

Alternative Dispute Resolution



CI Arb
evolving to resolve

Kenya Branch

CONTENTS

The Future of Justice: Integrating Technology in ADR, and the Emergence of Innovative Tools	<i>Kenneth Wyne Mutuma</i>
Adopting the Singapore Convention in Kenya: Insight and Analysis	<i>Kariuki Muigua</i>
Arbitration Awards in Zambia: The Application of Interest under the Public Works Sector Contracts	<i>Bwalya Lumbwe</i>
The Interface between Access to Justice and Arbitration in Kenya	<i>Peter Mwangi Muriithi</i>
Non-Lawyer Representatives in Arbitration: My Humble Submissions	<i>Paul Ngotho</i>
Handling The Reins in Mediation Within a Framework of Self-Determination	<i>Jacqueline Waihenya</i>
Towards Effective Peacebuilding and Conflict Management in Kenya	<i>Kariuki Muigua</i>
The Role of Courts in Arbitration: The Kenyan Experience	<i>Hon(Rtd) Justice: Muga Apondi</i>
The East African Court of Justice as an Arbitration Centre: The Undiscovered Gem	<i>Emmanuel Ugirashebuja</i>
COVID-19: Force Majeure Claim	<i>Austin Ouko</i>
Arbitration in Land Disputes: An Empirical Study on the Role of Lawyers in the Management of Land Conflicts in Kiambu County	<i>Henry K. Murigi</i>
Drafting The Arbitration Clause: Essential Components of an Arbitral Clause	<i>Endoo C. Dorcas</i>
Enhancing Access to Justice through Administrative Tribunals in Kenya	<i>Peter Mwangi Muriithi</i>



ALTERNATIVE DISPUTE RESOLUTION

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

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

Typesetting by:
New Edge GS,
P.O. Box 60561 – 00200,
Tel: +254 721 262 409/ 737 662 029,
Nairobi, Kenya.

Printed by:
Mouldex Printers
P.O. Box 63395,
Tel – 0723 366 839,
Nairobi, Kenya.

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

© Chartered Institute of Arbitrators, Kenya

All rights reserved. No article published in this journal may be reproduced, transmitted in any form, stored in any retrieval system of any nature without prior written permission of the copyright holder. The views expressed in each article are those of the contributors and not necessarily those of the Chartered Institute of Arbitrators, Kenya.

EDITOR-IN-CHIEF

Dr. Kariuki Muigua, Ph.D, Africa Trustee (CIArb), FCIArb, C.Arb

ASSOCIATE EDITORS

Dr. Wilfred Mutubwa, FCIArb, C.Arb

Ms. Jacqueline Waihenya, FCIArb

EDITORIAL TEAM

Mr. Simon Ondiek, FCIArb

Mr. Ngararu Maina, ACIArb

Mr. James Njuguna, MCIArb

Ms. Anne W. Kiramba, ACIArb

Dr. Francis Kariuki, Ph.D, FCIArb

Ms. Endoo Dorcas Chepkemei, MCIArb

KENYA BRANCH COMMITTEE

Africa Trustee (CIArb): Dr. Kariuki Muigua, Ph.D, FCIArb, C.Arb

Chairman & Ex. Committee Convenor: Dr. Wilfred Mutubwa, FCIArb, C.Arb

Vice Chair: Ms. Jacqueline Waihenya, FCIArb

Hon. Treasurer: Arch. Nekoye Masibili, MCIArb

Hon. Secretary: Ms. Wanjiku Muinami, MCIArb

Ass. Hon. Secretary, Chairman Edu., Training & Membership Subcommittee:

Dr. Kenneth Wyne Mutuma, C.Arb

Chairperson, Legal Subcommittee: Ms. Jane Sumbeiywo Mwangi, MCIArb

Chairman Marketing Subcommittee: Eng. Fredrick Aluoch, MCIArb

MEMBERS

Mr. Kyalo Mbobu, C.Arb

Hon. Sen. (Arch). Sylvia Kasanga, MCIArb

Ms. Eunice Lumallas, FCIArb

Mr. Arthur Igeria, FCIArb

Hon. Justice (Rtd) Aaron Ringera, C.Arb.

Mr. Paul Ngotho, C.Arb

Mr. Nyaga B. Kithinji, FCIArb

Mr. Calvin Nyachoti, C.Arb: Past Chairman

Mr. Samuel Nderitu, FCIArb (Chartered Arbitrator) Immediate Past Chairman - ex-officio
Member.

Patron: The Honourable the Chief Justice & President of the
Supreme Court of Kenya

This Journal should be cited as (2021 9(3) Alternative Dispute Resolution

ISBN 978-9966-046-14-7

Editor's Note

Welcome to the *Alternative Dispute Resolution Journal*, Volume. 9, No. 3, 2021, a publication of the Chartered Institute of Arbitrators-Kenya Branch (CIArb-K).

The Journal is leading publication in Alternative Dispute Resolution (ADR) and other related fields of knowledge. It provides a platform for scholarly discourse and engagement on pertinent and emerging issues in these areas.

ADR is continuing to be embraced in Kenya and across the globe as an indispensable tool of access to justice. There are efforts towards mainstreaming ADR into the legal system in Kenya. The value of ADR has led to some describing it as '*Appropriate Dispute Resolution*.' ADR mechanisms including arbitration, mediation, negotiation and Traditional Justice Systems provide efficient, cost effective and expeditious management of disputes. The Journal addresses some of the advantages, challenges and opportunities associated with the use of ADR.

Since it was launched, the ADR Journal has grown immensely. It is now one of the most cited and authoritative publications in ADR and access to justice. The Journal is a valuable resource for ADR practitioners, scholars, students, policy makers and everyone seeking knowledge on ADR.

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

This volume captures a collection of rich papers which provide a comprehensive discourse and critical analysis on germane and emerging issues in ADR. The themes covered in the volume include: *The Future of Justice: Integrating Technology in ADR, and the Emergence of Innovative Tools; Adopting the Singapore Convention in Kenya: Insight and Analysis; Arbitration Awards in Zambia: The Application of Interest under the Public Works Sector Contracts; The Interface between Access to Justice and Arbitration in Kenya; Non-Lawyer Representatives in Arbitration; Handling the Reins in Mediation Within a Framework of Self-Determination; Towards Effective Peacebuilding and Conflict Management in Kenya; The Role of Courts in Arbitration: The Kenyan Experience; The East African Court of Justice as an Arbitration Centre: The Undiscovered Gem; COVID-19: Force Majeure Claim; Arbitration in Land Disputes: An Empirical Study on the Role of Lawyers in the Management of Land Conflicts in Kiambu County; Drafting The Arbitration Clause: Essential Components of*

an Arbitral Clause and Enhancing Access to Justice through Administrative Tribunals in Kenya.

The Journal is expected to trigger appropriate responses and debate aimed at enhancing the use of ADR as a tool of access to justice.

CIArb-K wishes to thank the Publisher, Editorial Team, Contributing Authors, Reviewers and those who have made it possible to continue publishing such an integral publication in the field of ADR.

**Dr. Kariuki Muigua, Ph.D., FCIArb, (Ch. Arb), Accredited Mediator
Editor-In-Chief,
July, 2021.**

Dr. Kenneth Wyne Mutuma

Dr. Kenneth Wyne Mutuma is a practicing Advocate of the High Court of Kenya of over 20 years of law practice practicing at Kihara & Wyne Company Advocates.

He holds a Ph. D. in law from the University of Cape Town- South Africa, Master of Laws degree (LLM) from University of Cape Town- South Africa and a Bachelor of Laws (LLB) degree from the University of Liverpool, Liverpool, United Kingdom. He is also a fellow of the Chartered Institute of Arbitrators (FCI Arb). CS (ICS). He is also an accredited Mediator.

He is a member of numerous professional bodies ranging from Chartered Institute of Arbitrators (London); The Society of Mediators & Conciliators of East & Central Africa; International Commission of Jurists; Law Society of Kenya; The East African Law Society and The Institute of Certified Public Secretaries of Kenya (ICPSK). Dr. Kenneth Wyne Mutuma teaches law at the School of Law, University of Nairobi.

Dr. Kenneth Wyne Mutuma can be reached through kenmutuma@gmail.com or wyne@kenyanjurist.com

Dr. Kariuki Muigua

Dr. Kariuki Muigua is a distinguished law scholar, an accomplished mediator and arbitrator with a Ph.D. in law from the University of Nairobi and with widespread training and experience in both international and national commercial arbitration and mediation. Dr. Muigua is a Fellow of Chartered Institute of Arbitrators (CI Arb)-Kenya chapter and also a Chartered Arbitrator. He also serves as a member of the National Environment Tribunal and is the Chartered Institute of Arbitrator's (CI Arb- UK) Regional Trustee for Africa.

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

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

Bwalya Lumbwe

Bwalya Lumbwe holds a B.Eng. (Civil), M.Sc. (Construction), LLM-Construction Law and Arbitration with over 38 years of experience covering building, civil and mechanical construction in Zambia, Tanzania, Mozambique and the Congo.

He is a Registered Engineer, Fellow of the Engineering Institution of Zambia, the Chartered Institute of Arbitrators-UK, the Chartered Institute of Building-UK, a member of the American Society of Civil Engineers and the Association of Consulting Engineers-Zambia and a Chartered Construction Manager. He also sits on the International Federation of Consulting Engineers (FIDIC) National List of Dispute Adjudicators, Zambia.

He is an Adjudicator, Arbitrator, Dispute Adjudication Board Member listed under various international arbitration and adjudication institutions.

Bwalya Lumbwe can be reached arbitratorzambia@gmail.com

Peter Mwangi Muriithi

Peter. M. Muriithi is an Advocate of the High Court of Kenya. He holds a Master of Laws (LLM) degree from University of Nairobi and a Bachelor of Laws (LLB) degree from University of Nairobi. He is also a Member of Chartered Institute of Arbitrators (MCI Arb), a Patent Agent and a court Accredited Mediator.

Peter. M. Muriithi can be reached petermuriithiattorney@gmail.com

Paul Ngotho

Paul Ngotho HSC is a Fellow of Chartered Institute of Arbitrators (CI Arb)-Kenya chapter, a Chartered Arbitrator and a member of the Royal Institution of Chartered Surveyors (MRICS).

He holds an LLM in International Dispute Resolution from University of London, Diploma in International Commercial Arbitration and a B.A in Land economics with over 30 years of experience in East Africa and the United Kingdom. He also serves in the panels of ICDR, LCIA and Stockholm Arbitration institute and the ICC Commission on Arbitration and ADR.

Paul Ngotho HSC can be reached through ngothoprop@yahoo.com

Jacqueline Waihenya

Jacqueline Waihenya is a practicing Advocate of the High Court of Kenya. She holds a Master of laws (LLM) (Public Finance & Financial Services Law) and a Bachelor of Laws (LLB) degree both from University of Nairobi.

She is also a fellow of both the Chartered Institute of Arbitrators (FCI Arb) and the Institute of Certified Public Secretaries (ICPSK). She is also a renowned and experienced mediator with numerous mediation qualifications ranging from being a Chartered Mediator of the Institute of Chartered Mediators & Conciliators (ICMC) [2018]; Certified Advance Mediator (MTI); Certified Advance Mediation (Family & Divorce); Certified Professional Mediator CPM (MTI);

She is the current Vice Chair Chartered Institute of Arbitrators Kenya Branch and also the treasurer of the Mombasa Law Society. She is also the Vice Chair of the Kenya National Chamber of Commerce & Industry (Mombasa Chapter); a member of the National Steering Committee for the Formulation of the Alternative Dispute Resolution Policy 2020/2021; Vice Chair – Kenya National Chamber of Commerce & Industry (Mombasa Chapter) [2019-2021] and Associate Editor, CIARB-ADR.

Jacqueline Waihenya can be reached via waihenya@jwmadvocates.com

Hon(Rtd) Justice Muga Apondi

Hon(Rtd) Justice Muga Apondi is an Advocate of the High Court of Kenya, a Commissioner for Oaths and practicing at Muga Apondi & Associates, Advocates., where he is the Managing Partner. He holds a Master of Laws degree (International Trade & Investment Laws) from University of Nairobi and a Bachelor of Laws (LLB) degree from University of Nairobi. Hon(Rtd) Justice Muga Apondi is a former Puisne Judge. He also served as a Land Registrar-in-charge for 4 years in the Ministry of Lands. Hon(Rtd) Justice Muga Apondi can be reached via apondimuga55@gmail.com

Dr. Emmanuel Ugirashebuja

Justice (former) Dr. Emmanuel Ugirashebuja, is the immediate past President of the East African Court of Justice where he was also the Presiding Judge in the Arbitration mandate of the Court. He is the Dean Emeritus of the Faculty of Law University of Rwanda, where he continues to teach. He has taught and given lectures on diverse subjects, including the role of the judiciaries in the society as well as the evolution of the judiciary in Rwanda, in over 20 well renowned Universities. He spearheaded the publication of *The Court Manual: A Practical Guide to Law and Practice of the East African Court of Justice*. He co-edited a book entitled "EAC Law, Institutional, Substantive and Comparative EU Law Aspects", which was published by the international publishing house of Brill. In 2020, he was awarded by the Jindal Global University, India, the prestigious life time appointment as a Distinguished Fellow and Eminent Jurist due to "outstanding qualifications, academic interests, vast experience and commendable contributions to the global legal profession and for strengthening the

legal systems and judicial processes". He was hosted by the William Richardson, School of Law, University of Hawai'i as the 2019 Bright International Jurist-in-Residence. He has been appointed as an arbitrator and expert in several international and domestic arbitrations.

Dr. Ugirashebuja has amassed experience of a far wider range, from being an international judge, practitioner, arbitrator, consultant and law scholar.

Dr. Ugirashebuja can be reached eugira@hotmail.com

Austin Ouko

Austin Ouko is an Advocate of the High Court of Kenya and a Fellow of the Chartered Institute of Arbitrators (FCIArb). He holds a Post-Graduate Diploma (PGD) in International Commercial Law from College of Law of England and Wales; Master of the Science of Law from Stanford University Law School, a Master of Laws (LLM) degree from University of Nairobi and a Bachelor of Laws (LLB) degree from University of Nairobi.

Austin Ouko can be reached austinouko@gmail.com

Henry K. Murigi

Henry Murigi is an advocate of the high court and a senior prosecution counsel in Kenya. Henry is currently undertaking his doctoral studies at United States International University (USIU).

Henry Murigi can be reached through henkm2001@gmail.com

Endoo C. Dorcas

Endoo Dorcas is an Advocate of the High Court of Kenya practicing in the firm of Ronoh Law and Associates Advocates. She is currently undertaking her Masters of Laws from University of Nairobi. Ms Endoo holds a Master of Arts (Diplomacy and International Relations from Kenyatta University, a Post-Graduate Diploma from Kenya School of Law, Bachelor of Laws from Kenyatta University and a Diploma in Human Resource Management from University of Nairobi.

Ms. Endoo is a member of Chartered Institute of Arbitrators with vast training and skills in the area. She has sat as an Arbitrator in various references and has also represented clients in arbitration matters. She is also an Environmental Impact Assessment Expert and Environmental Audit duly certified by National Environment Management Authority

Ms. Endoo is a member of the Law Society of Kenya, Chartered Institute of Arbitrators (UK and Kenya), Environment Institute of Kenya and the Federation of Women Lawyers. She serves in the Disciplinary Committee of Athletics Kenya and the Bar-Bench Committee of National Environment Tribunal. She also sits in the board of Kenyatta University Alumni.

Endoo Dorcas may be reached through denchep@gmail.com

Alternative Dispute Resolution – Volume 9 Issue 3

Content	Author	Page
The Future of Justice: Integrating Technology in ADR, and the Emergence of Innovative Tools	Kenneth Mutuma Wyne	1
Adopting the Singapore Convention in Kenya: Insight and Analysis	Kariuki Muigua	26
Arbitration Awards in Zambia: The Application of Interest under the Public Works Sector Contracts	Bwalya Lumbwe	39
The Interface between Access to Justice and Arbitration in Kenya	Peter Mwangi Muriithi	71
Non-Lawyer Representatives in Arbitration: My Humble Submissions	Paul Ngotho	88
Handling The Reins in Mediation Within a Framework of Self-Determination	Jacqueline Waihenya	111
Towards Effective Peacebuilding and Conflict Management in Kenya	Kariuki Muigua	125
The Role of Courts in Arbitration: The Kenyan Experience	Hon(Rtd) Justice Muga Apondi	158
The East African Court of Justice as an Arbitration Centre: The Undiscovered Gem	Emmanuel Ugirashebuja	174
Covid-19: Force Majeure Claim	Austin Ouko	185
Arbitration in Land Disputes: An Empirical Study on the Role of Lawyers in the Management of Land Conflicts in Kiambu County	Henry K. Muriigi	211
Drafting The Arbitration Clause: Essential Components of an Arbitral Clause	Endoo C. Dorcas	233
Enhancing Access to Justice through Administrative Tribunals in Kenya	Peter Mwangi Muriithi	248

The Future of Justice: Integrating Technology in ADR, and the Emergence of Innovative Tools

*By: Kenneth Wyne Mutuma**

Introduction

How can technology enhance access to justice through ADR and what will it take?¹ These questions and the answers given to them fundamentally impact first, the economics of ADR in terms of costs and speed and second, pertinent legal issues such as the quality of justice delivery and legitimacy of ADR awards.² The questions compel us to think about the anatomy of ADR and its desired outcomes. Current trends of digitizing the legal sector are set to continue for as long as the wide array of ever-evolving technological resources are available.³ The Covid-19 pandemic has accelerated this trend towards leveraging smart technology to increase the quality and efficiency of ADR.⁴ Technology, however, has not always embraced by the legal fraternity. For instance, the advent of Online Dispute Resolution (ODR) was met with scepticism and even resistance.⁵ This resistance came from traditional lawyers and was informed by untested assumptions about the deployment of technology in ADR.⁶ It was assumed that face-to-face resolution of disputes yielded better results and was thus more superior than that conducted online.⁷ Of course, with time, this assumption has been challenged by the hundreds of thousands of cases efficiently resolved online where parties were located in different geographical locations.⁸ This illustrates how with hindsight, many present assumptions in relation to the impact of technology in ADR, can be flawed and there is

* *PhD (UCT), LLM (UCT), LLB (Liverpool), B Arch Studies (UON), Senior Lecturer (University of Nairobi) Advocate of High Court Kenya, Chartered Arbitrator, FCI Arb. Certified Secretary (ICS), Acc. Mediator of the High Court.*

¹ Raneta Lawson Mack, 'Using Technology to Enhance the ADR Practice' (1999) 1 J. Alt. Disp. Resol. 16.

² Stephen J Ware and Sarah Rudolph Cole, 'ADR in Cyberspace' (1999) 15 Ohio St. J. on Disp. Resol. 589.

³ AD Reiling, 'Courts and Artificial Intelligence', *IJCA* (HeinOnline 2020).

⁴ David Syme, 'Keeping Pace: On-Line Technology and ADR Services' (2006) 23 Conflict Resolution Quarterly 343.

⁵ *Ibid.*

⁶ Syme (n 4).

⁷ John Zeleznikow, 'Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts', *IJCA* (HeinOnline 2016).

⁸ Mack (n 1).

therefore a greater need for discussions around the trends in this area and how they are likely to impact upon both practitioners and disputants going forward into the future.

In this article, the author discusses the contribution of information communication technology (including AI) in the context of ADR and its primary role of promoting the access to justice through the different ADR platforms: arbitration, mediation, and negotiation. Various ICT tools and their uses in guaranteeing the efficiency of the ADR process are explored. More importantly, the question of whether it is technologically feasible to have an AI-powered machine to fully replace human ADR practitioners is critically analysed. The overarching argument is that information & communication technology (ICT) has catapulted efforts of quality justice delivery to the next level by guaranteeing cheaper and expeditious outcomes despite several limitations.⁹ Furthermore, contrary to the apocalyptic narrative of an AI takeover, the article argues that reality of AI-powered machines fully replacing ADR practitioners is far-fetched given complexity of cases and their need for persons with specialised knowledge.¹⁰

Technological Integration in Negotiation

Electronic negotiation (e-negotiation) is defined as the process of conducting negotiations between business partners using electronic means. The interest in e-negotiation is motivated by its potential to provide business partners with more efficient processes, enabling them to arrive at better contracts in less time. There are two categories of e-negotiation media: servers which implement multiple protocols, and applications which implement a single protocol. Traditionally, applications have dominated negotiation design, but lately, the importance of servers has increased, and a need for servers that are configurable is being felt.¹¹ Attempts were made to design configurable e-negotiation media to support more than one negotiation protocol. They were partially successful, the main drawback being that they were designed in an ad-hoc manner. Examples of these attempts were: the AuctionBot¹² which supports the

⁹ David Allen Larson, 'Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator' (2010) 25 Ohio St. J. on Disp. Resol. 105.

