the significant potential of disputes that can arise, arbitration appears to be well equipped to deal with them as discussed below.

b. Arbitration of IPP related disputes

Arbitration is already the dispute resolution mechanism of choice for many participants in the energy industry and it offers important advantages in the context of energy project disputes.[110] In 2020, energy disputes encompassed one of the top three industry sectors dominating the London Court of International Arbitration (LCIA)'s, International Court of Arbitration (ICC)'s and

[106]Ibid.
[107]Norton Rose Fulbright, *supra* note 98.
[108]Ibid.
[109]Ibid.
[110]Ibid.

International Centre for Settlement of Investment Disputes (ICSID)'s caseload. This trend is set to continue with fresh disputes arising from the industry. [111]

At COP26 conference held in Glasgow in 2021, lawyers put pressure on delegates to discuss the use of arbitration as a mechanism for resolving energy disputes and which led to introduction of this provision into the COP agreement.[112] While the COP26 agreement stops short of specifying arbitration as the preferred dispute resolution mechanism, it does provide for implementation of voluntary measures by national states that require contracts between states and industry, which can accommodate arbitration agreements.[113]

In 2015, Kenya joined the International Energy Charter Treaty (ECT) and became the 83rd signatory on 20th March 2017.[114] The ECT was signed in 1994 and entered into force in April 1998.[115] ECT is a multilateral investment treaty that helps to establish a legal structure for its member states in the investment, transit and energy trading businesses. The Treaty's provisions focus on four broad areas namely; the protection of foreign investments, based on the extension of national treatment, or most-favoured nation treatment (whichever is more favourable) and protection against key non-commercial risks.[116] Non-discriminatory conditions for trade in energy materials, products and energy-related equipment based on WTO rules, and provisions to ensure reliable cross-

[111] Mcmahon, *supra* note 101.
[112] Paralika, *supra* note 7.
[113] Ibid.
[114] See *https://www.energycharter.org/media/news/article/kenya-becomes-a-new-signatory-of-the-international-energy-charter/.*
[115] Available at *https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/.* The Energy Charter Treaty provides a multilateral framework for energy cooperation that is unique under international law. It is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources. The Energy Charter Treaty was signed in December 1994 and entered into legal force in April 1998.
[116] Ibid.

border energy transit flows through pipelines, grids and other means of transportation.[117] The resolution of disputes between participating states, and - in the case of investments - between investors and host states. The promotion of energy efficiency and attempts to minimise the environmental impact of energy production and use. [118]

Large scale energy projects are likely to involve investors, contractors and sub-contractors from multiple jurisdictions.[119] Further they are structured in variety of ways usually involving three phases: development, construction and operation. Thus, there is potential for many issues to arise that may result in a dispute. Given the cross-border nature of many energy projects, arbitration offers an impartial forum for the resolution of disputes. The relative ease of enforcing arbitral awards globally under the New York Convention is also a key advantage of arbitration. Another important advantage of arbitration is that it provides parties with the opportunity to have a say in the selection of arbitrators. In highly technical disputes, the ability to select arbitrators with specialised technical expertise or specific industry knowledge can be of great value to all parties.[120] Also party-appointed experts can be integrated into the proceedings at an early stage and help move the case along.[121]

Confidentiality is another attractive feature of arbitration. Arbitral proceedings and awards are private and generally confidential, unlike litigation.[122] This can be very important where, for example, trade or commercial secrets in emerging technologies risk being exposed as part of a dispute. This privacy – along with the perception that arbitration can be less hostile – can also assist in preserving

[117] Ibid.
[118] Ibid.
[119]Norton Rose Fulbright, *supra* note 98.
[120]Ibid.
[121] Paralika, *supra* note 7.
[122]Norton Rose Fulbright, *supra* note 98.

on-going commercial relationships, something that is important in energy projects which involve long-term relationships.[123]

In cases involving multiple stakeholders, there is scope to consolidate cases in multi-party arbitration either under the terms of the arbitration clause or under the rules of the arbitral institution. This avoids the risk of competing tribunals and inconsistent awards. [124]

Investor-state disputes are typically by way of arbitration, and bilateral or multilateral agreements will be structured in this way. These agreements protect investors investing outside their home state. If, for example, the state nationalised the investment of a project, they are compensated, which constitutes the fair and equitable treatment (FET) standard. [125]

Finally, there is generally no right of appeal from an arbitral award and, save for limited recourse to have an award set aside or enforcement denied, the outcome is considered final. This finality can reduce the cost and time involved in resolving disputes. [126]

On the other hand, international arbitration, more so the investor-state dispute settlement mechanism, may be considered a victim of its own success as it has been progressively criticized.[127] It started with criticism directed at the lack of transparency of investor-state proceedings. It was then followed by the disapproval of contradictory decisions in "twin" cases involving related parties with claims based on the same facts. Reference is also made to debates on the interpretation of umbrella clauses, the most-favored-nation treatment, and the

[123]Ibid.
[124] Mcmahon, *supra* note 101.
[125] Ibid.
[126]Norton Rose Fulbright, *supra* note 98.
[127]Eloïse Obadia, 'Investor- State Disputes: What Works Beyond Arbitration?', in Nassib G. Ziadé (ed), BCDR International Arbitration Review, (© Kluwer Law International; Kluwer Law International 2019, Volume 6 Issue 2) pp. 441 – 484.

state of necessity, to cite a few.[128] Beyond disagreements on substantive concepts, criticism has also arisen in other cases about the independence of arbitrators, the length and cost of arbitration proceedings, and more recently the use of third-party funding. Although not always voiced openly, the lack of quality of the awards has also become an issue. Parties are often disappointed with the outcome even if on the face of it they are winning. They view the reasoning of the tribunals as too short and limited and frequently find that the arguments they advanced are dealt with superficially, leading to a result that might appear incorrect. As a result of these issues, parties are too frequently unhappy with the outcome.[129]

Furthermore, given the multi-party nature of most renewable energy projects, a significant downside of arbitration is that it is difficult to extend the binding effect of the arbitration on third parties, make a third party notice or join a party to the proceedings.[130] Arbitral institutions increasingly provide for mechanisms in their rules to make it easier to bring in third parties, however this typically relies on the existence of back-to-back contracts with similar arbitration clauses.[131]

Conclusion

As shown in the paper, energy related disputes are often of very high monetary value, complex cases, and at times involve multiple stakeholders from different jurisdictions and thus much better resolved the under arbitration, than domestic litigation.

[128] Ibid at 448.
[129] Ibid.
[130] Paralika, *supra* note 7.
[131] Ibid.

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https://www.nortonrosefulbright.com/en/knowledge/publications/af84f6b1/renewable-energy-project-disputes.

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The Energy Charter Treaty.

Book Review: Accessing Justice Through ADR

By: ***Mwati Muriithi****

Author: Dr. Kariuki Muigua, PhD
Number of pages: 1171
Publisher: Glenwood Publishers Limited, Nairobi: Kenya (2022)
ISBN: 978-9966-046-30-7

Introduction

This book contains a collection of independent articles on Alternative Dispute Resolution (ADR) written over time. Some have been published in Journals and book chapters. The publication was necessitated by the need to consolidate the author's work in ADR and make it easy for the general readers, scholars, judges and academics to access.