¹⁰ Horst Eidenmueller and Faidon Varesis, 'What Is an Arbitration? Artificial Intelligence and the Vanishing Human Arbitrator' [2020] Artificial Intelligence and the Vanishing Human Arbitrator (June 17, 2020).

¹¹ Neumann, D., Benyoucef, M., Bassil, S., & Vachon, J. (2003). Applying the Montreal taxonomy to state-of-the-art e-negotiation systems. *Group Decision and Negotiation*, 12(4), 287.

¹² Wurman, P. R., Wellman, M. P., & Walsh, W. E. (1998, May). The Michigan Internet AuctionBot: A configurable auction server for human and software agents. In *Proceedings of the second international conference on Autonomous agents* (pp. 301-308).

configuration of various auctions; GNP¹³ which separates auction specifications from the logic of the server, and e-AuctionHouse¹⁴ which allows for the configuration of auctions with the help of an expert system. Recently, Kersten et al.¹⁵ designed a configurable negotiation server that supports bargaining, based on a process model which organizes negotiation activities into phases; and a set of rules that govern the processing, decision-making, and communication. The main problem in designing e-negotiation media, in addition to the ad hoc manner they have been designed, is the lack of a systematic approach.¹⁶ Indeed, to this day, design has been a trial-and-error process. There is thus a proposition for a new model for configurable e-negotiation systems in which “e-negotiation media” is the electronic marketplace (e-marketplace) where human and software participants meet to negotiate¹⁷ using negotiation software agents through an automated negotiation system. In this model, automated negotiation systems provide a framework for the existence of software agents.¹⁸ Furthermore, the e-market place enforces negotiation protocols, and makes these protocols available for consultation (by humans), and for automation purposes (by automated negotiation systems).¹⁹ Separating the protocols from the e-negotiation medium is a first step towards a configurable e-marketplace.²⁰ Separating negotiation strategies from protocols will also give flexibility to the design of automated negotiation systems,²¹ which will have a direct effect on the design of automated negotiation systems.²²

¹³ Benyoucef, M., Keller, R. K., Lamouroux, S., Robert, J., & Trussart, V. (2000, February). Towards a generic e-negotiation platform. In *Proceedings of the sixth international conference on re-technologies for information systems* (pp. 95-109).

¹⁴ University of Washington: The Auction House (2002)

¹⁵ Kersten, G. E., Law, K. P., & Strecker, S. (2004). A software platform for multiprotocol e-negotiations. *InterNeg Research Papers*.

¹⁶ Rinderle, S., & Benyoucef, M. (2005, November). Towards the automation of E-negotiation processes based on Web services—a modeling approach. In *International Conference on Web Information Systems Engineering* (pp. 443-453). Springer, Berlin, Heidelberg.

¹⁷ Ibid

¹⁸ Kraus, S. (2001, July). Automated negotiation and decision making in multiagent environments. In *ECCAI Advanced course on artificial intelligence* (pp. 150-172). Springer, Berlin, Heidelberg.

¹⁹ Benyoucef, M., & Rinderle, S. (2005). *A model-driven approach for the rapid development of e-negotiation systems*. Gesellschaft für Informatik eV.

²⁰ Braun, P., Brzostowski, J., Kersten, G., Kim, J. B., Kowalczyk, R., Strecker, S., & Vahidov, R. (2006). E-negotiation systems and software agents: Methods, models, and applications. In *Intelligent decision-making support systems* (pp. 271-300). Springer, London.

²¹ Kersten, G. E., & Lai, H. (2007). Negotiation support and e-negotiation systems: An overview. *Group Decision and Negotiation*, 16(6), 553-586.

²² Ibid

Technological Integration in Mediation

The advancement in technology has played a significant role in ensuring that mediation is accessible to all and sundry. Parties to mediation have been able to utilise the various forms of technology to assist them from the initial stages of selecting a mediator to the actual day of the mediation conference, and all points in between due to rapid technological advancement.²³ For example, online mediation came to be due to the popularity of mediation in solving both family and commercial disputes. This popularity and adoption of mediation procedures resulted in the clamour to make it more accessible and efficient to parties seeking to use mediation for dispute resolution²⁴. This is where technological advancement comes in in aiding development of mediation resulting to e-mediation²⁵. Just think of a situation where some individual wants to hire a mediator to aid them in resolving a conflict, they are having with another party but due to unavoidable reasons the parties are unable to meet face-to-face. In such a situation the parties can take advantage of online mediation²⁶. Noam Ebner writes that factors like these where parties have never met because they are in different geographical areas or engaging purely in online transaction were the main reasons that promoted online mediation services during the 1990s.²⁷ This was done mainly through emails. In many of these instances' parties were not ready to meet their counterparts, cementing the need for such services. Nowadays most service providers and even individual professional mediators offer online mediation services in one way or another.²⁸

Today, online mediation is familiar sight, not only being utilised by companies such as eBay to solve disputes between them and their customers in distant areas but also in solving disputes in workplaces and family conflicts, including of parties located in the

²³ Matthew Peaire and Aaron Jacobs, 'Optimizing the Use of Technology in Mediation' (*Butler.legal*, 2021)

<https://www.butler.legal/wp-content/uploads/2020/01/13477_technology_mediation_article_2.pdf> accessed 18 June 2021

²⁴ Rule, C. (2003). *Online dispute resolution for business: B2B, ecommerce, consumer, employment, insurance, and other commercial conflicts*. John Wiley & Sons.

²⁵ Ibid

²⁶ Harvard Law School, 'Using E-Mediation and Online Mediation Techniques For Conflict Resolution' (*PON - Program on Negotiation at Harvard Law School*, 2021) <<https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/>> accessed 17 June 2021

²⁷ Ebner, N. (2012). E-mediation. *Online Dispute Resolution: Theory and Practice*, 357.

²⁸ Ibid

same area.²⁹ The adoption of e-mediation beyond electronic commerce has resulted the adoption of offline conflicts such as in the areas of divorce disputes.³⁰ In this regard, online mediation is emerging as the most popular form of ODR.³¹ In terms of approach, the most common type of online mediation is facilitative mediation through which the mediators assists the parties in negotiating without asserting their judgements and interpretations on them so that the parties can themselves find a middle ground acceptable to them both. More recently, the development of ODR has been able to make mediation even more efficient and effective as parties are now able to not only conduct video conferences at the convenience of their locations but can also utilise ODR in making in-person mediation better by assisting traditional in-person mediators in the mediation room in accomplishing various tasks of mediation procedures and also mediation-related activities.³²

The rapid growth in technology has forced both mediators and parties to implement the advancement in technology to the mediation process.³³ In this regard, the use of technology brings certain practical aspects to the fore such as the quality of the interface between the parties in view of the relational goals that form the primary drivers of the mediation process and the aspiration of reaching a settlement. One must therefore think carefully around how to leverage technology so that the advantages inherent in physical meetings are not lost in the technological or virtual space. Thus, for example, visual aids can be used to enhance the oral mediation presentation. The use of visual aids not only engages the opposing party and mediator, but it also shows the other side that you have prepared the necessary tools to present your case and assist you in obtaining the best

²⁹ Harvard Law School, 'Using E-Mediation And Online Mediation Techniques For Conflict Resolution' (*PON - Program on Negotiation at Harvard Law School*, 2021) <<https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/>> accessed 17 June 2021

³⁰ Katsh, E. (2012). ODR: A Look at History-A Few Thoughts About the Present and Some Speculation About the Future. *Online Dispute Resolution: Theory And Practice: A Treatise On Technology And Dispute Resolution*.

³¹ Ebner, N. (2012). E-mediation. *Online Dispute Resolution: Theory and Practice*, at 370, 397.

³² Carrel, A., & Ebner, N. (2019). Mind the Gap: Bringing Technology to the Mediation Table. *J. Disp. Resol.*, 1.

³³ Matthew Peaire and Aaron Jacobs, 'Optimizing the Use of Technology in Mediation' (*Butler.legal*, 2021)

<https://www.butler.legal/wp-content/uploads/2020/01/13477_technology_mediation_article_2.pdf> accessed 18 June 2021

possible settlement outcome at mediation.³⁴ If the events of a matter are confusing, technology offers the additional advantage of a visual timeline and telling ones story through maps, graphs, and other demonstrative features to help the opposing party and mediator understand the facts of a case.³⁵ Similarly, satellite photographs obtained from Google Earth may be used to depict a “bird’s eye” view of a certain traffic intersection, or “street view” images can show the audience the physical condition of a particular building and so forth.³⁶ Below are ways through which technological advancements can have a positive impact upon both the process and outcome of mediation.

i) Tool for Selecting a Proper Mediator

The parties must make sure that they choose the best mediator who will help them to come up with an agreement that will be satisfactory to both of them.³⁷ This is because in the field of mediation there are so many mediators with different credentials with each being a pro in a certain area of mediation. Parties or the agents who hook up parties with mediators can in this regard utilise advanced AI search engines such as google in selecting the mediator of choice.³⁸ Such search engines will usually march the parties to a mediator with the right credentials for their matter.³⁹ From the fee to issues such as their area of expertise and schedules to be sure of their availability.

ii) Tool for Exchange and Collection of Information

The parties in mediation must be able to share all the relevant information to their mediator so that he can be able to prepare adequately and as a consequence be able to discharge his duties accordingly.⁴⁰ The parties may also have documents they may be

³⁴ Morgan Smith, How to Use Technology Effectively in Mediation, Cogent Legal blog, Sept. 14, 2012.

³⁵ Ibid

³⁶ Matthew Peaire and Aaron Jacobs, ‘Optimizing the Use of Technology in Mediation’ (*Butler.legal*, 2021)

<https://www.butler.legal/wp-content/uploads/2020/01/13477_technology_mediation_article_2.pdf> accessed 18 June 2021

³⁷ Ibid

³⁸James E. McGuire, Esq, ‘How technology helps companies resolve disputes fairly and efficiently’ (Technology: Tools for the 21st century mediation,5 October 2012) <https://www.jamsadr.com/files/uploads/documents/articles/mcguire-ic-technology-2012-10-05.pdf> accessed 19 June 2021.

³⁹ Ibid

⁴⁰Washington Arbitration & Mediation Services, ‘Technology & Mediation’ (Arbitration & Mediation News, 1 June 2012)

willing to share among themselves for purpose of the mediation process.⁴¹ The sharing can be done through via emails or on-line file hosting services such as Dropbox which allow mediators to transmit and exchange documents using a cloud-based file storage system.⁴² Online file hosting services are significantly faster, more cost-effective and environmental conscious than the exchange of paper documents.⁴³

Technology is also essential in collection of information which may be relevant to the advancement of mediation.⁴⁴ This can be done through websites such google and other search engines.⁴⁵ The internet also has several tools such as maps, photographs etc. we can also be helpful.⁴⁶ Social media sites such as twitter, and Facebook also be used to access publicly posited information which might be relevant to the dispute at hand.⁴⁷

iii) Tool for Online Dispute Resolution and Video-Based Mediation

Perhaps the most obvious and direct union between technology and mediation is Online Dispute Resolution (“ODR”). ODR is a general term used to describe the use of ADR methods utilizing the internet and cyberspace due to advancement in AI.⁴⁸ ODR first arose in the 1990’s with the emergence of the Internet and continues to be a growing topic amongst dispute resolution professionals.⁴⁹ One form of ODR, “e-Mediation” or “online mediation” allow parties to mediate their case remotely, implementing the use

< https://usamwa.files.wordpress.com/2013/01/wams-newsletter_8_2.pdf > accessed 19 June 2021.

⁴¹ Ibid

⁴² Matthew Peaire and Aaron Jacobs, ‘Optimizing the Use of Technology in Mediation’ (*Butler.legal*, 2021)

<<https://www.butler.legal/wp-content/uploads/2020/01/13477-technology-mediation-article-2.pdf>> accessed 18 June 2021

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Carrel, A., & Ebner, N. (2019). Mind the Gap: Bringing Technology to the Mediation Table. *J. Disp. Resol.*, 1.

⁴⁶ Ibid

⁴⁷ Washington Arbitration & Mediation Services, ‘Technology & Mediation’ (*Arbitration & Mediation News*, 1 June 2012) < https://usamwa.files.wordpress.com/2013/01/wams-newsletter_8_2.pdf > accessed 19 June 2021.

⁴⁸ Zlatanska, E., & Betancourt, J. C. (2013). Online Dispute Resolution (ODR): What is it, and is it the Way Forward?. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 79(3).

⁴⁹ Ibid

of “virtual collaborative workspaces or e-rooms.”⁵⁰ Virtual collaboration workspaces or e-rooms are forums that allow parties to collaborate and communicate exclusively through the use of technological channels, most commonly, via email, video and/or the internet.⁵¹ Various vendors such as skype, google through google meet and Microsoft via Microsoft Teams offer software that allows a mediator to conduct the online mediation process.⁵²

Technological Integration in Arbitration

In the ADR sphere, arbitration enjoys a unique prominent status for reasons that it is a preferred route for parties who desire a consensual, and private process because of its binding outcome.⁵³ Traditionally, arbitral tribunals consisted of human arbitrators who chaired proceedings physically.⁵⁴ Note that this was the only technologically feasible possibility then. Technological advancements like Artificial Intelligence and digitization are however disrupting the conventional way of conducting arbitrations.⁵⁵ The emergence of new tools and technologies has increased efficiency, in terms of speed and costs, as well as the quality of the arbitration process.⁵⁶ While the Covid-19 pandemic has accelerated this reality in the context of litigation, reliance on ICT has long been a feature upon which arbitration has relied upon given the international dimension of many disputes over which arbitral tribunals preside.

In more recent times, however, the utilisation of AI in this area brings about particular significance considering its promise of rationality, impartiality, and consistency free from human fallibilities.⁵⁷ Artificial Intelligence Applications that assist arbitrators in performing their duties can be categorized into three, that is, those that, assist in the

⁵⁰ Alexander N, 'From ADR To ODR: Can Technology Shape The Future Of Mediation Practice?' (*Privpapers.ssrn.com*, 11 February 2012) <https://privpapers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3751220_code115218.pdf?abstractid=3751220> accessed 19 June 2021.

⁵¹ Peters, L. M., & Manz, C. C. (2007). Identifying antecedents of virtual team collaboration. *Team Performance Management: An International Journal*.

⁵² Alexander N, 'From ADR To ODR: Can Technology Shape The Future Of Mediation Practice?' (*Privpapers.ssrn.com*, 11 February 2012) <https://privpapers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3751220_code115218.pdf?abstractid=3751220> accessed 19 June 2021.

⁵³ Eidenmueller and Varesis (n 12).

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Mack (n 1).

⁵⁷ Eidenmueller and Varesis (n 12).

management of cases, gather, and analyse facts, as well as assisting decision making by providing models of predictions.⁵⁸ Below is a brief discussion on how they have made arbitration more efficient and effective.

i) Tools for Case Management

Currently, the tools that are used for case management are mainly those that are not powered by Artificial Intelligence like those for conducting online meetings.⁵⁹ However, there are also applications that help in the planning and scheduling of workload.⁶⁰ For example, there are applications for the smart scheduling of meetings. These smart assistants often interact with people through emails and capture time, location, and relevant people information to ensure that there is minimum human engagement.⁶¹ These smart assistants are usually connected to users' calendars and can pick out important aspects of a meeting.⁶² It is then able to schedule it at an appropriate time depending on the parameters that the user has set.⁶³ The application can also be integrated with other platforms and collaborate with other scheduling applications to slot a meeting even with a fellow network member.⁶⁴ Through the identification of free and busy slots, the assistant can work effectively. In addition to this, smart personal assistants work in a similar manner. These applications promote the efficient, easy and effective organization of workload.⁶⁵ Arbitrators can use these applications for purposes of scheduling hearings and effective case management more so in complex arbitration hearings that involve multiple interested entities and parties globally.⁶⁶ In such a case, parties to an arbitration can come up with a scheduling network and use smart assistants to find convenient meeting slots for all parties, and filing dates prioritizing matters based on the importance of each case.⁶⁷ This will improve time management, and encourage

⁵⁸ Raneta Lawson Mack, 'CPR's ADR 2000 Online Seminar: Analyzing the Present and Future of ADR & Technology' (2000) 2 J. Alt. Disp. Resol. 11.

⁵⁹ Pablo Cortes, 'Using Technology and ADR Methods to Enhance Access to Justice' (2018) 5 IJODR 103.

⁶⁰ Eidenmueller and Varesis (n 12).

⁶¹ Cortes (n 68).

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Eidenmueller and Varesis (n 12).

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

expeditious disposition of matters which will culminate in better quality arbitral process.⁶⁸

ii) Tools for Fact Gathering and Analysis

There are also tools to aid arbitrators in fact gathering and analysis. These tools' primary function is to process large volumes of data, classify information by topic, and offer smart transcription.⁶⁹ With time, arbitration is becoming more complex. Therefore, in the course of their business, arbitrators are likely to come into contact with numerous visual aids, and colossal amounts of documents and data which in effect increase the workload as there is a requirement to distil the relevant information and determine the crux of the parties' submissions and arguments.⁷⁰ Document research and analysis tools are thus of particular importance to arbitrators in this regard. These tools work by using machine learning to establish the relevant parts of a document.⁷¹ In fact, some tools analyse up to 50 documents per minute with the accuracy margin being higher than that of manual reviews.⁷² Moreover, some applications allow the users to ask questions pertaining to the documents in review, caseload and statute used therein, as well as secondary sources.⁷³ This encourages the swift navigation of arbitrators through party submissions, case law and exhibits.⁷⁴ Additionally, there are those that use predictive coding to analyse the contents of documents provided and then uses this information to classify other documents.⁷⁵ Further, there are those that leverage cloud technology to search for documents in large databases.⁷⁶ These are used to determine the documents that are relevant to a case. Some assistants identify, extract, and analyse documents that enable arbitrators to extract relevant parts of contracts, exhibits and submissions.⁷⁷ Finally, there are also transcription applications that seek to convert audios and videos into texts.⁷⁸ Such applications can be resourceful in this Covid-19 era where online meetings are quite prevalent. In as much as currently there are no specific applications

⁶⁸ Cortes (n 68).

⁶⁹ Eidenmueller and Varesis (n 12).

⁷⁰ Ware and Cole (n 2).

⁷¹ Cortes (n 68).

⁷² Eidenmueller and Varesis (n 12).

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ray Worthy Campbell, 'Artificial Intelligence in the Courtroom: The Delivery of Justice in the Age of Machine Learning' (2020) 18 Colo. Tech. LJ 323.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Eidenmueller and Varesis (n 12).

for drafting arbitral awards, it is safe to say that the tools mentioned above for document review and analysis expedite the drafting process by aiding arbitrators with the analysis of several relevant parts of an award for example case law, submissions, exhibits, and applicable law.⁷⁹

iii) Tools for Decision Making

The third set of tools that can be employed by arbitrators are those used to predict outcomes and analyse decisions. In as much as these are used widely by litigators, they help arbitrators to deliver a high quality of awards.⁸⁰ Such awards are often perceived as legitimate and are likely to remain unchallenged. Predictive data analytic tools are used to analyse large datasets that are carefully labelled and contain diversified information.⁸¹ As will be discussed subsequently in this paper, the accuracy of these tools when it comes to their applications to arbitration is quite challenging especially due to the confidentiality of arbitral awards.⁸² This in turn reduces the pool of available data and eventually interferes with the accuracy of predictions.⁸³ That said, these applications are used to weigh out the risk factors associated with an arbitration case, therefore, mapping out the probabilities.⁸⁴ They can also be used to determine the time a particular case may last before a certain arbitrator provided there is sufficient data on the cases handled by the specific arbitrator.⁸⁵ This helps parties to make informed decisions when appointing an arbitrator.

The rapid growth of arbitration technology has led to a debate on what the future of AI in arbitration should be as some stakeholders are fully receptive to it, some partially whereas some are not receptive of this change at all. These views are informed by the ongoing debates and discussions about the possibility of AI applications that will completely replace arbitrators. Unlike the previous ICT applications discussed above which simply augment the speed, accuracy and quality of the arbitration process, those that replace arbitrators are intended to perform all their functions without human

⁷⁹ Ibid.

⁸⁰ Campbell (n 84).

⁸¹ Ware and Cole (n 2).

⁸² Zeleznikow (n 7).

⁸³ Ibid.

⁸⁴ Eidenmueller and Varesis (n 12).

⁸⁵ Ibid.

involvement.⁸⁶ This begs the question, is it functionally feasible for an AI application to fully substitute human arbitrators and perform even tasks that require social intelligence?⁸⁷ To answer this it will be important to analyse the anatomy of arbitration and critically examine whether AI applications, however innovative can carry out these functions. Note that arbitration unlike other ADR methods culminates in a binding decision known as the arbitral award.⁸⁸ This award is meant to administer justice between the parties. As such, it should adhere to the requisite decision-making standards for legitimacy in resolving disputes.⁸⁹ Can AI applications do this on their own? Some factions have answered this question in the affirmative, but this response has also been subjected to objections for various reasons.

To start with, when it comes to the requirement of neutrality and impartiality of the arbitrator, parties to an arbitration need not worry about the independence of an AI application as opposed to concerns that may emerge when a human arbitrator is involved.⁹⁰ Granted, human biases may be done away with when it comes to the use of AI applications in arbitration. However, a close look at how AI applications function rebuts this assertion. AI applications rely primarily on data to respond to commands. However, such data is first of all not always available and secondly not always objective.⁹¹ For example, data can sometimes contain implicit societal biases. The AI applications are thus likely to further entrench such biases and thus jeopardizing their independence.⁹²

With regard to managing the arbitration process, the AI applications will need to establish the facts of the case, review the submissions and evidence, give both parties an opportunity to be heard, apply substantive law to the matter and even grant interim measures.⁹³ With significant amounts of well-labelled data, machine learning tools can carry out these tasks.⁹⁴ For example, granting of interim measures is often based on well-

⁸⁶ Matt Billings and Leon Watts, ‘The Model of Relational Communication: Explaining Difficulties Encountered through the Use of Technology in ADR’ (2009) 11 *Asian Dispute Review*.

⁸⁷ Eidenmueller and Varesis (n 12).

⁸⁸ Mack (n 67).

⁸⁹ *Ibid.*

⁹⁰ Syme (n 4).

⁹¹ Mack (n 1).

⁹² *Ibid.*

⁹³ Eidenmueller and Varesis (n 12).

⁹⁴ Larson (n 16).

established laws that AI applications can always learn.⁹⁵ Indeed in common-law countries, it is likely for AI applications to function better due to the principle of stare decisis where precedent is used to determine emerging cases, which results in predictability.⁹⁶ Such cases can be used to generate data for future use.⁹⁷ This is unlike civil law jurisdictions where matters are decided on a case by case basis. Unfortunately, most arbitral awards are confidential as such this limitation can impede the efficient operation of the applications as there will not be enough data to train the application.⁹⁸ Finally, regarding rendering decisions, this basically entails, in a common-law jurisdiction, identification of applicable precedent, and distinguishing or comparing them to the present case.⁹⁹ Therefore case analysis applications can sufficiently give an objective outcome. However, the challenge here would be where the parties need an explanation of the outcome reached, which AI applications cannot do. Moreover, there are instances where making an arbitral award requires balancing of interests and concerns not merely applying an already established rule.¹⁰⁰ It would thus be morally objectionable for such decisions to be made by an algorithmic decision-maker.¹⁰¹ Above all else is the issue of the legitimacy of awards will come into question for various reasons. To start with the question becomes, what rights and responsibilities does a fully autonomous AI application have concerning liability and compensation matters.¹⁰² Further, are we ready to delegate such an important matter as administration of justice and the exercise of judicial powers to mere robots considering they lack the social intelligence that is only available to human beings?¹⁰³

Summary of Benefits and Challenges of Technological Advancement to ADR

Benefits and Challenges in Negotiation

The benefits of e-Negotiations are as follows: It lowers the purchase costs by intensifying bidding which in turn enhances competition including price cutting between

⁹⁵ Campbell (n 84).

⁹⁶ Ibid.

⁹⁷ Nadja Alexander, 'Mobile Mediation: How Technology Is Driving the Globalization of ADR' (2005) 27 Hamline J. Pub. L. & Pol'y 243.

⁹⁸ Eidenmueller and Varesis (n 12).

⁹⁹ Campbell (n 84).

¹⁰⁰ Eidenmueller and Varesis (n 12).

¹⁰¹ Ibid.

¹⁰² Larson (n 46).

¹⁰³ Laura Nader, 'The Globalization of Law: ADR as "Soft" Technology', *Proceedings of the Annual Meeting (American Society of International Law)* (JSTOR 1999).

suppliers.¹⁰⁴ Online negotiations mostly beat target savings unlike traditional negotiations which usually make an agreement on target price¹⁰⁵. e-Negotiations usually end up only when each supplier reaches their bottom line.¹⁰⁶ It artificially creates a “perfect competitive” market where the price is the lowest.¹⁰⁷ It reduces negotiation period from weeks down to hours, even minutes thus saving time.¹⁰⁸ The process is deadline driven thus ensuring no one misses the deadline since the system would not accept the offer afterward¹⁰⁹. It enhances probity as a buyer can be simply an observer during the e-negotiations in the process ensuring that there is honest and moral decency due to public scrutiny.¹¹⁰ Also, a permanent record for each step of the down-sloping price negotiation contains comprehensive information thus ensuring probity and integrity in negotiation processes¹¹¹. Adequacy of transparency as all scorecards for suppliers are available in the systems used for the e-negotiations processes.¹¹² It is a visible process with measurable results for the buyer to graphically demonstrate and track their savings.¹¹³ It is a flexibility process as any well specified product or service can be auctioned or purchased in the online platforms created.¹¹⁴ Additional suppliers are always available in the system providing a platform that allows buyers to negotiate with as many suppliers as possible.¹¹⁵

¹⁰⁴ Qinyu2015, 'E-Negotiation System — Advantages For Organizations' (*qinyu2015*, 2021) <<https://qinyu2015.wordpress.com/2015/05/06/e-negotiation-system-advantages-for-organizations/>> accessed 18 June 2021.

¹⁰⁵ Ibid

¹⁰⁶ CAPS RESEARCH, 'CAPS Research Program' (*CAPS Research*, 2021) <<http://www.capsresearch.org/research/>> accessed 18 June 2021.

¹⁰⁷ Ibid

¹⁰⁸ Goodman, J. W. (2002). The pros and cons of online dispute resolution: an assessment of cyber-mediation websites. *Duke L. & Tech. Rev.*, 2, 1.

¹⁰⁹ Qinyu2015, 'E-Negotiation System — Advantages For Organizations' (*qinyu2015*, 2021) <<https://qinyu2015.wordpress.com/2015/05/06/e-negotiation-system-advantages-for-organizations/>> accessed 18 June 2021.

¹¹⁰ Hayes, M. Procurement Policy.

¹¹¹ Ibid

¹¹² Laframboise, K., & Reyes, F. (2003, September). E-negotiations, supply networks and collaborative product development in aerospace manufacturing. In *14th International Workshop on Database and Expert Systems Applications, 2003. Proceedings.* (pp. 855-859). IEEE.

¹¹³ Biesaga-Słomczewska, E. J. Michał Osuch University of Łódź, Marketing Department. *Innovations and Knowledge Commercialization*, 107.

¹¹⁴ Neumann, D., Benyoucef, M., Bassil, S., & Vachon, J. (2003). Applying the Montreal taxonomy to state of the art e-negotiation systems. *Group Decision and Negotiation*, 12(4), 287.

¹¹⁵ Chiu, D. K., Cheung, S. C., Hung, P. C., Chiu, S. Y., & Chung, A. K. (2005). Developing e-negotiation support with a meta-modeling approach in a web services environment. *Decision support systems*, 40(1), 51-69.

The shortcomings of the e-negotiations include firstly it is hard and challenging to establish social rapport via e-mails¹¹⁶. The lack of nonverbal cues and the dearth of social norms regarding its use can cause negotiators to be impolite and to show little concern for their counterparts¹¹⁷. Secondly, e-mail negotiations are fraught with misunderstandings, both because emotions and tone are difficult to convey accurately and because parties neglect to consider the other side's perspective¹¹⁸. Notably, e-mail communicators are largely unaware of these limitations. As a consequence, e-mail often decreases information exchange, thereby leading to impasse and inefficient agreements compared with negotiations conducted in person¹¹⁹. Conflict management is on the rise, and digital communications may be to blame.

Challenges and Opportunities in Mediation

Online mediation the most widely used form of ODR is mostly used in the resolution of "high-volume, long-distance conflicts," because it offers substantial cost and scheduling benefits.¹²⁰ The parties can participate in e-mediation without having to leave their office, so long as they have access to the Internet through e-rooms such as zoom or skype.¹²¹ Accordingly, parties can immediately avoid the costs of travel and accommodations generally required for a remote mediation and also the same applies to the mediator who can facilitate the mediation process at the comfort of his/her home or office.¹²² Early studies have revealed that e-Mediations are an effective and useful

¹¹⁶ Harvard Law School, 'Conflict Management: The Challenges Of Negotiating Online' (*PON - Program on Negotiation at Harvard Law School*, 2021) <https://www.pon.harvard.edu/daily/conflict-resolution/the-challenges-of-online_negotiations> accessed 18 June 2021

¹¹⁷ Ibid

¹¹⁸ Kruger, J., Epley, N., Parker, J., & Ng, Z. W. (2005). Egocentrism over e-mail: Can we communicate as well as we think?. *Journal of personality and social psychology*, 89(6), 925.

¹¹⁹ Laubert, C., & Parlamis, J. (2019). Are you angry (happy, sad) or aren't you? Emotion detection difficulty in email negotiation. *Group Decision and Negotiation*, 28(2), 377-413.

¹²⁰ Matthew Peaire and Aaron Jacobs, 'Optimizing the Use of Technology in Mediation' (*Butler.legal*, 2021)

<https://www.butler.legal/wp-content/uploads/2020/01/13477_technology_mediation_article_2.pdf> accessed 18 June 2021

¹²¹ 'Karl Bayer's Disputing Blog » Online Dispute Resolution: An Amorphous Concept, Yet An Effective Tool Part V' (*Disputingblog.com*, 16 December 2016)

<<https://www.disputingblog.com/online-dispute-resolution-an-amorphous-concept-yet-an-effective-tool-part-v/>> accessed 19 June 2021

¹²² Ibid

medium to resolve disputes.¹²³ Online mediation is considered by many researchers as an effective means of resolving disputes Ebner writes.¹²⁴ This is because it is convenient as it allowing parties to participate when they have the time.¹²⁵ The slower pace of e-mail talks (relative to real-time conversations) allows mediators to carefully craft their responses and strategy rather than needing to react in the moment to disputants' statements in in-person mediation processes.¹²⁶ In addition, e-mail talks can level the playing field between disputants who tend to naturally dominate discussions and those who are more reserved.¹²⁷

Nonetheless, ODR certainly has its opposers as well. Many commentators believe that the lack of personal, "face-to-face" interaction associated with ODR and e-Mediation undermines the foundations of effective negotiation.¹²⁸ Disputants who engage in talks primarily via e-mail will miss out on the cues they would receive from body language, facial expressions, and other in-person signals.¹²⁹ Long-distance talks are prone to misunderstandings and also lack the rapport and warmth of face-to-face talks.¹³⁰ Research has shown that electronic communications are prone to lead to increased levels of antagonism, a shortfall in the exchange of information, less cooperation amongst the parties, and feelings of distrust.¹³¹ There are also concerns regarding the security of these

¹²³ Matthew Peaire and Aaron Jacobs, 'Optimizing the Use of Technology in Mediation' (*Butler.legal*, 2021)

<https://www.butler.legal/wp-content/uploads/2020/01/13477_technology_mediation_article_2.pdf> accessed 18 June 2021

¹²⁴ Ebner, N. (2012). E-mediation. *Online Dispute Resolution: Theory and Practice*, 357

¹²⁵ Harvard Law School, 'Using E-Mediation And Online Mediation Techniques For Conflict Resolution' (*PON - Program on Negotiation at Harvard Law School*, 2021)

<<https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/>> accessed 17 June 2021

¹²⁶ Ibid

¹²⁷ Ibid

¹²⁸ Matthew Peaire and Aaron Jacobs, 'Optimizing the Use of Technology in Mediation' (*Butler.legal*, 2021) <https://www.butler.legal/wp-content/uploads/2020/01/13477_technology_mediation_article_2.pdf> accessed 18 June 2021

¹²⁹ Harvard Law School, 'Using E-Mediation And Online Mediation Techniques For Conflict Resolution' (*PON - Program on Negotiation at Harvard Law School*, 2021)

<<https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/>> accessed 17 June 2021

¹³⁰ Ibid

¹³¹ Zlatanska, E., & Betancourt, J. C. (2013). Online Dispute Resolution (ODR): What is it, and is it the Way Forward?. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 79(3).

online platforms as they are prone to cyber-attacks and unethical hacking practices, issues of confirming the identity of the participants in a remote setting and whether the parties attending the meetings are the true participants or they are just participants chosen to attend on behalf of the real parties, as well as preserving the confidential nature of mediation where a text-based record is generated during the ODR process is also a mirage.¹³² Finally, given that disputants often choose local mediators via word of mouth, they may be less trusting of mediators whom they choose somewhat arbitrarily online.¹³³

Considering the challenges and opportunities presented today, what does the future outlook of the use of ICT in mediation suggest? In recent years, internet-based video technologies have vastly improved and have become more commonplace in business and commerce with applications such as Skype.¹³⁴ In fact, a majority of the smart phones and tablets that are sold today are capable of video conferencing.¹³⁵ Accordingly, practitioners and mediators have started to more commonly rely on video-environments for online mediations, in order to alleviate some of the aforementioned concerns related to ODR such as skype and google or even WhatsApp video calls sites which are end to end encrypted.¹³⁶ Obviously, allowing the parties to physically see one another, even remotely, adds a layer of intimacy, which permits nonverbal communication, such as verbal tone, gestures, and facial expressions, which are not possible in strictly text-based

¹³² Alexander N, 'From ADR to ODR: Can Technology Shape the Future Of Mediation Practice?' (*Privpapers.ssrn.com*, 11 February 2012) <https://privpapers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3751220_code115218.pdf?abstractid=3751220 > accessed 19 June 2021

¹³³ Harvard Law School, 'Using E-Mediation and Online Mediation Techniques For Conflict Resolution' (*PON - Program on Negotiation at Harvard Law School*, 2021) <<https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/> > accessed 17 June 2021.

¹³⁴ Matthew Peaire and Aaron Jacobs, 'Optimizing the Use of Technology in Mediation' (*Butler.legal*, 2021) <https://www.butler.legal/wp-content/uploads/2020/01/13477_technology_mediation_article_2.pdf> accessed 18 June 2021

¹³⁵ ¹³⁵Washington Arbitration & Mediation Services, 'Technology & Mediation' (*Arbitration & Mediation News*, 1 June 2012) < https://usamwa.files.wordpress.com/2013/01/wams-newsletter_8_2.pdf > accessed 19 June 2021.

¹³⁶ Shurven H, Lohman A, and Jung Y, 'The Responsive Judge International Perspectives' (*Academia.edu*, 2018) <https://www.academia.edu/37343617/The_Responsive_Judge_International_Perspectives > accessed 19 June 2021

environments.¹³⁷ While some practitioners may still have apprehensions about utilizing these technologies, it seems that an increasing number of parties and mediators are becoming open to the idea of ODR and Video-Based Mediation.¹³⁸

Challenges and Opportunities in Arbitration

While technology in arbitration guarantees cost-effective, fast, accurate and qualitative results, some challenges have also emerged with its use. To start with the occurrence of technological failure and the applications in use could stall the arbitration process.¹³⁹ It has also now become necessary that arbitrators and parties to arbitration be technology savvy failure to which there may be power imbalance where one party leverages the benefits of using AI applications having the other party at a disadvantage.¹⁴⁰ That said, there also occurs power imbalance between parties to an arbitration especially where one party has the resources to access technological applications thereby increasing their chances of putting forward a good case as compared to their opponent which could raise questions pertaining to fairness.¹⁴¹

Moreover, where predictive analytics are used to determine an arbitrator before whom a matter may be completed fast, junior arbitrators may be prejudiced since the applications are more likely to select only prolific arbitrators.¹⁴² Additionally, when it comes to the examination of witnesses, the fact that parties are in different physical locations can make the arbitrator miss out on body language which is very important in determining the credibility of testimonies.¹⁴³ Further, virtual sessions can encourage couching and prompting of witnesses which may put into question the credibility of the whole arbitral process.¹⁴⁴

¹³⁷ Ebner, N., & Thompson, J. (2014). Face Value-Non-Verbal Communication and Trust Development in Online Video-Based Mediation. *IJODR*, 1, 103.

¹³⁸ Alexander N, 'From ADR To ODR: Can Technology Shape The Future Of Mediation Practice?' (*Privpapers.ssm.com*, 11 February 2012) <https://privpapers.ssm.com/sol3/Delivery.cfm/SSRN_ID3751220_code115218.pdf?abstractid=3751220 > accessed 19 June 2021.

¹³⁹ David Allen Larson, 'Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR' (2005) 21 *Ohio St. J. on Disp. Resol.* 629.

¹⁴⁰ *Ibid.*

¹⁴¹ Eidenmueller and Varesis (n 12).

¹⁴² Matt Billings and Leon Watts, 'The Model of Relational Communication: Explaining Difficulties Encountered through the Use of Technology in ADR' (2009) 11 *Asian Dispute Review*.

¹⁴³ Larson (n 148).

¹⁴⁴ Billings and Watts (n 151).

Furthermore, arbitral awards are often confidential and are sealed.¹⁴⁵ This, therefore, makes data collection, recognition, and characterization for the purpose of machine learning difficult.¹⁴⁶ Even if the data were to be made available, the question arises, to whom should such information be made available and how would this impact the equality of parties to an arbitration.¹⁴⁷ Besides, there are also several instances where cases are resolved via voluntary settlements. Therefore, it is difficult to determine conclusively what prior results have been for purposes of applying them to future conflicts when it is impossible to know the number of cases settled voluntarily and on what terms the settlement was based.¹⁴⁸ For complex cases, generalized intelligence would be required to deal with a myriad of issues. AI applications merely have specialized capabilities making them fit for only simple straightforward cases.¹⁴⁹ There is also a risk of biased data or algorithms producing skewed results.¹⁵⁰ With technology, however, there is always a sense of optimism as developments in the future could very well cure the shortcomings of today.

Conclusion

From the discussions above it can be seen that technology has in many ways increased the effectiveness and efficiency of ADR. This has been made possible by the advancements which have been made in the field of both technology and artificial intelligence. The covid-19 era has reminded the world of the importance of technology especially the internet and the notion that it can be used for various functions which are mostly done remotely and still deliver on substantial results which might even be better than if such functions were done remotely. ADR is not an exception in this regard. Looked from another aspect, covid-19 has actually hastened the reliance of ADR on technology. A shift that many scholars have contended to be inevitable. Though we have not reached the level where AI can replace arbitrators and mediators, in e-negotiations there are a substantial number of machines and super-computers that have replaced negotiators. Similarly, it can be argued that AI advancements in this area as well as others, have also helped in ensuring that the processes are run smoothly by assisting in doing processes that are axillary to ADR processes such as filing and sharing of relevant information (documents) in a faster and convenient. The unique advantages that

¹⁴⁵ Eidenmueller and Varesis (n 12).