The author, Dr. Kariuki Muigua, PhD, was declared the first ever winner of the CIArb (Kenya Branch) ADR Lifetime Achievement Award, the highest honour given by the Institute to one member for his immense contribution to the growth of practice, research and scholarship of ADR in Kenya and across Africa. The award came barely a week after he had won the coveted Law Society of Kenya ADR Practitioner of the Year Award at the 4th Edition of the Nairobi Legal Awards for his outstanding practice in ADR and especially arbitration and his role as a mentor to many lawyers venturing into the area. He was also awarded the ADR Publisher of the Year for his scholarship, authorship and editorship of leading research and publications on ADR in Africa including the Journal of Conflict Management and Sustainable Development and the Alternative Dispute Resolution (ADR) Journal.

*** LLB (Hons) KU; Dip. In Law (KSL); ACIArb; Advocate of the High Court of Kenya; Legal Researcher.***

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.

He was also awarded the ADR Practitioner of the Year Award 2022 at the AfAA Awards. The award which was presented by the African Arbitration Association is awarded to the Arbitrator/ADR practitioner who is adjudged to have made outstanding achievements in, or contribution to, the development of Arbitration/ADR in Africa.

He was recognized and awarded for his role as the Chartered Institute of Arbitrators (CIArb) Africa Trustee from 2019 to 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022.

His book, *Settling Disputes through Arbitration in Kenya, 4th Edition;* Glenwood publishers 2022, was awarded the Publication of the Year Award 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022.

He is a member of the National Environment Tribunal which was awarded as the best performing Tribunal in Kenya for handling the most cases.

Dr. Kariuki Muigua has demonstrated his prowess and sound understanding of ADR. He notes that ADR is part of Conflict Management. Conflict management mechanisms include those that are coercive, such as, arbitration and the collaborative or none coercive ones (negotiation, (re) conciliation and mediation).

He further notes that the term Alternative Justice Systems is also applied to the many mechanisms that are used to administer Justice in Africa and elsewhere. There is also Traditional Justice Systems which incorporate customary practices negotiation, conciliation and arbitration.

The various articles seek to link ADR Mechanisms with the quest for justice. Access to Justice is possible through various mechanisms which include Litigation, Arbitration, Conciliation, Mediation. These mechanisms have existed for time immemorial in Africa.

The author points out that conflict management is culture specific. African communities have various cultures that recognize harmony and 'ubuntu' as part of life. 'I am because we are' is part of that philosophy of conflict management and harmonious living.

At the international level there is the growth of Arbitration and International Commercial Mediation. The debates arising from these developments are also covered in the various papers.

The author emphasizes on the need to write stories from our perspective: The formal and informal mechanisms for conflict management have their place in the totality of the framework for conflict management.

In line with the book, Accessing Justice through ADR is a quest worth pursuing.

Dr. Kariuki Muigua offered the book for free download in his law firm Kariuki Muigua & Co. Advocates website in a quest to realize the key objective of its publication, promoting knowledge on Accessing Justice through ADR.

This book is a must read for ADR students, teachers and tutors of ADR, ADR practitioners and to the general public interested in acquiring knowledge on the various ADR mechanisms and their role in resolving or settling disputes occurring in everyday life.

The Anatomy of Maritime Arbitration in Africa

Beth Michoma*

Abstract

Maritime Arbitration Centers play a critical role in resolving maritime disputes. Each year these centers release statistics of the number of disputes filed with them. However, data on maritime arbitration in Africa remains largely unreported.

There is no globalization without shipping and maritime transportation. For any country to prosper they must allow interconnectivity and key is to facilitate their citizens to tap into the international marketplace.

The demand, supply and transportation of goods may be facilitated through transport systems such as air, road, rail, multimodal transport systems but key is maritime transportation which accounts for the movement of 90 percent of the world's movement of goods.

Whilst Africa accounts for, "1.3 billion tons including both goods loaded and discharged, a 5.6% increase over 2020. The continent accounted for 6.9% of total goods loaded and 5% of total goods discharged",[1] a substantial percentage of the carriage of goods by sea, growth is imminent with increased utilization of our coastlines and the rise in interregional trade.

The African Union has made it a priority to work to enhance the capacity of African states to participate fully in international trade by investing in maritime

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[1]UNCTAD(*https://unctad.org/press-material/unctads-review-maritime-transport-2022-facts-and-figures-africa*) Accessed 16th January 2023

infrastructure as envisaged by the formation of the **Program for Infrastructure Development in Africa (PIDA)** and the appointment of the Africa Union High Representative for Infrastructure Development in Africa.

However, infrastructure development alone is not sufficient to ensure that African countries can keep up with entrenching maritime trade. African Countries must in addition ensure that there are concrete dispute resolution mechanisms entrenched, key being Maritime Arbitration.

This paper examines the anatomy of Maritime Arbitration, the types of disputes, and incorporation of arbitration clauses and gives recommendations to African Countries to entrench Maritime Arbitration as a dispute resolution mechanism.

Introduction

The nature of international trade ensures that goods such as Consumables, raw materials, food, and machinery can be sought and delivered to the international marketplace and dispatched to various countries. [2] Further, International trade allows countries access to goods and services that are not available domestically and as a result, the market runs on a demand and supply model. Key to international trade is the movement of goods from one country to another through transport infrastructure such air, road, rail, multimodal transportation systems and most important maritime transport through the carriage of goods by sea.[3]

International and interregional trade facilitated by carriage of goods by sea, has been an important activity that has enhanced the economic growth and prosperity of the African Continent throughout history.[4] The vast African

[2] Romney Robinson, International Trade (*https://www.britannica.com/topic/international-trade)* Accessed 23rd January 2023

[3] Trade finance global, Carriage of goods in international trade *(https://www.tradefinanceglobal.com/freight-forwarding/carriage/)* Accessed 23rd January 2023

[4] Alois Mlambo, African Economic History and Historiography, *(https://doi.org/10.1093/acrefore/9780190277734.013.304),* Accessed 23rd January 2023

coastline has been a beacon of adventure, prosperity and gateway to riches for traders and explorers searching to trade in salt, spices, precious metals and foodstuff throughout the African continent since time immemorial.

The historical upside of the international and interregional trade, for the African Continent was the establishment and prosperity of port towns such as Mombasa and Zanzibar in East Africa, port cities in North Africa such as Alexandria and port Suez in Egypt and Tanger Med in Morocco, West Africa port cities such as Abidjan, Lagos, Dakar, Lomé and southern Africa port towns such as Durban just to name a few.[5]

The strategic positioning of the Continent extends to its maritime zones. Thus, the Continent is bounded on the East by the Red Sea and the Indian Ocean, to the South of the Continent by the waters of the Atlantic Ocean and the Indian Ocean, to the North the Continent is bounded by the Mediterranean Sea and to the West by the Atlantic Ocean.