¹⁴⁶ Mack (n 1).

¹⁴⁷ Syme (n 4).

¹⁴⁸ Billings and Watts (n 151).

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

technology brings may be of particular significance to Africa given the relative disadvantage when it comes its relatively underdeveloped physical infrastructure; a major determinant when it comes to the question of access to justice. Could the present paradigm present an opportunity for the continent to close the gap of inequality in this regard? The author answers this question in the affirmative. The investments associated with upgrade technological infrastructure are likely to be far lower than those related to bringing the physical infrastructure connected with access to justice (roads, buildings etc.) at par with developed countries.

References

AD Reiling, 'Courts and Artificial Intelligence', IJCA (HeinOnline 2020).

Alexander N, 'From ADR To ODR: Can Technology Shape The Future Of Mediation Practice?' (Privpapers.ssrn.com, 11 February 2012) <https://privpapers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3751220_code115218.pdf?abstractid=3751220> accessed 19 June 2021.

Benyoucef, M., & Rinderle, S. (2005). A model-driven approach for the rapid development of e-negotiation systems. Gesellschaft für Informatik eV.

Benyoucef, M., Keller, R. K., Lamouroux, S., Robert, J., & Trussart, V. (2000, February). Towards a generic e-negotiation platform. In Proceedings of the sixth international conference on re-technologies for information systems (pp. 95-109).

Bichler, M., Kersten, G., & Strecker, S. (2003). Towards a structured design of electronic negotiations. Group Decision and Negotiation, 12(4), 311-335.

Biesaga-Słomczewska, E. J. Michał Osuch University of Łódź, Marketing Department. Innovations and Knowledge Commercialization, 107.

Braun, P., Brzostowski, J., Kersten, G., Kim, J. B., Kowalczyk, R., Strecker, S., & Vahidov, R. (2006). E-negotiation systems and software agents: Methods, models, and applications. In Intelligent decision-making support systems (pp. 271-300). Springer, London.

CAPS RESEARCH, 'CAPS Research Program' (CAPS Research, 2021) <<http://www.capsresearch.org/research/>> accessed 18 June 2021.

Carrel, A., & Ebner, N. (2019). Mind the Gap: Bringing Technology to the Mediation Table. J. Disp. Resol., 1.

Chiu, D. K., Cheung, S. C., Hung, P. C., Chiu, S. Y., & Chung, A. K. (2005). Developing e-negotiation support with a meta-modeling approach in a web services environment. Decision support systems, 40(1), 51-69.

David Allen Larson, 'Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator' (2010) 25 Ohio St. J. on Disp. Resol. 105.

David Allen Larson, 'Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR' (2005) 21 Ohio St. J. on Disp. Resol. 629.

David Syme, 'Keeping Pace: On-Line Technology and ADR Services' (2006) 23 Conflict Resolution Quarterly 343.

Department. Innovations and Knowledge Commercialization, 107.

Ebner, N. (2012). E-mediation. *Online Dispute Resolution: Theory and Practice*, 357.

Ebner, N., & Thompson, J. (2014). Face Value-Non-Verbal Communication and Trust Development in Online Video-Based Mediation. *IJODR*, 1, 103.

Goodman, J. W. (2002). The pros and cons of online dispute resolution: an assessment of cyber-mediation websites. *Duke L. & Tech. Rev.*, 2, 1.

Harvard Law School, 'Conflict Management: The Challenges Of Negotiating Online' (PON - Program on Negotiation at Harvard Law School, 2021) <<https://www.pon.harvard.edu/daily/conflict-resolution/the-challenges-of-online-negotiations>> accessed 18 June 2021.

Hayes, M. Procurement Policy.

Horst Eidenmueller and Faidon Varesis, 'What Is an Arbitration? Artificial Intelligence and the Vanishing Human Arbitrator' [2020] *Artificial Intelligence and the Vanishing Human Arbitrator* (June 17, 2020).

James E. McGuire, Esq, 'How technology helps companies resolve disputes fairly and efficiently' (Technology: Tools for the 21st century mediation, 5 October 2012) <https://www.jamsadr.com/files/uploads/documents/articles/mcguire-ic-technology-2012-10-05.pdf> accessed 19 June 2021.

John Zeleznikow, 'Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts', *IJCA* (HeinOnline 2016).

'Karl Bayer's Disputing Blog » Online Dispute Resolution: An Amorphous Concept, Yet An Effective Tool Part V' (Disputingblog.com, 16 December 2016) <<https://www.disputingblog.com/online-dispute-resolution-an-amorphous-concept-yet-an-effective-tool-part-v/>> accessed 19 June 2021.

Katsh, E. (2012). ODR: A Look at History-A Few Thoughts About the Present and Some Speculation About the Future. *Online Dispute Resolution: Theory and Practice: A Treatise On Technology And Dispute Resolution*.

Kersten, G. E., & Lai, H. (2007). Negotiation support and e-negotiation systems: An overview. *Group Decision and Negotiation*, 16(6), 553-586.

Kersten, G. E., Law, K. P., & Strecker, S. (2004). A software platform for multiprotocol e-negotiations. *InterNeg Research Papers*.

Kraus, S. (2001, July). Automated negotiation and decision making in multiagent environments. In *ECCAI Advanced course on artificial intelligence* (pp. 150-172). Springer, Berlin, Heidelberg.

Kruger, J., Epley, N., Parker, J., & Ng, Z. W. (2005). Egocentrism over e-mail: Can we communicate as well as we think?. *Journal of personality and social psychology*, 89(6), 925.

Laframboise, K., & Reyes, F. (2003, September). E-negotiations, supply networks and collaborative product development in aerospace manufacturing. In *14th International Workshop on Database and Expert Systems Applications, 2003. Proceedings.* (pp. 855-859). IEEE.

Laubert, C., & Parlamis, J. (2019). Are you angry (happy, sad) or aren't you? Emotion detection difficulty in email negotiation. *Group Decision and Negotiation*, 28(2), 377-413.

Laura Nader, 'The Globalization of Law: ADR as "Soft" Technology', *Proceedings of the Annual Meeting (American Society of International Law) (JSTOR 1999)*.

Matt Billings and Leon Watts, 'The Model of Relational Communication: Explaining Difficulties Encountered through the Use of Technology in ADR' (2009) 11 *Asian Dispute Review*.

Matthew Peaire and Aaron Jacobs, 'Optimizing the Use of Technology in Mediation' (Butler.legal, 2021)

<https://www.butler.legal/wp-content/uploads/2020/01/13477-technology-mediation-article-2.pdf> accessed 18 June 2021.

Mohamed S. Abdel Wahab, 'Online Dispute Resolution for Africa' (Mediate.com, 2021) <https://www.mediate.com/pdf/wahab1.pdf> > accessed 19 June 2021.

Morgan Smith, How to Use Technology Effectively in Mediation, *Cogent Legal blog*, Sept. 14, 2012.

Nadja Alexander, 'Mobile Mediation: How Technology Is Driving the Globalization of ADR' (2005) 27 Hamline J. Pub. L. & Pol'y 243.

Neumann, D., Benyoucef, M., Bassil, S., & Vachon, J. (2003). Applying the Montreal taxonomy to state of the art e-negotiation systems. *Group Decision and Negotiation*, 12(4), 287.

Pablo Cortes, 'Using Technology and ADR Methods to Enhance Access to Justice' (2018) 5 IJODR 103.

Peters, L. M., & Manz, C. C. (2007). Identifying antecedents of virtual team collaboration. *Team Performance Management: An International Journal*.

Qinyu2015, 'E-Negotiation System — Advantages For Organizations' (qinyu2015, 2021) <<https://qinyu2015.wordpress.com/2015/05/06/e-negotiation-system-advantages-for-organizations/>> accessed 18 June 2021.

Raneta Lawson Mack, 'CPR's ADR 2000 Online Seminar: Analyzing the Present and Future of ADR & Technology' (2000) 2 J. Alt. Disp. Resol. 11.

Raneta Lawson Mack, 'Using Technology to Enhance the ADR Practice' (1999) 1 J. Alt. Disp. Resol. 16.

Ray Worthy Campbell, 'Artificial Intelligence in the Courtroom: The Delivery of Justice in the Age of Machine Learning' (2020) 18 Colo. Tech. LJ 323.

Rule, C. (2003). *Online dispute resolution for business: B2B, ecommerce, consumer, employment, insurance, and other commercial conflicts*. John Wiley & Sons.

Rinderle, S., & Benyoucef, M. (2005, November). Towards the automation of E-negotiation processes based on Web services—a modeling approach. In *International Conference on Web Information Systems Engineering* (pp. 443-453). Springer, Berlin, Heidelberg.

Shurven H, Lohman A, and Jung Y, 'The Responsive Judge International Perspectives' (Academia.edu, 2018) <https://www.academia.edu/37343617/The_Responsive_Judge_International_Perspectives> accessed 19 June 2021.

Stephen J Ware and Sarah Rudolph Cole, 'ADR in Cyberspace' (1999) 15 Ohio St. J. on Disp. Resol. 589.

University of Washington: The Auction House (2002).

Washington Arbitration & Mediation Services, 'Technology & Mediation' (Arbitration & Mediation News, 1 June 2012) < https://usamwa.files.wordpress.com/2013/01/wams-newsletter_8_2.pdf > accessed 19 June 2021.

Wurman, P. R., Wellman, M. P., & Walsh, W. E. (1998, May). The Michigan Internet AuctionBot: A configurable auction server for human and software agents. In Proceedings of the second international conference on Autonomous agents (pp. 301-308).

Zlatanska, E., & Betancourt, J. C. (2013). Online Dispute Resolution (ODR): What is it, and is it the Way Forward?. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 79(3).

Adopting The Singapore Convention in Kenya: Insight and Analysis

By: *Kariuki Muigua**

Abstract

The paper offers insight on adopting the United Nations Convention on International Settlement Agreements Resulting from Mediation ‘Singapore Convention’ and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation ‘Model Law’. The two legal instruments are aimed at strengthening the practice of international commercial mediation whose development and uptake has been curtailed by numerous challenges including the absence of an elaborate enforcement mechanism. The paper critically analyses the salient provisions of both the Singapore Convention and the Model Law. It then discusses the applicability of the two legal instruments in Kenya and proposes the best approach in their adoption in order to enhance the practice of international commercial mediation in Kenya.

1. Introduction

The United Nations Convention on International Settlement Agreements Resulting from Mediation ‘*Singapore Convention*’ is an international legal instrument that recognizes the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations and which provides a legal framework for enforcement of settlement agreements resulting from mediation.¹ The Convention was opened for signature in Singapore on 7th August 2019 and calls upon governments and regional integration organizations that wish to strengthen their legal frameworks on international dispute settlement *to consider becoming parties to the convention* (emphasis added).² Adoption of the Convention is thus voluntary³

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

¹ United Nations Convention on International Settlement Agreements Resulting from Mediation, United Nations, New York, 2019, ‘*Singapore Convention*’.

² Ibid, Preamble.

³ Schnabel.T., ‘The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements’ 19 Pepp. Disp. Resol. L.J. 1 (2019)

Development of the convention was necessitated by challenges facing the practice of international commercial mediation where the trend has been that the outcome of a mediation is treated as a contractual agreement enforced as such and not as an award as in the case of arbitration.⁴ This has always been a problem in many states in that one party may pull out of such an agreement and seek court intervention as if the mediation never took place.⁵ The convention aims at enhancing the practice of international commercial mediation by building a bridge that would enable acceptability of international settlement agreements across states with different legal, social and economic systems.⁶

The Singapore Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 which amends the UNCITRAL Model Law on International Commercial Conciliation, 2002. The Model Law deals with procedural aspects of mediation. The paper discusses the best approach in adopting these legal instruments in Kenya in order to create a conducive legal environment for the practice of international commercial mediation.

2. Scope and Application of the Singapore Convention

The Convention applies to an *agreement resulting from mediation and concluded in writing* by parties to *resolve a commercial dispute* (“settlement agreement”) which, at the time of its conclusion, *is international*.⁷ This is aimed at encouraging cross border mediation and provides parties with an alternative to arbitration which has hitherto been the main dispute resolution mechanism for international commercial disputes.⁸ It does not apply to personal or family disputes.⁹

⁴ Muigua, K., ‘The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States’ available at <http://kmco.co.ke/wp-content/uploads/2019/12/The-Singapore-Convention-on-International-Settlement-Agreements-Resulting-from-Mediation-Kariuki-Muigua-December-2019.pdf> (accessed on 24/08/2020).

⁵ Ibid.

⁶ Singapore Convention, Preamble

⁷ United Nations Convention on International Settlement Agreements Resulting from Mediation, Article 1(1).

⁸IK. Zafar., ‘The Singapore Mediation Convention, 2019’, available at https://www.academia.edu/40289206/The_Singapore_Mediation_Convention (accessed on 25/08/2020)

⁹ Ibid, Article 1(2) (a).

A party which relies on a settlement agreement under the Convention is required to supply to the competent authority of the party to the convention where relief is sought certain information which include inter alia the *settlement agreement signed by the parties; a document signed by the mediator evidencing that the mediation was conducted and an attestation by the institution which administered the mediation.*¹⁰

Grant of relief under the convention is not absolute and the competent authority of the party to the convention where relief is sought may refuse to grant such relief upon proof that a party to the agreement was under some incapacity; the settlement agreement is null and void, inoperative or incapable of being performed; the settlement agreement is not binding or is not final; there is a serious breach by the mediator of standards applicable to the mediator or the mediation and public policy considerations.¹¹

The Convention is expected to have similar benefits for mediation as an international dispute resolution mechanism as the New York Convention has had for arbitration.¹² The New York Convention was formulated for purposes of providing a legal framework for the recognition and enforcement of foreign arbitral awards and has had tremendous impact and success on the practice of international commercial arbitration.¹³ The Singapore Convention has the potential of having such an impact on the practice of international commercial mediation.¹⁴ One of the key benefits of the convention is that it provides a process for the direct enforcement of cross-border settlement agreement between parties resulting from mediation. Consequently, it stipulates that each party to the convention shall enforce a settlement agreement in accordance with its rules of procedure.¹⁵ This provision allows parties to formulate their own rules of procedure suitable to national or local circumstances for purposes of effective enforcement of the convention. Such procedural rules can include the requirement for the settlement agreement to be in an official language of the party to the convention where relief is sought as envisaged under the Convention.¹⁶

¹⁰ Ibid, Article 4.

¹¹ Ibid, Article 5.

¹² IK. Zafar., 'The Singapore Mediation Convention, 2019', Op Cit

¹³ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), available at www.newyorkconvention.org/english (accessed on 26/08/2020)

¹⁴ IK. Zafar., 'The Singapore Mediation Convention, 2019', Op Cit

¹⁵ Singapore Convention, Article 3(1)

¹⁶ Ibid, Article 4(3)

The *Singapore Convention* is consistent with the *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018(Model Law)*¹⁷. This provides parties with the flexibility to adopt either the *Singapore Convention* or the *Model Law* as stand-alone legal instruments or both as complementary instruments in order to facilitate a comprehensive legal framework on mediation.¹⁸ Whereas the *Singapore Convention* governs the substantive aspects of mediation, the *Model Law* deals with the procedural aspects. However, the substantive aspects of the two legal instruments are a mirror image of each other in order to provide consistency in the practice of international commercial mediation. Article 1 of the *Singapore Convention* which provides for its scope and application is similar to article 3 of the *Model Law*. Both provide that the conventions apply to international commercial mediation.¹⁹ Section 3 of the *Model Law* also captures the substantive aspects stipulated under the *Singapore Convention* including the requirements for reliance on settlement agreements and grounds for refusing to grant a relief.²⁰

3. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

In addition to the substantive aspects discussed above, the *Model Law* governs the procedural aspects of international commercial mediation and international settlement agreements. It governs aspects such as commencement of mediation proceedings; number and appointment of mediators; conduct of mediation; communication between mediator and parties; disclosure of information; confidentiality; admissibility of evidence; termination of mediation proceedings and resort to arbitral or judicial proceedings.²¹

On the conduct of mediation, the *Model Law* gives effect to the principle of party autonomy which is one of the hallmarks of mediation and provides that parties are free

¹⁷ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002).

¹⁸ Muigua. K., 'The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States' Op Cit

¹⁹ Singapore Convention, Article 1; See also Model Law, article 3.

²⁰ Model Law, Articles 18 and 19; See also the Singapore Convention, articles 4 and 5.

²¹ Ibid.

to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.²² Where parties fail to agree on the manner in which the mediation is to be conducted, the Model Law allows the mediator to conduct the mediation in a manner he/she considers appropriate taking into account the circumstances of the case, wishes of the parties and the need for expeditious dispute resolution.²³ The Model Law also enshrines the principle of confidentiality and provides that unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential.²⁴ Disclosure is only permissible pursuant to legal requirements or for purposes of implementation or enforcement of a settlement agreement.²⁵

Further, in order to safeguard the sanctity of the mediation proceedings, the Model Law prevents admissibility of evidence by a party to the mediation proceedings, the mediator and any third person in arbitral, judicial or similar proceedings regarding matters such as an invitation to engage in mediation proceedings; views expressed by a party in the mediation in respect of a possible settlement of the dispute; statements or admissions made by a party in the course of the proceedings; proposals by the mediator and documents made solely for purpose of the mediation proceedings.²⁶

To guard against possible conflict of interest, the Model Law precludes the mediator from acting as an arbitrator in respect of a dispute that is subject of the mediation proceedings or a dispute that has arisen from the same contract or legal relationship.²⁷ This is due to the likelihood of bias owing to the arbitrator's knowledge of the parties and the dispute. The arbitrator is likely to have formed an opinion on the relative strength or weakness of the case based on the analysis of the facts and evidence from the mediation proceedings which could be prejudicial in neutral settlement of the dispute. A settlement agreement concluded under the Model Law is binding and enforceable according to the rules of procedure of the state where enforcement is sought.²⁸

²² Model Law, Article 7

²³ Ibid, Article 7(2)

²⁴ Ibid, Article 10

²⁵ Ibid

²⁶ Ibid, Article 11

²⁷ Ibid, Article 13

²⁸ Ibid, Article 15.

4. Application of the Singapore Convention and the Model Law in Kenya

Unlike international commercial arbitration, international commercial mediation is yet to take root in Kenya. Kenya has quite an elaborate legal and institutional framework that has facilitated the use of arbitration in managing international commercial disputes. These include the Arbitration Act²⁹, the Nairobi Centre for International Arbitration Act³⁰ and institutions such as the Chartered Institute of Arbitrators-Kenya, the Nairobi Centre for International Arbitration and the International Chamber of Commerce that have facilitated the uptake of international commercial arbitration. Kenya is also a signatory to the New York convention* that provides a framework for the enforcement of international arbitral awards. This is not the case for international commercial mediation at the moment. However, Kenya is continuing to develop its domestic mediation framework and this offers promise for international commercial mediation.

The Constitution of Kenya enshrines the right of access to justice and provides that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.³¹ In actualising the right of access to justice, the Constitution mandates courts and tribunals while exercising judicial authority to give effect to alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms*.³² Mediation is one of the forms of Alternative Dispute Resolution and flows from negotiation.³³ It arises where parties to a dispute have attempted negotiations but have reached a deadlock. As a result, parties agree to involve a third party to assist them continue with the negotiation process with the aim of breaking the deadlock.³⁴ *Mediation has been practiced in the country since time immemorial. Indigenous African communities adhered to the values of harmony and togetherness and whenever a dispute arose between two parties, they would attempt to amicably resolve the dispute through negotiation.³⁵ In case of a deadlock, other parties and institutions such as the council of elders would come in and assist parties arrive at a solution.³⁶

²⁹ Arbitration Act, No. 4 of 1995, Government Printer, Nairobi.

³⁰ Nairobi Centre for International Arbitration Act, No. 26 of 2013, Government Printer, Nairobi.

³¹ Constitution of Kenya, 2010, Article 48, Government Printer, Nairobi.

³² Ibid, Article 159 (2) (c).

³³ Muigua. K., *Resolving Conflicts Through Mediation in Kenya*, Glenwood Publishers, 2nd Ed., 2017, pg 3.

³⁴ Ibid

³⁵ Mwangi, M., 'Conflict in Africa; Theory, Processes and Institutions of Management' Centre for Conflict Research, Nairobi, 2006.

³⁶ Ibid.

Following Constitutional recognition of mediation and other ADR mechanisms vide article 159 (2) (c), measures have been taken towards mainstreaming mediation in the justice system. The Civil Procedure Act³⁷ was amended to introduce Court Annexed Mediation. The Act establishes the Mediation Accreditation Committee appointed by the Chief Justice whose functions include inter alia determining the criteria for certification of mediators; maintaining a register of qualified mediators and enforcing a code of ethics for mediators as may be prescribed.³⁸ The Act further allows courts to refer cases to mediation on the request of the parties concerned; where it is deemed appropriate to do so and where the law requires.³⁹ Vide the *Mediation (Pilot Project) Rules, 2015*, court-annexed mediation was introduced in the commercial and family divisions of the High Court at Milimani Law courts, Nairobi and has since spread to other divisions and court stations outside Nairobi. Court-Annexed mediation has had its impact and success with the annual State of the Judiciary & Administration of Justice reports highlighting the role it plays in enhancing access to justice in Kenya.⁴⁰

However, Court-Annexed Mediation has also been criticised for its inherent weaknesses. It has been argued that the process is formal contrary to the attributes of mediation such flexibility and ability to be conducted in informal settings.⁴¹ Further, the process to a large extent goes against the principle of voluntariness which is one of the hallmarks of mediation since parties are forced to mediate.⁴² It has also been asserted that court-annexed mediation is contrary to the attribute of privacy since court documents become public once filed and can be accessed by any person.⁴³

Attempts have been made towards addressing some of the challenges arising from the current practice of mediation in Kenya. The *Alternative Dispute Resolution Policy*⁴⁴ is

³⁷ Civil Procedure Act, Cap 21, Government Printer, Nairobi.

³⁸ Ibid, S 59A, Government Printer, Nairobi.

³⁹ Ibid, S 59B.

⁴⁰ Judiciary, State of the Judiciary and Administration of Justice Annual Reports, available at <https://www.judiciary.go.ke/resources/reports/> (accessed on 24/08/2020)

⁴¹ Muigua. K., 'Court Sanctioned Mediation in Kenya-An Appraisal' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf> (accessed on 24/08/2020)

⁴² Ibid; See also Wazir,MS, 'An Analysis of Mandatory Mediation' available at <https://su-plus.strathmore.edu/handle/11071/4817> (accessed on 27/08/2020)

⁴³ Ibid

⁴⁴ Alternative Dispute Resolution Policy (zero Draft), available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf (accessed on 24/08/2020)

one such endeavour. The purpose of this draft policy is to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access to justice for all Kenyans.⁴⁵ The policy is intended to create a *well-coordinated, well capacitated and cohesive ADR system* that is strategically linked to the formal system, while at the same time maintaining *its autonomy as an informal system* and providing quality justice services to Kenyans across the country.⁴⁶

The Policy identifies several challenges that undermine the full realization of the goals of ADR mechanisms including mediation. These include unclear scope of ADR, jurisdictional challenges, question of justiciability, inadequate implementation of existing laws and lack of framework legislation. The policy also identifies some of the challenges facing mediation in particular such as the existence of numerous institutions with each developing their own different rules, curricula and training programs.⁴⁷ This has resulted to duplication, disparate standards and a disjointed practice of mediation in Kenya. The policy proposes several recommendations aimed at enhancing the practice of ADR in Kenya which include strengthening the legal and institutional framework for ADR; enhancing the quality and efficacy of ADR services; regulation and governance; promoting quality and standards of practice in ADR; capacity building; increasing availability, accessibility and uptake of ADR services and developing a framework for efficient recognition, adoption and enforcement of ADR decisions.⁴⁸ Promoting quality and standards of practice of mediation as envisaged by the ADR policy will also be essential in facilitating international commercial mediation since it will boost confidence within the business community of the country's capability as an ideal mediation forum. While Kenya continues to strengthen its domestic legal and institutional framework on mediation, it is also important to create an enabling environment that would facilitate the uptake of international commercial mediation. Mediation is increasingly being used in international and domestic commercial practice as an alternative to litigation and arbitration due to its significant benefits, such as preserving commercial relationships, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.⁴⁹ As part of the international business community Kenya should not be left behind. The country should join the noble course towards creating an enabling legal and institutional environment to facilitate

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Singapore Convention, Preamble

international commercial mediation. Adopting the Singapore Convention and the Model Law represents a good starting point in the quest towards enhancing the scope of international commercial mediation in Kenya.

5. Adopting the Singapore Convention in Kenya

The foregoing discussion highlights some of the challenges facing the practice of mediation in Kenya such as inadequate legal framework; duplication, disparate standards and a disjointed practice of mediation and enforceability challenges with the exception of court-annexed mediation. These challenges do not create an enabling environment for the practice of international commercial mediation. *The Singapore Convention* and *Model Law* can cure these challenges by providing an elaborate procedural framework for the conduct of international commercial mediation and enforcement of mediation settlement agreements. Kenya can thus strengthen its legal framework on mediation by adopting the two legal instruments. Since conflict is culture specific⁵⁰, Kenya can adopt the two legal instruments with necessary modifications to suit to local circumstances. Indeed, both the Singapore Convention and the Model Law provide for their adoption with necessary modifications to suit local circumstances. The Singapore Convention recognises the different levels of experience with mediation in different jurisdictions and allows reservations whereby a party may declare application of the convention only to the extent that the parties to the settlement agreement have agreed.⁵¹ The Model Law also allows adjustments to be made to relevant articles according to the needs of party states.⁵²

In adopting the two legal instruments, Kenya can consider revising them appropriately to allow for the conduct of mediation proceedings in Kiswahili which is one of the official languages in the country. This will be important in facilitating commercial relationships between Kenya and its neighbouring countries such as Tanzania which is a key trading partner. Further, since article 12 of the Singapore Convention allows participation by regional economic integration organizations, the convention can be adopted within the context of the East African Community in addition to adoption by individual member states. This will be critical in promoting the pillars of East African Community integration and in particular the customs union and the common market

⁵⁰ LeBaron. M., 'Bridging Cultural Conflicts: A New Approach for a Changing World' Jossey-Bass, San Francisco, CA, 2003

⁵¹ Singapore Convention, Article 8

⁵² Model Law, Article 16

aimed at accelerating economic growth and development within the region.⁵³ It will also facilitate building of a legal bridge to promote uniform application of the convention within the East African Community region considering that some of the countries are Anglophone (Kenya, Uganda and Tanzania) whereas some are Francophone (Rwanda and Burundi). Further, in order to facilitate adoption and application of the Singapore Convention and the Model Law, Kenya should strengthen its institutional framework on mediation. Both the Singapore Convention and the Model Law envisage the role of an institution on matters such as appointment or replacement of a mediator.⁵⁴ The country may consider establishing a national mediation institute to facilitate such matters. The country should also strengthen its legal framework on mediation which should provide for the procedure for crucial matters such recognition and enforcement of mediation settlement agreements or setting aside of mediation settlement agreements. The Arbitration Act clearly provides for such procedures and this has led to the growth of arbitration as the preferred mode of commercial dispute resolution in the country.⁵⁵ In developing a national legal framework on mediation, drafters should ensure that the legislation captures these issues in order to give effect to the Singapore Convention and the Model Law.

*The Mediation Bill*⁵⁶ in Parliament represents a good starting point. However, the ideals of the ADR Policy need to be reflected in the Mediation law in order to enhance the uptake of mediation in the country. The Bill should go through adequate public participation to incorporate the views of all stakeholders in the country. There is need to rally the support from the business community and collaborating with institutions such as the International Chamber of Commerce, Kenya Private Sector Alliance (KEPSA) among others in developing a national framework on mediation in order to promote commercial mediation in the country. Public awareness and participation in developing a national legal an institutional framework on mediation is important in ensuring acceptability and uptake of mediation in the country.

The Singapore Convention represents an idea whose time has come. It can work to advance international commercial mediation as a facilitator of trade and business

⁵³ East African Community, Pillars of EAC Regional Integration, available at <https://www.eac.int/integration-pillars> (accessed on 26/08/2020)

⁵⁴ Model Law, Article 6

⁵⁵ Section 35 of the Arbitration Act, No. 4 of 1995 provides for setting aside of arbitral awards while section 36 provides for recognition and enforcement of awards.

⁵⁶ Mediation Bill, 2020, Government Printer, Nairobi.

relations and boost commerce in the country. Kenya should adopt the convention in order to enhance its international commercial mediation environment.

References

Alternative Dispute Resolution Policy (zero Draft), available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf

Arbitration Act, No. 4 of 1995, Government Printer, Nairobi

Civil Procedure Act, Cap 21, S 59A, Government Printer, Nairobi.

Constitution of Kenya, 2010, Article 48, Government Printer, Nairobi.

East African Community, Pillars of EAC Regional Integration, available at <https://www.eac.int/integration-pillars>

IK. Zafar., ‘The Singapore Mediation Convention, 2019’, available at https://www.academia.edu/40289206/The_Singapore_Mediation_Convention

Judiciary, State of the Judiciary and Administration of Justice Annual Reports, available at <https://www.judiciary.go.ke/resources/reports/>

LeBaron. M., ‘Bridging Cultural Conflicts: A New Approach for a Changing World’ Jossey-Bass, San Francisco, CA, 2003.

Mediation Bill, 2020, Government Printer, Nairobi.

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

Muigua. K., ‘The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States’ available at <http://kmco.co.ke/wp-content/uploads/2019/12/The-Singapore-Convention-on-International-Settlement-Agreements-Resulting-from-Mediation-Kariuki-Muigua-December-2019.pdf>

Muigua. K., *Resolving Conflicts Through Mediation in Kenya*, Glenwood Publishers, 2nd Ed.,2017.

Mwagiru, M., ‘Conflict in Africa; Theory, Processes and Institutions of Management’ Centre for Conflict Research, Nairobi, 2006.

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

Schnabel.T., 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' 19 *Pepp. Disp. Resol. L.J.* 1 (2019).

UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002).

United Nations Convention on International Settlement Agreements Resulting from Mediation, United Nations, New York, 2019, '*Singapore Convention*'.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), available at www.newyorkconvention.org/english.

Wazir.MS, 'An Analysis of Mandatory Mediation' available at <https://suplus.strathmore.edu/handle/11071/4817>.

Arbitration Awards in Zambia: The Application of Interest under the Public Works Sector Contracts

*By: Bwalya Lumbwe**

1. Background

Arguably the biggest source of construction sector works in Zambia is the public sector through the Government of Zambia,¹ followed by the copper mines and a distance third, other private sector developers. As a result, public works contracts may also be the biggest source of construction disputes.²

Public works construction contracts such as those for public infrastructure are procured using rules provided for under the Zambia Public Procurement Authority (ZPPA) legislation.³ These rules of procurement mandate the use of standard conditions of contract for the works⁴ save in some limited circumstances.⁵

The article was inspired by a contractor on a public works contract which was terminated by the employer. This resulted in a dispute which was referred to arbitration with an award being issued in 2016.⁶ Thereafter, the contractor sought an opinion on several

**Bwalya Lumbwe is a Civil Engineer who practices as a claims consultant, an arbitration consultant, an adjudicator, an arbitrator and dispute board practitioner. He can be contacted at arbitratorzambia@gmail.com.*

¹ As a guide infrastructure public procurement in Africa amounted to US \$69b in 2018. See Bwalya Lumbwe, 'Business Case for Arbitration and ADR in Africa: Dispute Resolution in Construction and Infrastructure: Are we keeping in step with growth?' (2nd NCIA International Arbitration & ADR Conference, Mombasa March 2020) <<https://conference.ncia.or.ke/>> accessed 11 March 2021.

² Bwalya Lumbwe, 'The African Arbitration Association is Here. Now what?' (Alternative Dispute Resolution, vol 7, issue 2, 2019) 32. Though these are limited to the execution phase of the works as opposed to the design phase.

³ Public Procurement Act No.12 of 2008; Bwalya Lumbwe, 'Construction Dispute Resolution in Zambia: A Public Procurement Perspective', [2020], 36 Const.L.J. Issue 4, 314. The Public Procurement Act No.12 of 2008 was repealed by the Public Procurement Act No. 8, 2020 which came into effect on the 13th April 2021. The new act does not apply retrospectively and the rules are largely the same. The article is based on the 2008 Act.

⁴ Bwalya Lumbwe, 'Construction Dispute Resolution in Zambia: A Public Procurement Perspective', [2020], 36 Const.L.J. Issue 4, 314.

⁵ reg 183(5), The Public Procurement Regulations, 2011.

issues which included scrutiny of the award for enforceability and recourse to setting aside under the arbitration legislation. Among other issues scrutinized was the award of interest. This scrutiny yielded findings of misapplication and misinterpretation of both contractual interest and statutory interest provisions. A question that arose subsequently was whether this finding was a one off or was a general problem. As it turned out, two further awards yielded similar findings. Thus, it became quite clear that more awards needed to be scrutinized to gauge the extend of the problem.

In carrying out the scrutiny, the author looked at different phases that attract interest in an arbitration. These are the periods before the award and that after the award.⁷ The period before the award or the pre-award stage, covers interest which accrues from the date of default⁸ or from the date on which the claim is instituted⁹ and is payable up to the date of award.¹⁰ This interest is often referred to as the pre-award interest and includes contractual interest.¹¹ The second phase is post award interest and is payable on the sums awarded and accrues till payment is satisfied.¹²

In total ten awards were scrutinized, and all bore findings of similar misapplication and misinterpretation of both contractual interest as well as statutory interest provisions. This pointed to a systemic problem in the way interest is generally applied and understood in arbitrations in Zambia.¹³

⁶ There is confidentiality protection afforded to the arbitral process in Zambia under s27 of the Arbitration Act No. 19 of 2000 which is the applicable law.

⁷ *Savenda Management Zambia LTD v Stanbic Bank Zambia Ltd*, Appeal no. 002/2016 Unreported R39 in dicta; see also the English practice in David St John Sutton et al, *Russell on Arbitration* (23rd edn, Sweet and Maxwell) 6-117, 6-122.

⁸ e.g., in construction contracts when a certificate is delayed or when it should have been.

⁹ *Savenda Management Zambia LTD v Stanbic Bank Zambia Ltd*, Appeal no. 002/2016 Unreported R39 in dicta; see also the English practice in David St John Sutton et al, *Russell on Arbitration* (23rd edn, Sweet and Maxwell) 6-117, 6-122.

¹⁰ *Savenda Management Zambia LTD v Stanbic Bank Zambia Ltd*, Appeal no. 002/2016 Unreported R39 in dicta; see also the English practice in David St John Sutton et al, *Russell on Arbitration* (23rd edn, Sweet and Maxwell) 6-117.

¹¹ See Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press) 9.73-9.82.

¹² David St John Sutton et al, *Russell on Arbitration* (23rd edn, Sweet and Maxwell) 6-117, 6-123; Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press) 9.83.

¹³ The awards were made by a combination of construction professionals-engineers and quantity surveyors, senior legal counsel, a sitting and retired judge and who are mostly members of the Chartered Institute of Arbitrators.

The Zambia Public Procurement Authority has two mandatory standard conditions of contract for public works execution or construction,¹⁴ both contain provisions for interest or financing charges¹⁵ on late payments.¹⁶ This article is largely limited to the scrutiny of interest awarded in arbitration awards originating from these two public works construction contracts.

The misapplication and misinterpretation partly stems from the interpretation of the legislation that governs interest under the arbitration legislation as well from the interpretation of contractual interest provisions. This is also due to the assumption that interest applicable under litigation is directly applicable under arbitration.

Internationally the basis upon which interest is awarded varies.¹⁷ The right to interest will generally flow from the parties' contract or by virtual of the underlying applicable law.¹⁸ It should however be noted that in Muslim jurisdictions the award of interest is generally forbidden whilst in some civil law countries it is obligatory.¹⁹ The situation in Zambia under public procured works is dual in that interest in awards stems from both the applicable contract as well under the applicable law.

The final product of any arbitral reference is an enforceable final award.²⁰ Hence to achieve that arbitral tribunals need to understand not only the applicable arbitration legislation but also the contractual provisions. In addition, it is also necessary to be

¹⁴ Bwalya Lumbwe, 'Business Case for Arbitration and ADR in Africa: Dispute Resolution in Construction and Infrastructure Are we keeping in step with growth?' (2nd NCIA International Arbitration & ADR Conference, Mombasa March 2020) <<https://conference.ncia.or.ke/>> accessed 11 March 2021; Bwalya Lumbwe, 'Construction Dispute Resolution in Zambia: A Public Procurement Perspective', [2020], 36 Const.L.J. Issue 4, 314.

¹⁵ Financing charges will have a component of interest. See Jeremy Clover, Simon Hughes, *Understanding the FIDIC Red Book: A Clause-by-Clause Commentary* (2nd edn, Sweet and Maxwell) 14-050.

¹⁶ The other works contract is the FIDIC Pink Book (2010) or the Condition of Contract for Construction for Building and Engineering Works Designed by the Engineer.

¹⁷ Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press) 9.73.

¹⁸ Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press) 9.73.

¹⁹ Bruce Harris et al, *The Arbitration Act 1996: A Commentary* (5th edn, Wiley Blackwell) 255.

²⁰ Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge) 155.

familiar with and understand other applicable legislation such as ZPPA Act²¹ including the attendant regulations²² as they contain provisions that may affect not only the dispute but also the efficacy of the award.

Furthermore, it is also important that arbitral tribunals understand contractual remedies available and not available that may or may not impact the award of interest. This article, therefore, partly seeks to provide tools to arbitrators that will produce an enforceable award in as far as the award of interest is concerned. It is in part essential that arbitrators understand both the statutory interest as well as contractual provisions in order to produce an award that will not be subjected to challenges.

The confidentiality of the arbitration process including awards is an important aspect in most jurisdictions including Zambia.²³ This article is, thus, published with permission from the Chartered Institute of Arbitrators, Zambia Branch under the terms of the Arbitration Act No.19 of 2000.²⁴ The author, therefore, is not at liberty to reveal the actual details of the dispute, the parties to the dispute or the names of those who constituted the tribunals.

2. Statutory Interest Provision under the Arbitration Act

The application of interest in arbitration awards in Zambia is governed by the Arbitration Act No. 19 of 2000 (AA2000). Specifically, sub-s16 (6) of AA2000 provides that:

- (6) Unless otherwise agreed by the parties an arbitral tribunal may award—
 - (a) in the case of an arbitration which, under article 1(3) of the First Schedule, is international, simple or compound interest, in accordance with the law applicable to the arbitration; or
 - (b) in any other case, simple or compound interest in accordance with **the law applicable in Zambia to judgement debts²⁵ on the whole or any part of any sum and in relation to such period and at such rate as is specified in the arbitral award.**²⁶

²¹ Public Procurement Act No.12 of 2008.

²² The Public Procurement Regulations, 2011.

²³ Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press) 2.161-2.196.

²⁴ s 27(2) (c).

²⁵ Highlighted for emphasis only.

²⁶ Underlined for emphasis only.

Although the Zambian arbitration law is based on the UNCITRAL Model Law, s16(6) is not in the Model Law and is hence an addition into AA2000.²⁷ This article is limited to construction arbitration cases that are not international, so the applicable interest is that under SS (16)(6)(b).

The language of the provision leaves no doubt that the award of interest is discretionary and not mandatory²⁸ and only applicable if the parties have not made any other agreement as to what and how interest should be applied. The parties, therefore, are at liberty to agree what powers the tribunal should have regarding the award of interest.²⁹ Without such an agreement an arbitral tribunal has discretionary power to award or not to award interest on the awarded amount. The practice, though, should be to award interest unless there are compelling reasons not to do so.³⁰ The ten examined awards mentioned above were all under circumstances in which the arbitral tribunal had the discretion to award interest in accordance with sub-s (16)(6)(b).