The Continent is thus well placed for growth and revenue due to the established maritime trade routes through its collective coastline of 18,950 miles or 30500 Kilometres in length.[6]

Further, The East African community has access to the maritime domain as provided for by the Coastal states of Kenya and Tanzania consisting of the

[5] PWC, Ports of sub-Saharan Africa, *(https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjMgefSu938AhUVTaQEHZCeCSIQFnoECFIQAQ&url=https%3A%2F%2Fwww.tralac.org%2Fimages%2Fdocs%2F12935%2Fports-of-sub-saharan-africa-map-pwc-april-2018.pdf&usg=AOvVaw0h7Zt_88Gx14poOTQ7CTjW*) Accessed 23rd January 2023

[6] Countries in Africa with the Longest Coastlines *(https://www.worldatlas.com/articles/countries-in-africa-with-the-longest-coastlines.html)* Accessed 16th January 2023

waters of the Indian Ocean. Through Kenya and Tanzania, the EAC has a coastline of approximately 1,950 kilometres.[7]

Maritime transport and carriage of goods by sea is increasingly vital and a cornerstone of International and Interregional trade as we realize a more globalized world. Currently more than 90 per cent of goods for import and export are transported by sea.[8] Further maritime volumes are set to triple by 2050. The value of global maritime trade is currently estimated at more than 14 trillion US Dollars as of 2019.[9]

As such the blueprint for a more globalized and efficient maritime transport system is a priority for the African union as evidenced by the importance placed on the **2050 Africa's Integrated Maritime Strategy (2050 Aim Strategy).**[10]

As the Continent focuses on updating Maritime Infrastructure and ensuring seamless maritime transportation and global trade through the construction of ports and berths to scale up revenue, it is also a critical element of the Continent's success and economic growth, to ensure that dispute resolution

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[7] Beth Michoma. Maritime Human Rights: Duties and Obligations of the Eac Partner States in The Protection of Human Rights in The Maritime Environment

[8] The Organization for Economic Cooperation and Development (OEC, 'Ocean shipping and shipbuilding'
(https://www.oecd.org/ocean/topics/ocean-shipping/#:~:text=The%20main%20transport%20mode%20for,comes%20with%20opportunities%20and%20challenges) Accessed 1st September 2022

[9] Guy Platten, 'Africa can become a maritime hub for global trade'
(https://www.un.org/africarenewal/magazine/september-2021/africa-can-become-maritime-hub-global-trade#:~:text=Currently%2C%20the%20global%20maritime%20trade%20is%20worth%20%2414%20trillion) Accessed 1st September 2022

[10]2050Africa's Integrated Maritime Strategy (2050 Aim Strategy) (*https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi304DIpcz8AhVd9rsIHQvtDUIQFnoECBQQAQ&url=https%3A%2F%2Fau.int%2Fsites%2Fdefault%2Ffiles%2Fnewsevents%2Fworkingdocuments%2F33832-wd-african_union_3-1.pdf&usg=AOvVaw0bCDHzscFgd8Za-FT3uiNY)*accessed 16thJjanuary 2023

mechanisms for maritime disputes are in place to elevate the status of Africa's maritime states.

Further, a Country's established dispute resolution mechanisms are key in attracting business and investment, it is no different where carriage of goods by sea is important.

So far Admiralty law is practiced in most Courts in Africa and there are mechanisms and procedures entrenched in the Courts to ensure that maritime disputes will be heard by Judges well versed with Admiralty law.[11] However, litigation is not the only solution, in regard to solving Maritime disputes. An aggrieved party in a maritime dispute may resort to mediation or Arbitration. Currently, Parties to a maritime dispute are increasingly submitting their disputes to Maritime Arbitration, a recognized branch of dispute resolution in international trade. However, the uptake in Africa Maritime Arbitration is quite low.[12]

Scope of Maritime Arbitration

Maritime Arbitration covers disputes that arise from the utilization of ships or vessels.[13] Key disputes that may be subjected to Maritime arbitration include claims arising out of marine salvage operations and towage, mortgages, ownership of vessels, ship building, damage related to collisions at sea or at port as witnessed where the vessel **The Ever Given** a container ship ran aground and blocked the Suez Canal for six days disrupt maritime transport at the Canal and

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[11] Gazette Notice No. 9123/ 2015, High Court of Kenya, Notification of Practice Directions On the Division of the High Court of Kenya, *(http://kenyalaw.org/kl/index.php?id=6041),* Accessed 23rd January 2023

[12] Andrew Pike, Maritime Arbitration to resolve Cross-Border Shipping Disputes in Sub-Saharan Africa, (*https://bowmanslaw.com/insights/shipping-aviation-and-logistics/maritime-arbitration-resolve-cross-border-shipping-disputes-sub-saharan-africa/),* Accessed 23rd January 2023

[13]Lexis Nexis, Maritime arbitration—an introduction (*https://www.lexisnexis.co.uk/legal/guidance/maritime-arbitration-an-introduction),* Accessed 23rd January 2023

disputes arising from carriage of goods by sea such as the interpretation of charter party, contracts of affreightment and bills of lading. [14]

Nature of maritime disputes arising from Charter Party and Bills of lading
Transportation of goods through maritime transport requires an avenue by which cargo shall be loaded at one port and the cargo discharged to another port as envisioned by charter party. In a nutshell a charter party consists of a charterer hiring a vessel from a ship-owner to transport the cargo either through a voyage charter party or a time charter party.

The distinction between a voyage charter party and a time charter party is key in establishing what disputes may arise from a charter party. A voyage charter party in particular, involves a charterer chartering a vessel to carry cargo loaded at one port to be discharged at another port as stated by **Lord Diplock** in the case of **Oldendorff (E L) & Co GmbH v Tradax Export SA, The Johanna Oldendorff.**[15] **"**In this matter a charter party was entered into between the appellant vessel owners and the respondent charterers. The issue arose as to the time at which lay time commenced at the vessel's discharging port.

The House of Lords held that before a ship could be said to have arrived at a port, it should, if it could not proceed immediately to a berth, have reached a position within the port where it was at the immediate and effective disposition of the charterer. If it was at the place where ships usually lay, it would be in such a position, unless in some extraordinary circumstances, proof of which would lie in the charterer. If the ship was waiting at some other place in the port, then it would be for the owner to prove that it was as fully at the disposition of

[14] Ruth Michaelson, 'Ever Given released from Suez Canal after compensation agreed' *(https://www.theguardian.com/world/2021/jul/07/ever-given-released-from-suez-canal-after-compensation-agreed)* Accessed 16th January 2023
[15] Oldendorff (E L) & Co GmbH v Tradax Export SA, The Johanna Oldendorff, [1974] AC 479, [1973] 3 All ER 148, [1973] 3 WLR 382

the charterer as it would have been if in the vicinity of the berth for loading or discharge."

This case was important in establishing the essence of a voyage charter party and the successive steps that would conclude a voyage charter party as dealt with by Lord Diplock and apportioning risk where it lies throughout the Voyage in case of a dispute.

Thus, **Lord Diplock** stated that a voyage charter party falls into four successive stages as follows;

1. The vessel has been brought to an agreed loading port established by the charterer and communicated to the ship owner.
2. The loading operation takes place and any default of providing cargo to load or insufficient cargo and in the case of a dispute the charterer would be responsible.
3. The voyage embarks to the discharge port and at this stage the ship owner is in charge of the operation.
4. The last stage constitutes discharge of the cargo.

Therefore, **Lord Diplock's** successive stages show that maritime disputes that may be referred to maritime Arbitration, occur firstly, if the ship does not reach the loading port and a notice of readiness to load issued to the charterer at the agreed date and time. Secondly, a dispute may arise due to delay by the charterer to load the vessel with cargo on the agreed date and time or due to provision of insufficient cargo. Thirdly a dispute may arise due to the fact the ship owner provides a vessel that does not conform to the description given in the charter party.