An important aspect of the provision is that it limits the application of interest to that which is in accordance with **the law applicable in Zambia to judgement debts**.³¹

The Cambridge business English dictionary defines a judgement debt as ‘a sum of money that a court of law has ordered a company or person to pay.’³² The law applicable to judgement debts in Zambia is aptly named, The Judgments Act³³ (JA) and provides as follows:

Every³⁴ Judgment, order or decree of the High Court or order of a subordinate court whereby any sum of money, or any costs, charges or expenses, is or are to be

²⁷ Refer to Bwalya Lumbwe, LLM/MSc Construction Law and Arbitration Dissertation: Issues in Arbitration in Zambia-Challenges Pertaining to the Arbitration Act, Related and Subsidiary Legislation, submitted to The Robert Gordon University, Aberdeen Business School, May 2017; Also see Bruce Harris et al, *The Arbitration Act 1996: A Commentary* (5th edn, Wiley Blackwell) 254-259.

²⁸ *Savenda Management Zambia Ltd v Stanbic Bank Zambia Ltd*, Appeal no. 002/2016 Unreported R42 in dicta.

²⁹ Bruce Harris et al, *The Arbitration Act 1996: A Commentary* (5th edn, Wiley Blackwell) 254.

³⁰ David St John Sutton et al, *Russell on Arbitration* (23rd edn, Sweet and Maxwell) 6-124.

³¹ Emphasis mine.

³² judgment debt<<https://dictionary.cambridge.org/dictionary/english/judgment-debt>> accessed 11 March 2021.

³³ Chapter 81 of the Laws of Zambia.

³⁴ Emphasis mine.

payable to any person **shall**³⁵ carry interest as may be determined by the court which rate shall not exceed **the current lending rate as determined by the Bank of Zambia from the time of entering up the judgment, order, or decree until the same shall be satisfied**,³⁶ and such interest may be levied under a writ of execution on such judgment, order or decree.³⁷

The AA2000 is, thus, subjected to another piece of legislation for the purposes of determination of interest under any arbitration.³⁸ Another way of putting it is that the Judgments Act is implied into AA2000 by legislation. No other legislation is mentioned or referred to under sub-s 16(6).

For the purposes of arbitration, the words *judgement, order or decree* in the Judgments Act are replaceable by *award* for the purposes of determination of interest applicable in an award. By the same token *High Court, court* or *subordinate court* become *tribunal or arbitrator*.

It is also quite clear that in litigation judgment interest is mandatory and must accrue from the date of judgment till the judgment amount is settled.³⁹ This is not to the case in arbitration as the provisions in the Judgments Act have been tampered by the provisions in the AA2000, specifically sub-s 16(6), making the application of interest a tribunal's discretionary act, were parties have not agreed otherwise.

In England and Wales, an arbitral tribunal also has power to award interest up to the date of the award and beyond that date in circumstances where the parties have not agreed

³⁵ Emphasis mine.

³⁶ Emphasis mine.

³⁷ Judgments Act, s 2.

³⁸ For other legislation that AA2000 is subjected to see Bwalya Lumbwe, LLM/MSc Construction Law and Arbitration Dissertation: Issues in Arbitration in Zambia-Challenges Pertaining to the Arbitration Act, Related and Subsidiary Legislation, submitted to The Robert Gordon University, Aberdeen Business School, May 2017.

³⁹ *Savenda Management Zambia Ltd v Stanbic Bank Zambia Ltd*, Appeal no. 002/2016, delivered 3rd Oct 2019, Unreported R42 in dicta. Note that the Judge refers to a 1961 Act instead of the updated 1997 Act which removed reference to the 6 % interest. Technically there is an overlap between interest up to the date of award and interest from the date of the award. It is one and the same day.

otherwise⁴⁰ with the latter being the same as under AA2000. The saving provisions in the English Arbitration Act⁴¹ are there so that the other power to award interest is not ousted by the statutory provisions.⁴² In other words where there is contractual interest provided for under the contract, that right is still applicable.

The difference, though, with AA2000 is that an arbitral tribunal is only permitted to award statutory interest from the date of award. There is no provision for pre-award statutory interest. So, where there is no contractual interest provision, an arbitral tribunal is not permitted to award pre-award interest.

Despite the clear provisions and limitations under the Judgments Act, that interest must accrue from the date of the award till the amount of awarded is settled, sub-s16(6)(b) contradicts this by further stating that such interest should be ‘...in relation to such period and at such rate as is specified in the arbitral award.’ This provision, hence, appears to give authority to a tribunal to order a rest period in the application of interest as it sees fit in contradiction to the provision in the Judgments Act under which there is no such period provided for. Another way of looking at this, is that the mandatory provision in the Judgments Act wherein interest accrues from the date of award till paid with no rest periods, is tampered by this latter provision in the AA2000 which authorizes rest periods at such rate a specified by an arbitral tribunal.

The resolution of this contradiction lies in answering the question as to which part of this legislation is superior, one contained in the Judgments Act but implied into AA2000 or the extension directly provided to the in AA2000.

However, it is the author’s view that tribunals do not order rest periods and simply follow the provisions in the Judgments Act. This, hence, assumes a rest period of zero and avoids the winning party from being deprived of interest⁴³ as rest periods by implication are a period in which interest is suspended.

⁴⁰ s 49(3)-(4); See Bruce Harris et al, *The Arbitration Act 1996: A Commentary* (5th edn, Wiley Blackwell) 254-259.

⁴¹ 1996.

⁴² David St John Sutton et al, *Russell on Arbitration* (23rd edn, Sweet and Maxwell) 6-127.

⁴³ Bruce Harris et al, *The Arbitration Act 1996: A Commentary* (5th edn, Wiley Blackwell) 256.

In repetition, what is also quite clear is that there is no statutory power inherent in the Judgments Act or in sub-s16(6) to award interest between the date of default⁴⁴ or from the date on which the dispute is instituted up to the date on which the award is made.⁴⁵ This is the pre-award interest. However, even the courts of law sometimes mix up powers under pre-award statutory powers available with powers under litigation. In *Savenda Management Zambia Ltd v Stanbic Bank Zambia Ltd*,⁴⁶ an arbitration case, a Supreme Court Judge sitting as a single Judge stated, in dicta, that pre-award interest ‘should be given as of right.’⁴⁷ That dicta is applicable in litigation⁴⁸ but not in arbitration.

3. The ZPPA Standard Conditions of Contract-Interest Provisions

ZPPA mandates the use of two standard Conditions of Contract which are:

- a. The Small Works Contract; and
- b. Conditions of Contract for Construction for Building Engineering Works Designed by the Employer used for large and/or complex works.⁴⁹

The former is a copy of the World Bank standard form of contract, 2010 version while the latter is an exact copy of the FIDIC⁵⁰ Multilateral Development Bank Harmonised Edition, 2010 otherwise known as the Pink Book.⁵¹ Both condition of contract are used worldwide.⁵²

The interest provisions in the two types of conditions of contract are discussed below.

⁴⁴ e.g., in construction contracts when a certificate is delayed or when it should have been.

⁴⁵ Appeal no. 002/2016 Unreported R39.

⁴⁶ Appeal no. 002/2016, Delivered 3rd Oct 2019, Unreported.

⁴⁷ *Savenda Management Zambia Ltd v Stanbic Bank Zambia Ltd*, Appeal no. 002/2016, Delivered 3rd Oct 2019 Unreported, R39.

⁴⁸ *Kasote Singogo v Lafarge Zambia Ltd* SCZ/8/267/2011, Decided 20th May 2020. Unreported, [5.8].

⁴⁹ Bwalya Lumbwe, ‘Construction Dispute Resolution in Zambia: A Public Procurement Perspective’, [2020], 36 Const.L.J. Issue 4, 314.

⁵⁰ French acronym for the International Federation of Consulting Engineers.

⁵¹ Bwalya Lumbwe, ‘Construction Dispute Resolution in Zambia: A Public Procurement Perspective’, [2020], 36 Const.L.J. Issue 4, 314.

⁵² Bwalya Lumbwe, ‘Business Case for Arbitration and ADR in Africa: Dispute Resolution in Construction and Infrastructure-Are we keeping in step with growth?’ (2nd NCIA International Arbitration & ADR Conference, Mombasa March 2020) <<https://conference.ncia.or.ke/>> accessed 11 March 2021; See Publications <<https://fidic.org/bookshop>> accessed 11 May 2021.

3.1 The Small Works Contract

The ZPPA Small Works Standard Conditions of Contract, cl 40.1 states that:

Payments shall be adjusted for deductions for **advance payments⁵³ and retention**. The Employer shall pay the Contractor the amounts certified by the Project Manager within 28 days of the date of each certificate. If the Employer makes a late payment, the Contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date by which the payment should have been made **up to the date when the late payment is made at the prevailing rate of interest for commercial borrowing⁵⁴** for each of the currencies in which payments are made.

Clause 40.2 continues and states that:

If an amount certified is increased in a later certificate or **as a result of an award by the Adjudicator or an Arbitrator**, the Contractor shall be paid interest upon the delayed payment as set out in this clause. Interest shall be calculated from the date upon which the increased amount would have been certified in the absence of the dispute.

Under this type of contract progress payments are conditioned on the production of Interim Payment Certificates (IPC) or certificate⁵⁵ or a Final Payment Certificate.⁵⁶ The right to interest is automatic as there is no need to give a notice.⁵⁷ In the event of a dispute on an IPC, the adjudicator or arbitral tribunal acts as a certifier in place of the Project Manager.⁵⁸

⁵³ The advance payment is for the purposes of mobilization and cash flow support and is an interest free loan by the employer to the contractor. Its payment is dependent on the production of guarantee. See cl 48.

⁵⁴ Emphasis added.

⁵⁵ The Small Works Contract does not refer to an IPC but simply to a certificate. See cl 39.

⁵⁶ cl 39 Small Works Contract; Stephen Furst et al, *Keating on Construction Contracts* (9th edn, Sweet and Maxwell) 20-228.

⁵⁷ Christopher R. Seppälä, 'International Construction Contract Disputes: Third Commentary on ICC Awards Dealing Primarily with FIDIC Contracts, (ICC International Court of Arbitration Bulletin, Vol 23/Number 2 – 2012) 14-050.

⁵⁸ Christopher R. Seppälä, 'International Construction Contract Disputes: Third Commentary on ICC Awards Dealing Primarily with FIDIC Contracts, (ICC International Court of Arbitration Bulletin, Vol 23/Number 2 – 2012) 37; Stephen Furst et al, *Keating on Construction Contracts* (9th edn, Sweet and Maxwell) 20-228.

There are, therefore, three situations under which interest is payable. One and two are on late payment of an IPC or final certificate, the other is when the amount on an IPC is increased by the Project Manager in a later certificate or by an adjudicator or arbitral tribunal.⁵⁹

On the latter, interest is thus payable only on those amounts that are increased in a later certificate by the Project Manager, the adjudicator, or the arbitrator. For interest to apply there ought to have been a certificate issued by the Project Manager which is later increased by them or the adjudicator or arbitral tribunal.

Where, for example, the Project Manager entirely fails to certify work or under certifies, an adjudicator's or arbitral tribunal's finding that an extra amount was due, is not subject to contractual interest. This is because there is no underlying IPC that was issued by the Project Manager.

Furthermore, the Small Works Contract does not have an express provision compelling the Project Manager to issue a certificate within a specified period from the date when the Contractor submits his monthly statement of claim.⁶⁰ Hence, where there is an inordinate delay in the issuance of a certificate by the Project Manager, such delay is not subject to interest as contractual interest is payable only on a delayed payment on a certificate issued. An entitlement to interest under this circumstance does not arise under the terms of the contract as it is not expressly provided for.⁶¹

Similarly, a delayed payment on an advance payment⁶² which is usually the first IPC issued does also not attract interest. This is so because clause 40 deals with interest payments on those certificates that are based on progress of the works and implicitly excludes an advance payment certificate.⁶³ The amount of advance payment and when payment is to be made will be stated in the Particular Conditions of Contract unlike the progress IPC which is stated under cl 40. The remedy for late settlement of an advance

⁵⁹ The contract foresees a tribunal of one.

⁶⁰ Though the period of time is implied into the contract through reg.137(f) of the Public Procurement Regulations, 2011 via Chapter 2 of the Laws of Zambia, the Interpretation and General Provisions Act, s36. The period becomes a reasonable time.

⁶¹ Julian Bailey, *Construction Law* (2nd edn, Informa Law) 6.365.

⁶² See cl 48.

⁶³ See Jakob B Sørensen, *FIDIC Red Book: A companion to the 2017 Construction Contract* (ICE Publishing)14.2.

payment lies in claiming additional costs and time under sub-cl 41.1(i). Clearly such a late payment is breach of contract though no interest payment is provided for as a remedy under the terms of the contract.

A contractor's right to claim interest does not prejudice any other right or remedy.⁶⁴ The Small Works Contract lists grounds for termination of contract which are non-exhaustive⁶⁵ and provides for a slipway for other grounds.⁶⁶ Hence, where there is an unwarranted delay to settle an advance payment, a contractor ought to make an application under sub-cl 56.3 seeking that such a delay is a fundamental breach allowing the contractor to terminate the contract. This remedy, however, requires the Project Manager who is employed by the Employer to determine that such a breach is indeed a fundamental breach. This puts the Project Manager in an awkward position but under this circumstance, he is required to act as a professional and not as an agent of the employer in making such a determination.⁶⁷

An alternative way is to terminate the contract under common law in circumstance where the delay in payment of the advance is inordinate and may be considered a repudiation of contract.⁶⁸ The common law rights are not usually excluded unless expressly stated so in the contract.⁶⁹ The Small Works Contract does not contain such an exclusion, hence the right is applicable.

There is no requirement under common law or any legislation that requires that a contract contain an entitlement for a party to be paid interest on late payments.⁷⁰ Such a provision must expressly be conferred into the contract.⁷¹ The applicable law in Zambia does not provide for interest as a remedy either against a failure to certify or

⁶⁴ Jakob B Sørensen, *FIDIC Red Book: A companion to the 2017 Construction Contract* (ICE Publishing) 14.8.

⁶⁵ sub-cl 56.2.

⁶⁶ sub-cl 56.3.

⁶⁷ Will Hughes, Ronan Champion, John Murdoch, *Construction Contracts: Law and Management* (5th edn, Routledge) 18.2.

⁶⁸ Julian Bailey, *Construction Law* (2nd edn, Informa Law) 9.32.

⁶⁹ *Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75*; UK: Can A Contractual Term Exclude Common Law Rights? <<https://www.mondaq.com/uk/contracts-and-commercial-law/84660/can-a-contractual-term-exclude-common-law-rights>> **accessed 17 June 2021.**

⁷⁰ Julian Bailey, *Construction Law* (2nd edn, Informa Law) 6.365.

⁷¹ Julian Bailey, *Construction Law* (2nd edn, Informa Law) 6.365.

under certify as stated above.⁷² Where such a remedy is sort parties should expressly provide for it under the terms of contract.⁷³

In cases of wrongful termination of contract by an Employer, the usual heads of claims include work done but not certified, irrecoverable statutory termination cost of employees, irrecoverable costs of termination cost of equipment contracts, irrecoverable costs of transportation of equipment and others. These heads will not attract contractual interest when found due by a tribunal, even though some costs are incurred immediately or soon after termination. Where an arbitration takes months or years from the time of incurring the cost, the contractor will, thus, not be able to recover interest which is the usual remedy⁷⁴ under litigation though recoverable only from the date of writ to the date of judgement.⁷⁵ The only recourse, thus, to interest is from the date of issuance of an award.⁷⁶

The Small Works Contract provides that ‘Interest shall be calculated from the date by which the payment should have been made up to the date when the late payment is made.’⁷⁷ What, then, transpires once an adjudicator or arbitrator certifies interest on top of the principle in an award? Does the interest continue running till the judgement debtor satisfies the debt in accordance with contractual provision? Literal reading of this clause will mean that the principal amount awarded will continue to attract interest till payment is made at whatever future date it is partly or fully settled and may well be after an award is made. This question will be answered later.

For the record, the ZPPA Small Works Contract is by far the most applicable in Zambia and consequently has the most disputes. As indicated earlier it is also used worldwide,⁷⁸ hence some the interpretations in this article may well apply in other jurisdictions.

⁷² For an alternative view see Christopher R. Seppälä, ‘International Construction Contract Disputes: Third Commentary on ICC Awards Dealing Primarily with FIDIC Contracts, (ICC International Court of Arbitration Bulletin, Vol 23/Number 2 – 2012) 30.

⁷³ Julian Bailey, *Construction Law* (2nd edn, Informa Law) 6.366.

⁷⁴ See in contrast David St John Sutton et al, *Russell on Arbitration* (23rd edn, Sweet and Maxwell) 6-124.

⁷⁵ *Kasote Singogo v Lafarge Zambia Ltd* SCZ/8/267/2011, Decided 20th May 2020. Unreported, [5.8].

⁷⁶ *Kasote Singogo v Lafarge Zambia Ltd* SCZ/8/267/2011, Decided 20th May 2020. Unreported, [5.8].

⁷⁷ cl 40.1.

⁷⁸ As a world bank form of contract.

It is important to note that under the Small Works Contract dispute resolution procedure⁷⁹ only those disputes that result from the decision of the Project Manager can be referred to an adjudicator in the first instance.⁸⁰ Where a party is dissatisfied with the decision of the adjudicator only then should the matter be referred to arbitration.⁸¹ Reference of a dispute to adjudication is, therefore, a condition precedent to a reference to arbitration. The ZPPA legislation further bars the parties to refer a dispute directly to arbitration without an amendment of contract which embeds the dispute resolution clause⁸² and such an amendment must be approved the Attorney General.⁸³

Since the contract limits referable disputes to those decisions of the Project Manager, it means that those decisions that are reserved for the parties such as termination of contract that result in a dispute are thus not referable to adjudication or arbitration.⁸⁴ As the contract stands, without an amendment to permit adjudication and/or arbitration, such a party decision that results in a dispute can only be litigated.⁸⁵

Of the ten the examined awards nine are on ZPPA contracts and are disputes on termination and as such the resultant awards are illegal⁸⁶ as the parties did not amend the contracts as required by the ZPPA legislation.⁸⁷ Regardless of the illegality, the awards still show the problems of the application of interest. For the record, other than one, none of the parties challenged the award based on illegality. It is thought that the reason is that the parties and their representatives were not aware of the ZPPA provision.⁸⁸

⁷⁹ cl 24.

⁸⁰ Bwalya Lumbwe, 'Construction Dispute Resolution in Zambia: A Public Procurement Perspective', [2020], 36 Const.L.J. Issue 4, 314.

⁸¹ Bwalya Lumbwe, 'Construction Dispute Resolution in Zambia: A Public Procurement Perspective', [2020], 36 Const.L.J. Issue 4, 314.

⁸² cl 24.

⁸³ Bwalya Lumbwe, 'Construction Dispute Resolution in Zambia: A Public Procurement Perspective', [2020], 36 Const.L.J. Issue 4, 314.

⁸⁴ Bwalya Lumbwe, 'Construction Dispute Resolution in Zambia: A Public Procurement Perspective', [2020], 36 Const.L.J. Issue 4, 314.

⁸⁵ Bwalya Lumbwe, 'Construction Dispute Resolution in Zambia:

⁸⁶ Bwalya Lumbwe, 'Construction Dispute Resolution in Zambia: A Public Procurement Perspective', [2020], 36 Const.L.J. Issue 4, 314.

⁸⁷ Bwalya Lumbwe, 'Construction Dispute Resolution in Zambia: A Public Procurement Perspective', [2020], 36 Const.L.J. Issue 4, 314.

⁸⁸ Bwalya Lumbwe, 'Construction Dispute Resolution in Zambia: A Public Procurement Perspective', [2020], 36 Const.L.J. Issue 4, 314.

3.2 FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (Pink Book)

The Pink book states at cl 14.8 that:

If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive **financing charges compounded monthly**⁸⁹ on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in Sub-Clause 14.7 [Payment], **irrespective (in the case of its sub-paragraph (b)) of the date on which any Interim Payment Certificate is issued.**⁹⁰

Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above **the discount rate of the central bank**⁹¹ in the country of the currency of payment, or if not available, **the interbank offered rate**,⁹² and shall be paid in such currency.⁹³

The Contractor shall be entitled to this payment without formal notice or certification, and without prejudice to any other right or remedy.