Thus, most disputes referred to Maritime Arbitration are due to delays during loading and discharging of cargo, deviation and on whether there is a binding charter party between the parties.[16]

Parties are turning increasingly to such as the COVID-19 pandemic where quarantine regulations were enforced led to the scaling down of port manpower and wreaked havoc on maritime transport and logistics.

The pandemic forced the reconfiguring of maritime routes and clogging of ports during discharging and loading, causing a break in supply and loss to carriers, charterers and shippers due to breach of contracts. These delays led to commodity prices going up and had to be offset by the consumers. [17]

Notable ports that experienced delays are the Ports of Shanghai, Los Angeles and Mombasa amongst others.[18] It is important to note that now the war in Ukraine is also wreaking Havoc to the efficiency of Maritime Transport and causing delays on the loading and Discharge of foodstuffs from the Port of Odessa.[19]

In regards to disputes arising from Time Charter parties, it is important to first note, that a time Charter party consists of the chartering of a vessel for a specific amount of time to complete multiple lawful voyages.[20] A Time Charter Party

[16]Ravi Aswani, Maritime Arbitration Report, (https://blog.jusmundi.com), Accessed 23rd January 2023
[17] Parisa Kamali, Alex (Shiyao) Wang, Longer Delivery Times Reflect Supply Chain Disruptions, *(https://www.imf.org/en/Blogs/Articles/2021/10/25/longer-delivery-times-reflect-supply-chain-disruptions),* Accessed 23rd January 2023
[18] Review of Maritime transport(https://unctad.org/webflyer/review-maritime-transport-2022) Accessed 16th January 2023
[19] Kirk Klocke, Delays, Freight Rate Hikes Likely as Ukraine War Disrupts Shipping Operations, *(https://www.windowanddoor.com/news/delays-freight-rate-hikes-likely-ukraine-war-disrupts-shipping-operations),* Accessed 23rd January 2023
[20] Voyage Charter vs Time Charter *(https://www.marineinsight.com/maritime-law/voyage-charter-vs-time-charter/)* Accessed 23rd January 2023

puts the ship and Crew of the ship at the disposal of the charterer. In particular, the Master of the ship takes instructions from the Charterer except for matters related to navigation.

Maritime disputes that arise from time charters, may include, disputes as to the identity of the vessel chartered specifically in regards to its name, flag, age, capacity, speed and fuel consumption. In a Time Charter party the Ship owner and the Charterer will agree as to which ship is being chartered in detail, when the Time Charter will commence and at what point the ship will be Redelivered back to the Ship owner.[21] If any of these terms are breached then the dispute may be referred to maritime Arbitration.

Disputes arising from the Bill of Lading may also be referred to maritime Arbitration. The Bill of lading is one of the most important documents in Maritime transport as it is evidence of the contract of carriage and may be transferable to third parties. The Bill of lading is termed as evidence of the carriage because the contract of carriage itself will have been arranged prior to the issue of the bill of lading.[22]

The bill of lading has three main purposes and they are as follows:

1. It is a document of title to the cargo described in the bill of lading and shipped.
2. It acts as a receipt for the cargo; and
3. It evidences the agreed terms and conditions for the carriage of the goods by sea by the shipper and carrier.

The holder of a bill of lading may opt for maritime arbitration where a dispute arises in regard to the loss or damage to the cargo, delivery of cargo that does

[21] Wilson, John, Carriage of goods by sea, 7th ed., Pearson Addison Wesley, 2010, page 111
[22] Wilson, John, Carriage of goods by sea, 7th ed., Pearson Addison Wesley, 2010, page 115

not conform to the description in the bill of lading or delivery of cargo without the production of bill of lading occasioning fraud and theft. Moreover, a shipper or third party to whom the bill of lading has been transferred to, may refer to Maritime Arbitration a dispute on economic loss, where there is inability to use the cargo to fulfil another contract by virtue of the carrier breaching the contract of carriage.

Further, a carrier may refer a dispute to arbitration over demurrage charges where the vessel is not discharged in time.[23]

Incorporation of Arbitral Clauses in Charter Parties and Subsequent Bills of Lading

For parties to avail their disputes to maritime arbitration it must be expressly provided for in the Charter Party and the Bill of lading. In a nutshell, there must be an unequivocal and consensual Arbitration Agreement in place and the Arbitration Clause must be clear and precise in the charter party and Bill of lading as was held in the case of **T W Thomas and Co Ltd v Portsea Steamship Co**.[24]

Therefore, in regard to a voyage charter party the charter party must state clearly the willingness to submit disputes to maritime Arbitration, the seat of the arbitration and the law applicable.

It is important to note that most time charter parties will have the terms incorporated through standard forms such as Baltime 1939 Uniform Time-Charter (as revised 2001)[25]. The Baltime standard forms at Clause 22 gives the

[23]Aceris Law LLC, Demurrage Claims in International Arbitration, *(https://www.acerislaw.com/demurrage-claims-in-international-arbitration/)* Accessed 23rd January 2023

[24] T W Thomas and Co Ltd v Portsea Steamship Co Ltd s [1911] UKHL 628, 49 SLR 628

[25]Baltime1939(*https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiazujkqMz8AhVwi_0HHWKMDQ0QFnoECBIQAQ&url=http%3A%2F%2Fusbc.com.ua%2Fpublic%2FBALTIME_1939.pdf&usg=AOvVaw3CL7dSrKGH_K1SpPmYo0_v) accessed 16th* January 2023

ship owner and the charterer the leeway to incorporate an Arbitration clause into the charter party. Clause 22 A is as follows;

> "22. Dispute Resolution
> (A) This Charter shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charter shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause. The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.
>
> The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement. Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator."

Further charter parties may incorporate the other standard forms such as the NYPE 93[26], NYPE 2015[27] or Shell time 4[28] which all have arbitration clauses in lieu of the Baltime 1939 Uniform Time-Charter (as revised 2001) standard form. In both voyage and time Charter Parties the words of incorporation should be express and should not be subject to general words of incorporation. The incorporated Arbitration clauses in both voyage and time charter parties must then subsequently be incorporated into the Bill of Lading.

However, the peculiarity of a bill of lading is that it is transferable to a person who may not be privy to the charter party. Incorporation of terms in the bill of lading from the charter party may be done by reference to the charter party where they are 'germane to the receipt, carriage, or delivery of the cargo or the payment of freight'. An Arbitration clause is not a germane term but an ancillary term of utmost importance.

Thus, all ancillary terms should expressly be stated in the bill of lading to forestall binding a shipper to unusual terms that they are not aware of, these includes arbitration clauses in the charter party but not expressly incorporated in the bill of lading.

Moreover, a transferee is not bound by any oral terms and/ or oral agreements not stated in the bill of lading as was held in the case of **Leduc v Ward.**[29]
In the case of Tradigrain S.A. v King Diamond Shipping S.A. The Spiros C[30] a matter on appeal and heard by Lord Justice Rix, Lord Justice Brooke, Lord

[26] NYPE 93*(https://www.bimco.org/contracts-and-clauses/bimco-contracts/nype-93*) Accessed 16th January 2023
[27]NYPE2015*(https://www.bimco.org/contracts-and-clauses/bimco-/~/link.aspx?_id=EEBE70C0DDB44328BFE184C79D2BA623&_z=z)* Accessed 16th January 2023
[28] Shell time 4(https://www.bimco.org/contracts-and-clauses/chartering-help-and-advice/time-charter-advice/illegitimate_voyage_orders_shelltime_4) Accessed 16th January 2023
[29] Leduc & Company v Ward, [1888] 20 QBD 475
[30] Tradigrain v King Diamond Shipping, The Spiros C [2000] 2 Lloyd's Rep 319, at 327; [2000] EWCA Civ J0713-11, at p.9.

Justice Henry, it was made clear and the position in **Leduc V Ward reiterated** that in international trade where the use of bills of lading is critical, a subsequent holder of the bill of lading should not be bound by agreements that are not included in the bill of lading.

An arbitration clause is key and is not germane and cannot be incorporated by general words or reference and thus must be expressly incorporated in the bill of lading. This is clear as held in the case of **T W Thomas and Co Ltd v Portsea Steamship Co Ltd**[31] **where "**a bill of lading provided that goods should be delivered to the shipper or his assigns, 'he or they paying freight for the said goods with other conditions as per charter-party with average accustomed. ' . . 'Deck load at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter-party, including negligence clause.' The charter-party also contained an arbitration clause and the holder of the bill of lading tried to rely on the arbitration clause. It was held that "the terms of the bill of lading were insufficient to incorporate therewith the arbitration clause of the charter-party, which could only be done by clear and explicit language."

Where the arbitration clause has been clearly and explicitly provided for in the bill of lading the same should provide for the applicable law and jurisdiction.

Conclusion

Maritime Arbitration will continue to be important as maritime transport increases in Africa.

Currently most of the Maritime Arbitration clauses in charter parties and bill of ladings provide for arbitration in London, New York, Hong Kong and Singapore with centers such as the London maritime Arbitration Association key to dispute resolution mechanism. The use of English Law, US law and Chinese law is quite prevalent and is catered for in the Arbitration clauses.

[31] T W Thomas and Co Ltd v Portsea Steamship Co Ltd s [1911] UKHL 628, 49 SLR 628

To ensure that African countries are able to build on their maritime Arbitration capacity. Parties engaged in maritime disputes may agree to have the seat of arbitration in Africa, and further apply the laws and procedural rules of an African state that incorporate the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on international commercial arbitrations. Moreover, Countries in Africa may incorporate into the bill of lading African country specific laws and exclusive jurisdiction.

Further, African Countries should consider establishing Maritime Arbitration centers, legislating and enacting Maritime Arbitration procedural rules and further tapping into the vast number of professionals in Maritime law, seafarers and professionals with technical and shipping expertise. The continent should take note of our own growth in interregional trade enabled by the African Continental Free Trade Area Agreement which is tapped to increase trade throughout Africa.

Moreover, regular reviews of the African Maritime Transport Charter and 2050 AIMS will be necessary to keep abreast with the ever-changing maritime environment.

Book Review: UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwean Arbitration Act

By: **Bwalya Lumbwe**[*]

Authors: Davison Kanokanga
Prince Kanokanga
ISBN: 978 1 48513 953 9
Publisher: Juta and Company (Pty) Ltd, 2022.

Harmonisation of international trade law is an important function of The United Nations Commission on International Trade Law (UNCITRAL) functions.[1] This function is achieved through the production of Model Law text for a number of trade related issues. One of the trade laws is the UNCITRAL Model Law on arbitration.[2]

A key element of the UNCITRAL Model Law system is that it sets out to achieve the harmonisation of international trade law with the objective that the laws concerned are interpreted in a uniform manner.[3] Those jurisdictions who adopt the UNCITRAL Model Law on arbitration, like other texts on other trade issues,

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[1] United Nations Commission on International Trade Law< *https://uncitral.un.org/*> accessed 21 January 2023; United Nations Commission on International Trade Law, Case Law on UNCITRAL Texts (CLOUT)<*https://uncitral.un.org/en/case_law*> accessed 21 January 2023.

[2] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006< *https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration*> accessed 21 January 2023.

[3] United Nations Commission on International Trade Law <*https://uncitral.un.org/en/case_law*> accessed 21 January 2023.

are 'required' to abide by the principle that in interpreting the texts concerned, judges and arbitrators should consider the international origin of the law and the need to promote uniformity in its application.[4]

Not a lot has been written on arbitration in Africa and a lot less on the interpretation of arbitration legislation in various African jurisdictions including those that have adopted the Model Law.

Thus, the publication of *UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwean Arbitration Act*, is a very useful addition to arbitration literature in Africa. The book's usefulness extends to those other jurisdictions worldwide were the UNCITRAL Model Law on arbitration has been adopted. More so that the arbitration legislation in Zimbabwe is applicable to both local and international arbitration.

The book starts off with an introduction with a history of arbitration in Zimbabwe followed by a detailed, article-by-article analysis supported with the Zimbabwean case law combined with other case law from other Model Law jurisdictions and more.

The book is dotted with useful references to the *travaux préparatoires* which simply means preparatory activities undertaken by the commission prior to the conclusion of each article and explains the reasoning behind each of the Articles in the Model Law. Model Law jurisdictions are further 'required' to adhere to the principle that when interpreting the Model Law text, regard must be made to the *travaux préparatoires* because they are an aid to those interpreting the provisions of the Model Law in obtaining uniformity in their decision making.

Thus, the father and son team of Davison and Prince Kanokanga both leading practitioners in arbitration in Zimbabwe seem to have taken this into account and written the book in a simple to understand language. The simplistic style is

[4] See United Nations <*https://www.un.org/en*> accessed 23 December 2022.

unlike many other legal books of the same nature with the result that others in different jurisdictions including non-lawyers and professionals engaged in arbitration can easily follow and understand the issues at hand.

The usefulness of the book, as has been pointed out in the Foreword of the book, is further enhanced 'because Zimbabwe is a perfect example of a jurisdiction that implements and applies the Model Law in its true spirit and intent.'

The book should be appealing and be useful to a range of people from students interested or undertaking law and dispute resolution studies, to those in other professions where arbitration is used regularly as a means of dispute resolution such as engineering and construction in addition to practicing lawyers and judges.

For those who wish to study the subject matter in more detail, the book contains a rich bibliography and case law from both Zimbabwe and other jurisdictions.

In addition, the book is also a welcome addition to those who use and follow the development of Case Law on UNCITRAL Texts (CLOUT). UNCITRAL established CLOUT in 1988 to collect and disseminate information on court decisions and arbitral awards relating to UNCITRAL texts to support consistency in decisions and awards on its texts which includes the arbitration Model Law. The system collects information from various Model Law jurisdictions and publishes it online at *https://www.uncitral.org/clout/index.jspx*.

Though there are only 12 cases as at 24/12/2022 on the CLOUT website contributed by Zimbabwe, the book indirectly adds many more cases on the Zimbabwean interpretation of the Model Law useful to many other Model Law jurisdictions.

A natural next step for the authors and I challenge them, is to consider a direct addition of this wealth of Zimbabwean Model Law jurisprudence to CLOUT for

greater exposure and simply because it's the right thing to do given the usefulness of the case law to the rest of the Model Law jurisdictions and even beyond.

The Notion of Good Faith in Construction and Arbitration

By: ***Damian James****

Introduction

Good faith is a concept frequently referred to in construction projects. It is used regularly as a term to vilify another party when a dispute arises. Often a party will suggest that another party has, "not acted in good faith" and so is in the wrong.