The Cambridge online dictionary defines finance charges as the total cost including interest that one must pay for borrowing money in the form of a loan or with a credit card.⁹⁴ Therefore, finance charges include other cost other than interest or on top of interest. The contract provides for each certified amount under an IPC to be paid within 56 days of the Engineer having received the contractor's statement of claim.⁹⁵ Finance charges, thus, begin to accrue on the expiry of the 56 days irrespective of when the IPC is issued.⁹⁶ This is captured in the clause above with the reference to sub-clause 14.7.

Unlike the Small Works Contract the advance payment, where it is not paid on the due date, will attract finance charges. This is because the above delayed payment clause

⁸⁹ Emphasis mine.

⁹⁰ Emphasis mine.

⁹¹ Emphasis mine.

⁹² Emphasis mine.

⁹³ Like the Small Works Contract, the advance payment is an interest free loan for mobilization and cashflow support. See cls 14.2, 14.3, 14.6, 14.7.

⁹⁴ Finance charges <<https://dictionary.cambridge.org/dictionary/english/finance-charge>> accessed 16th April 2021.

⁹⁵ Referred to as a Statement and is a defined term under the contract.

⁹⁶ Sub-cl 14.7(b).

allows for finance charges to accrue in accordance with sub-clause 14.7. This sub-clause includes a specific payment period in which the advance payment must be paid which is different to that of the normal IPC.⁹⁷

Regarding circumstances where the Engineer has failed in his obligation to issue an IPC or has under certified, finance charges are due from the date 56 days after the Engineer received the contractors statement of claim.⁹⁸ Hence, where a tribunal later finds that sums were due to the contractor but never certified or under certified finance charges will be due from date from the date 56 days after the Engineer received the contractors claim unlike the Small Works Contract.

The dispute resolution provisions under the contract call for referral of disputes to a dispute board⁹⁹ in the first instance then to arbitration upon the dissatisfaction of any one party.¹⁰⁰ Referral to a dispute board is a condition precedent to referral to arbitration. Like the Small Works Contract the ZPPA legislation bars the parties referring a dispute to arbitration directly without an amendment to contract and without the authority of the Attorney General.¹⁰¹

There are other remedies applicable which may be employed in accordance with contract terms where there are delays in payment, under certification or lack of certification. For example, and unlike the Small Works Contract, termination is an express remedy where there is failure by the Engineer to issue any type of payment certificate.¹⁰² The other remedy lies in work slowdown and suspension of works under sub-cl 16.1.¹⁰³ This remedy may lead also to an extension time under sub-cl 8.4 and cost claims under sub-cl 20.1.¹⁰⁴

⁹⁷ Sub-cl 14.7(a). Unlike the Small Works Contract the Pink Book expressly provides that an advance payment is payable as an IPC.

⁹⁸ Sub-cl 14.7(b).

⁹⁹ sub-cl 20.2.

¹⁰⁰ sub-cl 20.6.

¹⁰¹ Bwalya Lumbwe, 'Construction Dispute Resolution in Zambia: A Public Procurement Perspective', [2020], 36 Const.L.J. Issue 4, 314.

¹⁰²sub-cl 16.2 (b).

¹⁰³ Brian W, Totterdill, *FIDIC Users Guide: A Practical Guide to the 199 Red and Yellow Books* (2nd edn 2009)263.

¹⁰⁴ Brian W, Totterdill, *FIDIC Users Guide: A Practical Guide to the 199 Red and Yellow Books* (2nd edn 2009)263.

As already indicated above an advance payment delay attracts interest. Further inordinate delays in payment of the advance amount attracts a remedy of termination but only after 42 days from expiry of the time stated for payment to have been made¹⁰⁵ or in an extension of time¹⁰⁶ and recovery of costs.¹⁰⁷

However, the same question arises as under the Small Works Contract as to when finance charges cease to accrue.

4. Other Legislation and Case Law on Interest

Having looked at provisions of interest and finance charges under the ZPPA standard conditions of contract, it is necessary to look at what other litigation legislation and case laws govern the application of interest and finance charges. As a reminder it was stated earlier that part of the problem in the application of interest is because of the assumption that legislation applicable to litigation is also applicable in arbitration which is not the case.

Other than the Judgments Act there are two other pieces of legislation that govern the application of interest in Zambia. These are as follows.

4.1 The High Court Act

The High Court Act¹⁰⁸ provides that:

Where **any**¹⁰⁹ judgment or order is for a sum of money, interest **shall**¹¹⁰ be paid thereon at **the average of the short-term deposit rate per annum prevailing** from the date of **the cause of the action or writ as the court or judge**¹¹¹ may so direct to the date of judgment.¹¹²

The author could not find any reference to this piece of legislation in any Supreme Court of Zambia ruling in the recent past though there are many cases under which

¹⁰⁵ cl 16.2(c), Pink Book.

¹⁰⁶ cl 8.4 (e) or (b), Pink Book.

¹⁰⁷ cl 20.1, Pink Book.

¹⁰⁸ s8, Order XXXVI, High Court Act, Chapter 27 of the Laws of Zambia.

¹⁰⁹ Emphasis mine.

¹¹⁰ *ibid.*

¹¹¹ Emphasis only.

¹¹² s8, Order XXXVI, High Court Act, Chapter 27 of the Laws of Zambia

interest disputes under litigation have been decided in that court.¹¹³ The author is also not aware of any changes that precludes the application of this legislation at the time of writing this article.

The High Court Act is not implied into AA2000 and does not in any way expressly or impliedly infer that it is applicable in arbitration proceedings.

4.2 Chapter 74, The Law Reform (Miscellaneous Provisions) Act

The operative part of this law is s 4 which states:

In any proceedings tried in any Court of record for the recovery of any debt or Power of courts of record to award damages, **the court may**,¹¹⁴ if it thinks fit, order that there shall be included in the sum for interest on debts and which judgment is given interest at such rate as it thinks fit on the whole or any part of the damages debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: Provided that nothing in the section-

- (i) shall authorise the giving of interest upon interest; or
- (ii) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
- (iii) shall affect the damages recoverable for the dishonour of a bill of exchange.

As is the case with the High Court Act, this legislation is not implied into AA2000 and does not in any way expressly or impliedly infer that it is applicable in arbitration.

A point to note though is that this law is discretionary whereas the High Court Act is mandatory.¹¹⁵

¹¹³ See examples and reference to a plethora of authorities in which the SCZ has decided interest issue in *Kasote Singogo v Lafarge Zambia Ltd* SCZ/8/267/2011, Decided 20th May 2020. Unreported [5.4-5.9]

¹¹⁴ Emphasis mine.

¹¹⁵ *Kasote Singogo v Lafarge Zambia Ltd*, SCZ/8/267/2011 decided 20th May 2020 Unreported, [5.8].

The interpretation of this law is peculiar given the existence of the High Court Act. In the pivotal case of *Kasote Singogo v Lafarge Zambia Ltd*,¹¹⁶ the SCZ states, with reference to the Law Reform (Miscellaneous Provisions) Act, which does not contain an interest rate applicable, that the usual practice of courts has been to peg the interest at the average short-term deposit rate from the date of commenced of an action to the date of judgment.¹¹⁷ This rate addition or interpretation wording is very similar to that in the High Court Act but the SCZ made no reference to that legislation.

The other difficulty is that in the same case but with reference to other cases in the past, the SCZ appear to have made the Law Reform (Miscellaneous Provisions) Act mandatory. The court stated that:

We have stated in a number of cases that interest **shall**¹¹⁸ be awarded at the short-term bank deposit rate from the date of writ to the date of judgment, thereafter at the current lending rate as determined by the Bank of Zambia from the date of judgment to the date of payment, unless parties have agreed otherwise...¹¹⁹

The use of the word shall in the first part of the statement which refers to the Law Reform (Miscellaneous Provisions) Act, in the authors, view changes the express intent which the same court acknowledged, that of the discretionary nature of the Act, to that of a mandatory nature. Whether this legal is another question. The use of the word may instead of shall, would have been the appropriate choice. This, therefore, adds confusion to the interest provisions.

4.3 Case Law

The most authoritative and current case law on the application of interest under litigation, though some of it is implied into the arbitration proceeding through the Judgments Act, is that of *Kasote Singogo v Lafarge Zambia Ltd*,¹²⁰ already referred to above and decided in May 2020.

¹¹⁶ SCZ/8/267/2011 decided 20th May 2020 Unreported.

¹¹⁷ *Kasote Singogo v Lafarge Zambia Ltd* SCZ/8/267/2011 decided 20th May 2020 Unreported, [5.8].

¹¹⁸ Emphasis mine.

¹¹⁹ *Kasote Singogo v Lafarge Zambia Ltd* SCZ/8/267/2011 decided 20th May 2020 Unreported, [5.8].

¹²⁰ SCZ/8/267/2011, decided 20th May 2020.

The SCZ in this case stated once again in the ruling that ‘...**when a judgment is rendered, the principal sum found owing and interest if any, merge to form the judgment debt and this attracts interest as may lawfully be ordered by the Court in accordance with Section 2 of the Judgments Act.**’¹²¹ As this was a ruling on the law applicable in Zambia to judgement debts the implication is that this ruling is also implied into the AA2000 and thus applicable to arbitration proceedings.

If the same reasoning is applied, as was the case earlier to the Judgment Act but now to the SCZ interpretation in quotation marks highlighted above, the word *judgment* becomes *an award*, *judgment debt* becomes *award debt*¹²² and *Court* becomes *Tribunal or arbitrator*.

The implication is that contractual interest or finance charges derived from late payment of Interim Payment Certificates and other certificates cease to accrue once an award which covers interest is rendered. Thereafter, the award debt will attract interest at no more than the current lending rate as determined by the Bank of Zambia.¹²³ This, therefore, answers the question as to when contractual pre-award interest or finance charges cease to accrue, a question that was posed earlier.

5. Interest and Finance Charges as Applied in Examined Awards

Only five awards are referred to below, but they generally cover all problems noticed in the analysis of all the 10 awards. In all these cases the parties did not agree to any other application of interest. Hence the default position was that provided under ss16(6). Furthermore, nine awards were as a result of termination of contract by the Employer under the ZPPA standard Small Works Contract except and one that was ad-hoc but had similar problems. The ad-hoc example is indicative of similar problems beyond the ZPPA standard conditions of contract. No Pink Book awards were available.

¹²¹ *Kasote Singogo v Lafarge Zambia Ltd*, SCZ/8/267/2011, decided 20th May 2020 [5.4], Unreported. Emphasis mine.

¹²² Though once enforcement proceedings are undertaken this reverts more or less to a Judgement debt. See s20(3) of AA2000.

¹²³ *Kasote Singogo v Lafarge Zambia Ltd*, SCZ/8/267/2011, decided 20th May 2020 [5.8]

5.1 ABC v DEF

This is an award made in 2016 by an arbitral tribunal of three.¹²⁴ The dispute resulted from an employers' termination of contract under the ZPPA Standard Condition of Contract for Small Works. The arbitral tribunal had stated in the award that s16 of AA2000 governs the award of interest. The interest section of the final award states that:

Interest will be payable on the amount due to the Respondent **from the date of commencement of the arbitration up to the date of the award at commercial bank average short term deposit rates.**¹²⁵ From the date of the award, interests shall be due and accrue in accordance with the provisions of section 2 of the Judgements Act. For this purpose, we determine that that this rate shall be equivalent to the prevailing Bank of **Zambia Monetary Policy Rate.**¹²⁶

Neither sub-s16(6) nor the Judgements Act addresses pre-award interest as is stated in the first sentence of the award. As already discussed above there is no law that provides for such authority in arbitration proceedings. Hence this part of the award was totally erroneous and illegal.

A point to note though is that the wording in the award is remarkably similar to that under the High Court Act provisions and the case law on the Law Reform (Miscellaneous Provisions) Act earlier referred to and both of which are not applicable in arbitration.

The reference to the commercial bank average short term deposit rates is also problematic because such rates are based on varying periods of time.¹²⁷ The rate may be based on a week, a month, three months, or six months and may be up to a year. So, there are usually several rates all which are short-term deposit rates differentiated only by the period of time. Where a tribunal has power to award short term interest rate, it must identify whether it is a rate based on a week, one month, three months or six months

¹²⁴ Consisted of one construction professional and two state counsels which is the highest accolade that can be bestowed on a lawyer.

¹²⁵ Emphasis mine.

¹²⁶ Emphasis mine.

¹²⁷ Refer to Monetary and Financial Statics < <https://www.boz.zm/monetary-and-financial-statistics.htm> > accessed 11th May 2021. Press on Statistics Fortnightly Series, then Commercial Bank Interest Rates to view Deposits over K20,000.

or a year or whatever periods a commercial bank or central bank employs. In this instance parties were left to decide as to what that interest was.

The arbitral tribunal further awarded some contractual interest on IPC's that were not paid on time and those that were not paid up to the time of the award but calculated only up to the time the claim was submitted to the arbitral tribunal which was about two years or so before the final award. There was, therefore, a significant amount of time where interest was not awarded. Where a request for interest has been made it is incumbent upon a tribunal to ensure that it has the tools to be able to calculate interest up to the date of award.

Assuming that pre-award interest provision was correctly applied, a secondary issue that arose was that there was no calculation of the awarded interest that would then merge with principal and form the basis for post-award interest. The tribunal provided only a method for calculation of that interest. The parties then had to calculate the pre-award interest before applying the post award interest. In disputes where positions are entrenched this may lead to fresh disputes on the calculations.

Another problem was that contractual interest on unpaid IPCs formed part of the award. As was indicated earlier the right to interest under both forms of ZPPA standard condition contracts is automatic. Non-payment of such interest does mean there is a dispute. Hence, this interest should not have been part of the award in any case as there was no dispute declared.

Furthermore, the arbitral tribunal also awarded IPC's that were never paid. Simply because an IPC is not paid on time and still outstanding up to time of the award does not mean that there are in dispute. Non-payment does not automatically translate into a dispute. The awarded amount included a large amount in unpaid IPC's which should never have formed part of the award.

This is a problem that many arbitral tribunals face, and a way round it is ensuring that the parties agree that there is no dispute on the IPC's, and this is then recorded as a matter not contended and that those IPC's are due for payment. The same logic is applicable to contractual interest resulting from a late payment on an IPC.

The arbitral tribunal also awarded interest on a late payment of the advance payment. As already stated, the Small Works Contract does not provide for the payment of interest

for such late payments, unlike the Pink Book. Neither is there any law that provides for such a payment. The remedy for such a late payment lies elsewhere in the contract. Hence, this was another erroneous and illegal award of interest. The errors above are decisions beyond the scope of submissions and thus may be subjected to setting aside proceedings as are other similar decisions below.¹²⁸

5.2 GHI v JKL

This was another construction dispute based on a ZPPA Small Works Contract. The dispute was also a result of termination of contract by the Employer. The award was rendered by an arbitral tribunal of three¹²⁹ in 2018. For reason that remain unexplained the contract did not have the standard interest clause referred to above and the arbitral tribunal noted this in the award.

As this is a public works contract the ZPPA Regulations¹³⁰ mandates under reg 139 that:

- (1) A contract shall state the period of payment.
- (2) A contract shall provide for interest to be paid to the supplier, where a procurement entity fails to make payment within the period specified in the contract.
- (3) A contract shall clearly state the interest rate to be applied, how interest payment shall be calculated and any other conditions relating to payment of interest.

The Small Works Contract meets each one of these conditions.¹³¹ As earlier stated the use of the ZPPA standard conditions of contract is mandatory. Hence, the arbitral tribunal should have, therefore, applied the interest clause that is in the standard conditions of contract. Clearly the tribunal lacked knowledge as to the applicable procurement regulations as regards public works contracts.

Further on in the award, the tribunal referred and quoted the Judgments Act and then stated that ‘As to the rate of interest and the effective date, we know of no-good reason not to follow the rate applicable under our Judgments Act.’ The tribunal additionally stated that ‘Accordingly we determine that all amounts will carry interest applicable at

¹²⁸ Refer to s17(2)(iii) AA 2000 on setting aside, equivalent art 34(2)(iii) of the UNCITRAL Model Law.

¹²⁹ Consisted of three senior construction professionals.

¹³⁰ The Public Procurement Regulations, 2011, S.I. No. 63, 2011.

¹³¹ cl 39,40.

the current Bank of Zambia lending rates up to the date of award. Thereafter, at the short-term fixed deposit rate.’

The tribunal then proceeded to award interest on that basis on three items:

1. Deducted liquidated damages.
2. Delayed IPC No. X.
3. Unpaid uncertified value of works at termination.

From the three items above, 1 and 2 were due contractual interest. Item 1 is an adjustment to all IPC’s by the addition of wrongly deducted liquidated damages on certificates. This meets the condition as laid out under cl 40.2 of the Small Works Contract. Item 2 is simply interest on an IPC that was settled late. Note, however, as mentioned above that a delayed payment of an IPC or non-payment of interest cannot be a dispute simply because it has not been paid. In this instance, as is the case above, the tribunal should not have made such an award as the interest was not disputed. The third item, as earlier discussed, should not attract contractual interest as this is work was not certified by the Project Manager. For interest to apply there ought to have been an IPC which was under certified at the time of termination.

In addition, the interest awarded was, in the case of pre-award interest, that based on the current Bank of Zambia lending rates, while the post award interest was based on the short-term fixed deposit rate. As a reminder, the Judgements Act only provides for post award interest and for the use of a rate not exceeding the Bank of Zambia current lending rate from the date when the award is rendered to the date when the award debt is settled. In other words, the maximum applicable rate will be the current rate on the day of the award is applicable. A tribunal is at liberty to apply a lower rate, but the author cautions this must be with good reason.

In this case the tribunal did not have any authority to award pre-award interest as already discussed earlier. Furthermore, the application of the short-term interest from the date of award was also totally erroneous and illegal as this should have in fact been interest provided for under the Judgments Act which is a rate not exceeding the Bank of Zambia current lending rate. Additionally, if the application of the short-term interest rate was legal which it was not, the tribunal should have fixed the exact rate and not merely make a general statement as that kind of interest is dependent on a period of time. As is the case above, once again the parties were left to calculate the pre-award interest which

should have merged with the principal sum found owing to form the judgment debt. The calculation interest is a task that should have been performed by the tribunal.

The arbitral tribunal, further awarded, on recoverable arbitration costs, interest at the rate of 10.1 percent per annum, being 2% above the of Bank of Zambia short term deposit rate at the date of the award, from the date before or on which it should have been paid until the date costs are paid. Again, no authority as to the source of rate applied was cited. The contract did not have any such provision. Assuming that this award of interest was correct, the tribunal did not set a specific short-term interest, so the parties were left with the task of agreeing what that rate is as the rate is dependent on the period of time as earlier stated.

This award also ordered that the award sums to paid within 30 days from the date of the award but with no penalty as to what would transpire if a party failed to pay within that period. There was also no statement as whether interest was rested or suspended within that 30-day period. As you will recall there is a contradiction between the provisions in the Judgments Act and the additional provision in the AA2000 which provides for rest periods.

5.3 MNO v PQR

In this case whose award was in 2019 again based on the Small Works Contract, an arbitral tribunal of one¹³² simply applied interest on a sum due at the current Bank of Zambia lending rate effective from the date of termination of contract and without giving any authority as to the source of this pre-award interest. The Small Works Contract contains no such interest authority nor is there case law in support. The implication of this award is such that interest was awarded is both pre and post award stages. It leaves the parties once more with the task of calculating the pre-award interest which should always be done by a tribunal as it is required to be merged into the post award interest.

¹³² A senior lawyer.

5.4 STU v VWX

This award was made in 2021.¹³³ An arbitral tribunal of one¹³⁴ awarded pre-award interest on a delayed payment on certificates based on the average of the short-term deposit rate per annum prevailing from the date of his appointment to the date of the award when it should have been from the date of commencement of the arbitration. Art 21 of AA2000 provides a definition as to the commencement of an arbitration but that is not when an arbitrator appointment is made. It is ‘the date on which a request for that dispute to be referred to arbitration is received by the respondent.’¹³⁵

As indicated earlier there is no basis for the award of pre-award interest based on the average of the short-term deposit rate per annum or any other rate unless the parties agreed to that. In any event the tribunal should have awarded interest, if contractually bound based on the commercial borrowing rate as required under the terms of the contract. There was no such dispute hence the award was erroneous and illegal.