But, like many legal terms, good faith is often used without a full understanding of its meaning and implications. Furthermore, this commentary will examine whether good faith can have a slightly different meaning in different contexts. For example, in the construction contract, as opposed to in the arbitral process under different rules.

This paper sets out to define good faith, its origins and purpose and the reaction of various commentators. The article then goes on to look at the use of good faith in different settings, whether geographical, contractual, statutory or procedural. Finally, we examine the notion and doctrine of good faith as it appears in the resolution of disputes through arbitration.

What is Good Faith and where did it come from?

Firstly, it may be helpful to take a look at definitions of good faith and examine its origins. As with many of the more significant doctrines of law, good faith is cited as originating in Roman Law. As readers will undoubtedly be aware, its Latin origins lie in the phrase '*Bona Fide*'. Quite literally 'good faith'. The Cambridge dictionary terms it as "real, not false". [1]

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[1] *https://dictionary.cambridge.org/dictionary/english/bona-fide* (Accessed 27/01/2023)

As Sir Rupert Jackson observes in his address around the well documented 'Yang Sem' case, to the Hong Kong society of construction law, it was the Romans under Emperor Gaius who developed the notions of contractual obligations and bi-lateral contracts forming obligations between two parties[2].

However, faith did not mean for the Romans a religious faith as it is perhaps more commonly interpreted now. It is rather a degree of integrity and trustworthiness. As Adams[3] observes, the Romans regarded it as one of their first virtues. They had a well-known saying, "Punica fides" referring to the untrustworthiness of a Carthaginian.

Leggatt J in Astor Management v Atalaya Mining stated,

> *"A duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people."*[4]

Good faith then, can be regarded as a high standard of integrity or trustworthiness. Parties acting in good faith or contractually bound to do so, should hold themselves to that standard. It is surely no coincidence that fidelity has its origins in that same Latin word. Infidelity equally comes with a number of pejorative overtones with which we are all familiar!

Good Faith in English / Common Law

As so much in African law is derived from English and Common Law, perhaps it may help to examine a recent definition. Cesare McArdle of Herrington

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[2] *https://www.scl.org.uk/system/files/papers/207_jackson.pdf* (Accessed 27/01/2023)

[3] *http://www.csun.edu/~hcfll004/fides.html* (Retrieved 27/01/2023)

[4] Astor Management AG v Atalaya Mining Plc [2017] EWHC 425 (Comm) at [98], per Leggatt J.

Carmichael, in reviewing the now notorious post office litigation in the UK pulls out key elements that the court defined in relation to good faith. These are that parties should:

- "Adhere to the spirit of the contract.
- Observe reasonable commercial standards of fair dealing.
- Be faithful to the agreed common purpose.
- Act consistently with the justified expectations of the other party.
- Prevent action that frustrates the purpose of the agreement.
- Require disclosure of all material facts to the other party.
- Not knowingly lull the other party into a false belief.
- Not provide false information upon which the other party will rely."[5]

So in light of this case, perhaps good faith in common law jurisdictions may be easier to define? There has however been much debate over what exactly good faith means and whether in any jurisdiction there is a suitable degree of certainty that can be attributed to notions of good faith. All is perhaps not as clear as we might hope.

Whilst all the attributes referenced in the preceding quotation appear good in principle, are they actually elements of a contract that are possible to enforce? At the very least, in England anyway, there is now a reference point for the definition of good faith, and if such a notion is explicitly excluded then at the very least, those terms cannot be implied.

Difficult to Define

However, as Seeley and Hooley have noted, good faith can be very hard to define. They note, "the concept seems impossible to define with any degree of precision."[6] Add into the debate issues of linguistics and translation and the

[5]*https://www.lexology.com/library/detail.aspx?g=f154aa68-09f2-40d6-88d0-c921e005b387* (Accessed 27/01/2023)

[6]*https://www.lawteacher.net/free-law-essays/trading-law/the-doctrine-of-good-faith-case.php?vref=1*, (accessed 27/01/2023)

notion of good faith can seem almost impossible to penetrate in any meaningful way. Across different cultures and different jurisdictions there are apparent challenges in setting out clearly what the doctrine really means and how it should affect contractual relations.

Cornell University states that "Depending on the exact setting, good faith may require an honest belief or purpose, faithful performance of duties, observance of fair dealing standards, or an absence of fraudulent intent."[7] With such a broad range of potential interpretation apparent in that one definition, it is apparent that Sealy and Hooley may have a point.

In law, it is often said that certainty is needed. The principle of legal certainty is well-established in that, "the law must be clear, precise and unambiguous, and its legal implications foreseeable."[8] If, as others have noted, there is little precision and accuracy in the notion of good faith, how can we then use it to help us determine behaviour and resolving disputes in construction or other contracts?

Does it exist in Law and Contract?

Having defined and examined the origins of the term, it is then necessary or appropriate to ask how or if it can exist in our laws and contracts. It seems more common in countries with their origins in civil code systems, such as those that were, in the past, colonised by countries of the European continent such as France.

It is perhaps also helpful to consider the historical context of the evolution of law in these various places. Unlike some European countries, such as France, Germany or England, many countries around the world have been the subject to different legal influences. These influences and their approach to the notion of good faith will all inevitably have influenced the way in which it is treated.

[7] *https://www.law.cornell.edu/wex/good_faith* (accessed 27/01/2023)

[8] *https://www.lexisnexis.co.uk/legal/glossary/legal-certainty* (accessed 27/01/2023)

McKendrick observes that English law "stands out from the many other jurisdictions which recognise the existence of a doctrine of good faith."[9] Many countries, including the USA, have the notion of good faith written into their statute books and in their legal codes. The US Commercial code describes it as "honesty in fact in the conduct or transaction concerned[10]". We go on to look at good faith in Africa later in this article, but similar definitions do appear in the statutes of various nations across the African continent.

However, English law is particularly unusual in not having such a notion. Having said that, good faith exists contractually in many standard forms and in bespoke construction contracts. Where there is a contractual obligation to which parties have subscribed, what is the effect?

The Role of Good Faith in Construction Contracts

Several commentators have opined on the role of good faith in construction contracts. These commentators are extremely experienced and far better placed to discuss the subject than the author, so we shall examine some of their perspectives:

Sir Rupert Jackson in his address to the Hong Kong Society of Construction Law notes that in the well-known case of London Borough of Merton v Leach, the judge held that there was "no implied duty of good faith"[11] in the interpretation of a JCT contract and a dispute thereunder. Sir Rupert also examines modern contracts and notes that many bespoke contracts add a specific good faith clause, but says, "In practice, it is difficult to see what these aspirational provisions add to the black letter terms of the contract"[12].

Julian Bailey in an article examining the role of good faith in construction contracts notes Professor John Uff's view that virtues of "trust", "fairness" and

[9] McKendrick, 2015, Contract Law, Palgrave MacMillan, p.217
[10] Ibid
[11] *https://www.scl.org.uk/system/files/papers/207_jackson.pdf* (accessed 27/01/2023)
[12] Ibid at 6.3

"good faith", "do not seem to "bite" in any legal sense. They are aspirations".[13] Once again, to the English, common law mind at least, it seems that the doctrine of good faith is perhaps one of very limited value in the management, execution and perhaps dispute resolution of construction contracts.

What's the Position in Africa?

As outlined above, because of the mixed history of the various African nations, good faith often has a subtle difference in meaning from country to country. In South Africa, it has been noted that the Supreme Court of Appeal referred to good faith in the following terms:

> *"the concept of bona fides or good faith has acquired a meaning wider than mere honesty or the absence of subjective bad faith. According to this extended meaning, it has an objective content which includes other abstract values such as justice, reasonableness, fairness and equity."*[14]

So, in this case, it seems that there is a defined notion of good faith. However, with a common-law approach to dispute resolution, the Supreme Court of Appeal also appears to struggle in the same way that the English courts do.

Other jurisdictions have other issues. In Kenya for example, the system comprises a mix of statute, English common law, customary law and Islamic law[15]. Good faith appears in the Sale of Goods Act, established in 1964 (presumably brought forward from the Kenya Colony when the nation gained independence from Britain in 1963). Beyond that, good faith appears in a number of other elements of statute of Kenya. But whether it would apply in a contract for construction is arguably less clear.

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[13] "Faith, Hope, and Charity", Julian Bailey, (2020), Mecanismos Contractuales en Construcción No.55, pp19-31, The Role of Good Faith in Construction – a Common Law Perspective, Revista Derecho & Sociedad,

[14] *http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812013000500003* (accessed 27/01/2023)

[15] *https://globalaccesstojustice.com/global-overview-kenya* (accessed 27/01/2023)

Similarly in Zambia, notions of good faith appear in statute, such as the penal code,[16] which sets out some clear definitions of what constitutes good faith within the meaning of that code. It appears to be a term used regularly in legal and contractual negotiations in that country. However, there is still a notion of the use of customary law, which covers, "a host of customary laws existing in different ethnic groups"[17]. Once again therefore, we see the potential for uncertainty in a legal system where ideally there should be certainty.

How Does Good Faith Affect Construction Disputes and Arbitration?

In the resolution of disputes, the notion of cooperation and collaboration is often raised. Dagenais notes that in the resolution of construction disputes,

> *"Good faith plays an important role in the exchange of information between the parties and in the resolution of disputes. We thus advocate a global approach based on good faith that promotes cooperation rather than confrontation, for instance the doctrine of partnering"*[18]

Whilst this is a positive and again, aspirational position to take, the authors base their theory on civil code notions in the Canadian legal system and appear to base their thoughts on the premise that good faith is a well-established, clear and defined legal term. In reality, for those of us working outside the confines of a mature civil code jurisdiction, the notion is less clear and therefore not perhaps so simple.

Procedural Good Faith

In arbitration, we see the notion of 'procedural good faith'. The notion that those going to arbitration to resolve disputes, and indeed those resolving the disputes should act in good faith. Notwithstanding the issues outlined above, there are a

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[16] *https://www.parliament.gov.zm/sites/default/files/documents/acts/Penal%20Code%20Act.pdf* (accessed 27/01/2023)

[17] *https://globalaccesstojustice.com/global-overview-zambia/* (accessed 27/01/2023)

[18] *Introduction to good faith in construction contracts*, Daniel Alain Daenais, (2007), Construction Management and Economics, 25:7, pp715-721.

number of areas in which good faith is cited as being critical for the resolution of disputes. As will be seen below, most arbitral bodies incorporate some notion of good faith into their rules and decisions.

For the IBA, the rules relating to the taking and giving of evidence include that:

> *"The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely."*

And in terms of sanctions against those not acting in good faith:

> *"If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence."*[19]

So, it appears that under the IBA rules at least the notion of good faith is intended to 'have teeth'. Sanctions are available against those who the tribunal feel have not acted in good faith.

The LCIA

Under LCIA rules, there are obligations for all parties to act in good faith. Henriques examines whether those obligations also necessarily apply to arbitrators and their arbitral institutions.

[19] *https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b*

Rule 14.2 of the LCIA Rules states that,

> *'… at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties.'*

And at 13.2 that,

> *'for all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith (…)'*

Henrique in his helpful article continues to examine the reasons for the inclusion of such terms by the LCIA and various scenarios in which good faith has been tested at law. These include scenarios where a party might seek to gain benefit from their own malfeasance or take advantage of an unfair bargaining power. However, he also notes that such concepts are also covered by other doctrines, such as unconscionability in Common Law[20].

Henrique appears to suggest that though English law itself doesn't specifically appear to recognise the doctrine of good faith, there are enough parallels between other Common Law doctrines and good faith for it to be established de facto, if not de jure.

Moreover, Henrique looks at the role of arbitral panels and other participants in the arbitral process. Particularly an arbitrator, questioning whether the arbitrator is in fact, "the personification of good faith"[21]? As the determiner of a dispute, does the arbitrator (and their governing body) have a duty to act in good faith? Henriques asserts they do. Indeed, it is difficult to envisage a scenario where an arbitrator or arbitral body would last for long if they did not. As Henriques observes, "the principle of good faith and its manifestations

[20] 33 ASA BULLETIN 3/2015 (SEPTEMBER) at p.516
[21] Ibid at p.527

represent truly on-going duties applicable to each and every agent and stage of arbitration"[22].

The ICC

In a very helpful examination of good faith in ICC arbitration, Simon Weber and Julie Martinez identify core principles that the ICC appear to adhere to when implementing the doctrine of good faith in arbitral awards. These are approximately that:

1. Parties must reach the common goal.
2. Parties must respect the contract.
3. Good faith does not trump the terms of the contract.
4. Burden of proof includes a presumption of good faith.
5. Termination of contract may be in bad faith.
6. The doctrine of Estoppel may be applied to result in bad faith[23].

The pair notes that good faith can be found in numerous arbitral decisions, including those from countries as diverse as Germany, The Netherlands, the USA and even England. They also note the presence of good faith in jurisdictions where contracts operate under Shari'a law. The tribunal in such a case stated,

> "*The notion of good faith complies with the Koran verses that command people to be honest in their transactions and that prohibit fraudulent dealings. According to the Shari'a, good faith in commercial dealings is a primary obligation and all actions are judged by the underlying intents*"

[22] Ibid at p.529

[23] *https://www.trans-lex.org/109210/_/weber-simon-martinez-julie-good-faith-in-international-arbitration:-comparative-approaches-in-icc-awards-in:-the-icc-international-court-of-arbitration-bulletin-2020-issue-2-p-112-et-seq/*

So it would appear then, that despite the apparent difficulties of defining clearly good faith outlined above, there are quite clear rules around the operation of good faith in the resolution of disputes through arbitration.

Conclusion

In conclusion, in Common Law jurisdictions in particular, it seems that the doctrine of good faith is fraught with a degree of uncertainty. Uncertainty even over the very existence of good faith, let alone its correct interpretation and applicability to construction contracts and construction law. However, as Henrique observes, there are doctrines, perhaps more certain in Common Law, that apply and match the principles of good faith, arguably with a degree more of certainty than civil code notions of the term.

In arbitration however, perhaps as a result of the cross-jurisdictional nature and the procedural nature of the process, it appears that there is little doubt about the importance and relevance of good faith. Particularly procedural good faith which seems particularly well settled under most of the commonly used sets of rules. Henrique also takes the notion a step further, imputing a duty of good faith upon not just the parties to the dispute, but to all participants and actors in the arbitration process.

The only question that perhaps remains, is what 'teeth' the doctrine really has? The author is not aware of any area in which sanctions have successfully been applied in relation to good faith. This in turn brings us back to the point Sir Rupert Jackson posed in Hong Kong, when he said, "it is difficult to see what these aspirational provisions add". So perhaps, whilst good faith is a doctrine to which aspiration is positive in construction contracts, enforcement of the same may prove something of a challenge should it arise in formal dispute resolution negotiations, particularly if those negotiations do not take place under the recognised arbitration rules outlined above.

Call for Submissions

Alternative Dispute Resolution is a peer-reviewed/refereed publication of the Chartered Institute of Arbitrators, Kenya, engineered and devoted to provide a platform and window for relevant and timely issues related to Alternative Dispute Resolution mechanisms to our ever growing readership.

Alternative Dispute Resolution welcomes and encourages submission of articles focusing on general, economic and political issues affecting alternative dispute resolution as the preferred dispute resolution settlement mechanisms.

Articles should be sent as a word document, to the editor *(editor@ciarbkenya.org/ c.c.: admin@kmco.co.ke)* and a copy to the editorial group *(adrjournal@ciarbkenya.org).* Articles should ideally be around 3,500 – 5,000 words although special articles of up to a maximum of 7,500 words could be considered.

Articles should be sent to the editor to reach him not later than Tuesday 28th April 2023. Articles received after this date may not be considered for the next issue.

Other guidelines for contributors are listed at the end of each publication. The Editor Board receives and considers each article but does not guarantee publication.

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The Editorial Board welcomes and encourages submission of articles within the following acceptable framework.

Each submission: -

- should be written in English

- 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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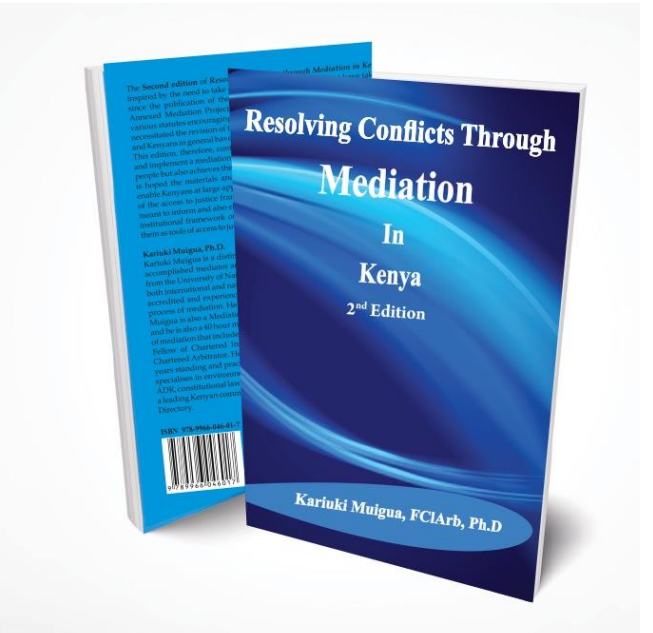

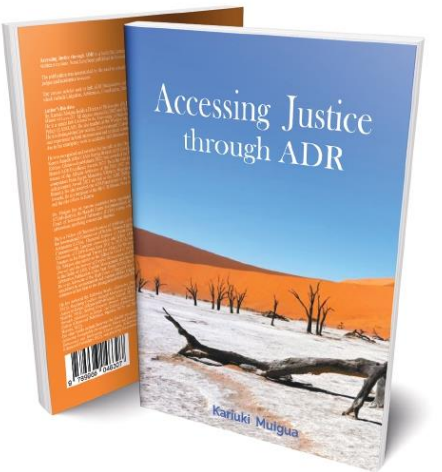

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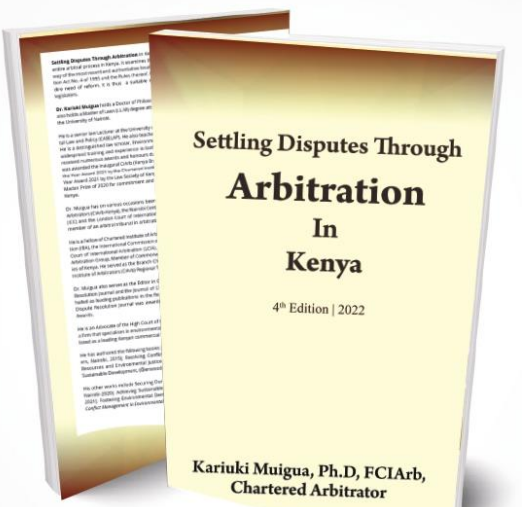

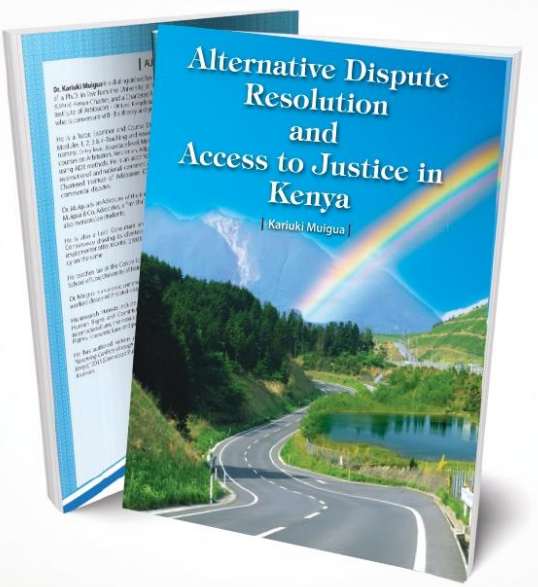

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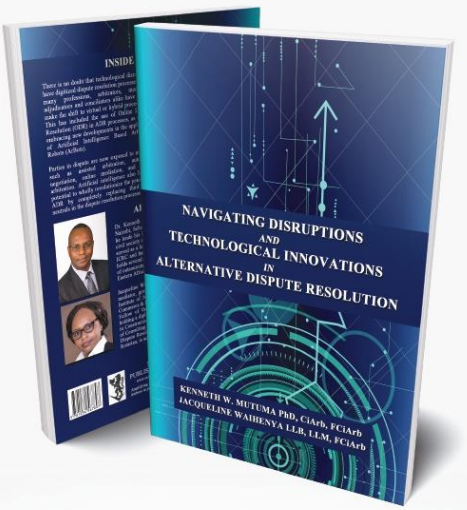

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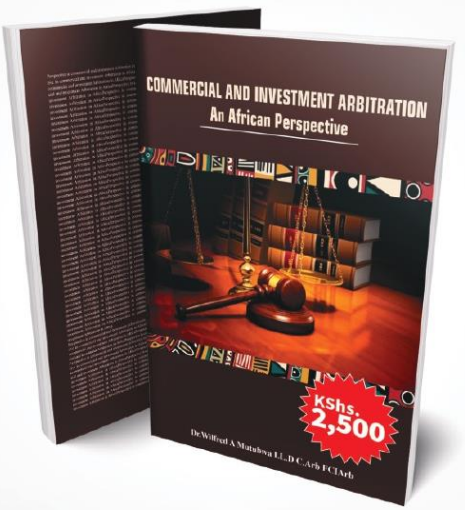

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