This award like the one above also ordered that the award sums to paid within 30 days from the date of the award but with no penalty as to what would transpire if a party failed to pay and whether interest was rested or suspended within that 30-day period.

5.5 YZA v YZB

This was awarded in 2020 by a panel of three.¹³⁶ The contract was an ad-hoc private type. The Tribunal quoted as authority, in awarding post award interest the Judgments Act and the add on provisions on rests etc. The award also stated that the award of interest stems from the principle that a party who has been kept out his money is entitled to damages in form of interest as a result of the other party’s action. This statement was made without citing of any authority. Whereas this may apply to litigation it is not directly applicable to arbitration unless the parties have agreed so.

The award also stated that interest awards are governed by the principle that it shall run from the date of commencement of the action to the date of payment if the parties have not agreed otherwise. This position as mentioned earlier is incorrect as it is applicable only in litigation unless the parties have agreed that this is applicable to their dispute

¹³³ The predecessor to ZPPA used a version of the World Bank form which is what was used here.

¹³⁴ Construction professional.

¹³⁵ Art. 21, AA2000, Model Law section.

¹³⁶ A senior Judge, senior lawyer and a construction professional.

which was not the case. The contract did not provide for any such interest. The tribunal thus inserted litigation provisions into an arbitration dispute resulting in an illegality being part of the award. This interest as is the case in litigation was based on short term deposit rate from the date of commencement of arbitration to the date of award.

Furthermore, the losing party was permitted to make payment of the principle amount and pre-award interest from a date 60 days from the date when the award was collected. The inclusion of the rest period of 60 days as stated earlier contradicts the provision in the Judgments Act. The pre-award interest was like in the other cases above not calculated by the tribunal and was left to the parties to resolve. The 60 days' rest period was without interest which again as indicated earlier contradicts the provision in the Judgments Act which states that interest must accrue from the date of the award.

The award then ordered, in event of a failure to pay within the 60 days period simple interest from the date on which the principle and pre-award interest should have been paid until the date of full payment. This again is again contrary to the provision in the Judgment Act as interest should run from the date of award but appears to be in line with extended provision in the AA2000.

Like the other awards there is really no sanction for the failure to pay within 60 days. The interest that accrues after that 60 days cannot be said to be a sanction as the winning party has in fact lost interest in that time.

6. Conclusion

With the few awards examined there appears to be a problem in the interpretation of both the contractual interest clauses as well as the interpretation and application of interest legislation in arbitrations. The sample size of the award examined may be small but the fact that all showed similar problems in the application of interest supports the notion that there may well be a systemic problem in the way interest is applied in Zambia.

Arbitrators and party representatives can benefit from clarity in the provision in the AA2000 regarding interest which are far from being simple. Interest provisions under AA2000 thus need to be simplified. On the other hand, arbitral tribunals need to pay more attention to both contractual as well statutory interest provisions to avoid making the mistakes that have been pointed out.

With regard to the Small Works Contract with its attendant problems when it comes to a Project Managers failure to certify or under certification etc., thus resulting in a contractors failure to recover interest, the solution lies in enhancing the form of contract by adding in such provisions to allow for recovery as is the case with the Pink Book.

Ideally those parts of the awards that were erroneous and illegal hence not enforceable should have been subjected to setting aside proceedings of which remittance is an alternative to setting aside.¹³⁷ In a case where setting aside proceedings were not applied for as required under s 17(3), AA 2000, an award with all its wrong application of interest will still be enforceable.¹³⁸

It may be possible to take an alternative approach to setting aside proceedings in circumstances where pre-award interest has been awarded, but no figure has been provided under the award. This alternative, though, will only apply in situations where that pre-award interest is not erroneous and illegal by being a matter beyond the scope of submission to arbitration, hence, subjecting it to possible setting aside proceedings.¹³⁹ This alternative is by advancing the argument that the interpretation of the award is incomplete because the actual pre-award interest figure has not been provided by the tribunal. As such an additional award is required under the provisions of art 33(3) of the Model Law part of AA2000¹⁴⁰ to correct the omission.

Are there no sanctions for such errors? There is a case to be made that a party representative who accepts such erroneous awards to the detriment of their client may face negligent charges well after the award was enforced as long as action is taken within the time permitted under the Law Reform (Limitation of actions Etc.) Act¹⁴¹ which is

¹³⁷ Bwalya Lumbwe, Remission of an Award: An Analysis of the Supreme Court of Zambia Decisions in *Metalco Industries Ltd v Nubian Resources Ltd* (2016) Z.R. Volume 3, p.1344, (*African Journal of Arbitration and Mediation*, Volume 1, Number 2, 2021), forthcoming.

¹³⁸ s 20 AA2000.

¹³⁹ Refer to s17(2)(iii) AA 2000 on setting aside, equivalent art 34(2)(iii) of the UNCITRAL Model Law.

¹⁴⁰ To understand how AA2000 is structured refer to Refer to Bwalya Lumbwe Bwalya Lumbwe, LLM/MSc Construction Law and Arbitration Dissertation: Issues in Arbitration in Zambia-Challenges Pertaining to the Arbitration Act, Related and Subsidiary Legislation, submitted to The Robert Gordon University, Aberdeen Business School, May 2017

¹⁴¹ Chapter 72, The Laws of Zambia and; Bwalya Lumbwe, *The Arbitration Act, Zambia: Peculiarities and Implications* (Alternative Dispute Resolution, Vol 9 Issue 1, 2021) 114.

six years for a simple contract or twelve for a contract under seal from the date on which a cause of action of accrued.¹⁴²

It is unlikely that a tribunal will have any liability for any of the commissions apparent in the examined awards. This is so because under AA2000 arbitrators enjoy immunity under s 29 save for acts committed in bad faith.¹⁴³

The problems encountered in the award of interest are indicative of failure of training and generally negligence on the part of arbitrators as well as party representatives in ensuring that awards rendered are as far possible are not challengeable in any way. This also highlights another problem which is that parties must appoint experienced arbitrators in the field in which they are competent. In arbitrating public works construction-based disputes in Zambia, an arbitrator must not only be conversant with contract provisions but also with the public procurement rules and regulations as well as other applicable legislation. This position may well be the case in other jurisdictions.

It is an established practice that tribunals must decide a dispute in accordance with the governing law chosen by the parties. In *African Alliance Pioneer Master Fund v Vehicle Finance Ltd*,¹⁴⁴ an arbitration case, the Supreme Court of Zambia stated that parties are not at liberty to choose arbitration proceedings that clearly contravene the governing law.¹⁴⁵

The court went further by approving the notion that an arbitral tribunal has a duty to take into consideration those acts that are barred under the governing law in arriving at a decision in an award, even where there is no plea by the litigants (parties) before the tribunal.¹⁴⁶ This implies that tribunals must be fairly conversant with all applicable or governing laws. In practice should a tribunal come across an act that is barred that parties have not pointed out, it must give the parties an opportunity to submit to it before deciding the issue.

¹⁴² The Act provides for the use of the U.K. Limitation Act 1939 as the law applicable in Zambia.

¹⁴³ s28. See also, Bwalya Lumbwe, *The Arbitration Act, Zambia: Peculiarities and Implications* (Alternative Dispute Resolution, Vol 9 Issue 1, 2021) 114.

¹⁴⁴ SCZ/8/08/2011, Appeal No. 21/2011.

¹⁴⁵ SCZ/8/08/2011, Appeal No. 21/2011, J39.

¹⁴⁶ SCZ/8/08/2011, Appeal No. 21/2011, J38.

In ending it is important that the interaction between the High Court Act and Chapter 74, The Law Reform (Miscellaneous Provisions) Act is resolved.

Bibliography

Legislation

The Arbitration Act 2000, No. 19

Public Procurement Act 2008, No.12

Chapter 81, Judgments Act, of the Laws of Zambia

Public Procurement Regulations, 2011

Chapter 2, The Laws of Zambia, The Interpretation and General Provisions Act

Chapter 27, The Laws of Zambia, High Court Act

The UNCITRAL Model Law

Chapter 72, The Laws of Zambia, The Law Reform (Limitation of Actions, Etc.) Act

Limitation Act 1939, U.K.

The Arbitration Act 1996, U.K.

Chapter 74, The Law Reform (Miscellaneous Provisions) Act

The Public Procurement Act 2020, No. 8

Awards

10 Awards were examined but the details cannot be published owing to statutory privacy regulations.

Case Law

Zambia Telecommunication Co. Ltd v Celtel Zambia Ltd [2008] Vol 2 ZR 44

Savenda Management Zambia Ltd v Stanbic Bank Zambia Ltd, Appeal no. 002/2016 Unreported

Kasote Singogo v Largfarge Zambia Ltd SCZ/8/267/2011, Decided 20th May 2020. Unreported

African Alliance Pioneer Master Fund v Vehicle Finance Ltd SCZ/8/08/2011, Appeal No. 21/201. Unreported

Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75

Internet Resources

judgment debt <<https://dictionary.cambridge.org/dictionary/english/judgment-debt>> accessed 11 March 2021

Publications < <https://fidic.org/bookshop> > accessed 11 May 2021

Judiciary of Zambia <<http://www.judiciaryzambia.com/#>> (go to court structure) accessed 10 March 2017

Finance charges <<https://dictionary.cambridge.org/dictionary/english/finance-charge> > accessed 16th April 2021

Refer to Monetary and Financial Statics < <https://www.boz.zm/monetary-and-financial-statistics.htm> > accessed 11th May 2021

UK: Can A Contractual Term Exclude Common Law Rights? <<https://www.mondaq.com/uk/contracts-and-commercial-law/84660/can-a-contractual-term-exclude-common-law-rights>> accessed 17 June 2021.

Other Resources

Harris B, Planterose R, Tecks J, *The Arbitration Act 1996: A Commentary* (5th edn, Wiley Blackwell 2014)

Blackaby N, Partasides C, Redfern A, Hunter M, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press)

Onyema E, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge)

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

St John Sutton D, Gill J, Gearing M, *Russell on Arbitration* (23rd edn, Sweet and Maxwell)

Lumbwe B, 'Construction Dispute Resolution in Zambia: A Public Procurement Perspective', [2020], 36 Const.L.J. Issue 4, 314

Lumbwe B, 'Business Case for Arbitration and ADR in Africa: Dispute Resolution in Construction and Infrastructure-Are we keeping in step with growth?' (2nd NCIA International Arbitration & ADR Conference, Mombasa March 2020) <<https://conference.ncia.or.ke/>> accessed 11 March 2021

Furst S, Ramsey V, *Keating on Construction Contracts* (9th edn, Sweet and Maxwell)

Seppälä C R, 'International Construction Contract Disputes: Third Commentary on ICC Awards Dealing Primarily with FIDIC Contracts, (ICC International Court of Arbitration Bulletin, Vol 23/Number 2 – 2012) 14-050

Bailey J, *Construction Law* (2nd edn, Informa Law)

Sørensen J B, *FIDIC Red Book: A companion to the 2017 Construction Contract* (ICE Publishing)

Hughes W, Champion R, Murdoch J, *Construction Contracts: Law and Management* (5th edn, Routledge)

Seppälä C R, 'International Construction Contract Disputes: Third Commentary on ICC Awards Dealing Primarily with FIDIC Contracts, (ICC International Court of Arbitration Bulletin, Vol 23/Number 2 – 2012) 30

Totterdill B W, *FIDIC Users Guide: A Practical Guide to the 199 Red and Yellow Books* (2nd edn 2009)

FIDIC Pink Book (2010): FIDIC Multilateral Development Bank Harmonised Edition, 2010

Lumbwe B, Remission of an Award: An Analysis of the Supreme Court of Zambia Decisions in *Metalco Industries Ltd v Nubian Resources Ltd* (2016) Z.R. Volume 3, p.1344, (African Journal of Arbitration and Mediation, Volume 1, Number 2, 2021), forthcoming.

Lumbwe B, The Arbitration Act, Zambia: Peculiarities and Implications (Alternative Dispute Resolution, Vol 9 Issue 1, 2021) 114

Clover J, Hughes S, *Understanding the FIDIC Red Book: A Clause-by-Clause Commentary* (2nd edn, Sweet and Maxwell)

ZPPA Small Works Standard Conditions of Contract

The Interface between Access to Justice and Arbitration in Kenya.

*By: Peter Mwangi Muriithi**

Abstract

The right of access to justice is codified under Article 48 of the Constitution of Kenya 2010 and various international conventions.¹ The right to access justice is considered to be an inalienable human right. It is on this basis that this paper questions to what extent does arbitration as a mode of dispute resolution promote or inhibit access to justice as a fundamental human right.

The attributes² associated with arbitration as a means of settlement of disputes are considered to promote access to justice to a great extent. However, on the other hand, certain aspects associated with arbitration are considered to inhibit access to justice. For example; high costs associated with arbitration, confidential nature of arbitration is considered to limit the right to access to information especially in public interest cases and the lack of the principle of stare decisis in arbitration.

It is, however, notable that arbitration is considered to have inherent ways of addressing the aspects that are associated with it and are considered to inhibit and/or limit access to justice. For example; consent to enter into an arbitration agreement is considered to address the issue of high costs in arbitration considered to be a limitation to the right of access to justice.

Premised on the foregoing, this paper seeks to conceptualize the right of access to justice in arbitration as a mode of settlement of disputes.

***LL.B & LL.M-University of Nairobi, PGDL, Patent Agent, Court Accredited Mediator, MCI Arb, Legal Audit & Compliance Officer and Publisher. Email; muriithipitaz@gmail.com**

¹Article 48 of the Constitution of Kenya 2010 and for example, in Article 2 paragraph 3 and Article 14 of the UN International Covenant on Civil and Political Rights (ICCPR) and in Article 8 and 10 of the Universal Declaration of Human Rights provide for access to justice.

²Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* 3rd Edition (Glenwood Publishers Ltd) Page 3-6 outlines attributes associated with arbitration as a means of settlement of disputes these include; confidentiality, autonomy of parties, private and consensual process, flexibility, transnational applicability and limitation of appeals.

1.0 Introduction

In interrogating the interface between arbitration and access to justice it is paramount to contextualize what constitutes arbitration and the concept of access to justice. Arbitration is considered to be a private system of adjudication of disputes. Parties who arbitrate are the ones who have made a deliberate choice to resolve their disputes outside of any judicial system.³ Succinctly, arbitration involves a final and binding decision, producing an award that is enforceable in a court.⁴ This method of solving disputes has taken root mainly in the settling of commercial disputes.

Arbitration in Kenya is mainly legally grounded on Article 159 2(c) of the Constitution of Kenya⁵ and the Arbitration Act Cap No. 4 of 1995. On the other hand, access to justice is a basic principle of the rule of law. It is a fundamental right that allows individuals to use legal tools and mechanisms to protect their rights.⁶ As an important element of the rule of law, access to justice is a vital part of civil, criminal, and administrative law. It is both a process and a goal, and it is crucial for individuals seeking to benefit from other procedural and substantive rights.⁷

Putting into perspective access to justice the *United Nations General Assembly in the Resolution it adopted on 30th November 2012* opined in paragraphs 14 and 15;

“...Without access to justice, people cannot make their voices heard, exercise their rights, cope with discrimination or hold decision-makers accountable,”

The right to *access to justice* is internationally recognized and is considered to be a basic and inviolable right. The right for access to justice is codified under various international instruments which Kenya has ratified. For example; Article 8 and 10 of the Universal

³Margaret L. Moses, *The principles and practice of International Commercial Arbitration*, page 1(Cambridge University Press)

⁴Ibid No.3

⁵Article 159(2) of the Constitution of Kenya 2010 provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted subject to clause 3.

⁶Lima, V., Gomez, M., 2019, *Access to Justice: Promoting the Legal System as a Human Right*, in: *Peace, Justice and Strong Institutions*. Springer International Publishing Cham, page 1.

⁷FRA (2016) *Manuale di diritto europeo in materia di accesso alla giustizia*. European Union Agency for Fundamental Rights, Wien.

Declaration of Human Rights (UDHR) to a great extent enumerates the right to access to justice.⁸

Further, Article 2 paragraph 3 and Article 14 of the UN International Covenant on Civil and Political Rights (ICCPR) provide for access to justice. Access to justice is also protected in UN instruments such as the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, and the Convention on the Rights of Persons with Disabilities in 2006 and other conventions, as, for example, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted in 1979 by the UN General Assembly.⁹

Access to justice as a concept is not easy to define as it is very wide. It is much more than improving an individual's access to courts or guaranteeing legal representation, but it can be defined in terms of ensuring that legal and judicial outcomes are just and equitable.¹⁰

Access to justice may refer to a situation where people in need of help, find effective solutions available from justice systems that are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.¹¹ Access to justice could also refer to judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue.¹²

⁸Article 8 of UDHR provides verbatim that; "...Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Further Article 10 of UDHR provides "... Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

⁹Lima, V., Gomez, M., 2019, Access to Justice: Promoting the Legal System as a Human Right, in: Peace, Justice and Strong Institutions. Springer International Publishing Cham, page 2.

¹⁰UNDP (2004) Access to justice practice note (Practice note), access to justice and rule of law, Democratic Governance Group, Bureau for Development Policy, UNDP, New York

¹¹M.T. Ladan, Access to justice as a human right under the ECOWAS community law 'A paper presented at: The Commonwealth Regional Conference on the theme: - The 21st Century Lawyer: Present Challenges and Future Skills, Abuja, Nigeria, 8 to 11 April, 2010

¹²M.T. Ladan, Access to justice as a human right under the ECOWAS community law 'A paper presented at: The Commonwealth Regional Conference on the theme: - The 21st Century Lawyer: Present Challenges and Future Skills, Abuja, Nigeria, 8 to 11 April, 2010.

Available at ;

Further, *access to justice* refers to a fair and equitable legal framework that protects human rights and ensures the delivery of justice.¹³ It also refers to the opening up of formal systems and structures of the law to disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.¹⁴

In the case of; *Dry Associates Limited vs. Capital Markets Authority & another*¹⁵, the court in its decision at paragraph 110 was of the view that;

“..Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”

Expounding further on what constitutes access to justice, *Justice D.S Majanja* had this to say in the case of; *Kenya Bus Service Ltd & another vs. Minister For Transport & 2 others [2012] eKLR*¹⁶

“...By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and protection against legal formalism and dogmatism. (See “Law and Practical Programme for Reforms” (1992) 109 SALJ 22) Article 48 must be located within the Constitutional

<[¹³Ibid No.12](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAF OAO&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07->lastly accessed on 27/06/21</p></div><div data-bbox=)

¹⁴Global Alliance Against Traffic in women(GAATW) < <https://www.gaatw.org/157-what-we-do/what-we-do/446-access-to-justice>> lastly accessed on 27/06/21

¹⁵eKLR, Petition No. 358 of 2011

¹⁶eKLR, Civil Suit 504 of 2008

imperative that recognizes the Bill of Rights as the framework for social, economic and cultural policies.

*Without access to justice, the object of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. **Article 48**, therefore, invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law.”*

The access to justice framework in Kenya is hinged on the citizen’s knowledge of the existence of rights as enshrined in the Constitution’s Bills of Rights and their capacity and empowerment and to seek redress from the available justice systems.

Article 22(1) of the Constitution of Kenya provides that every person has a right to institute a claim that a right or fundamental freedom has been infringed, violated or denied.¹⁷

Further, the Chief Justice is to make rules for the court proceedings in the actualization of this provision.¹⁸ These rules must meet certain fundamental criteria that include that the formalities relating to the proceedings as well as the formalities of instituting such claim shall be kept at a minimum, observe the rules of natural justice and shall not be unreasonably restricted by procedural technicalities.¹⁹

In addition, Article 48 of the Constitution requires the State to ensure access to justice to all persons and the fees required, if any, should be reasonable and should not impede justice. The right to access to justice is further echoed under Article 159(2) of the Constitution that the courts and tribunals are to ensure that justice is not delayed, that it is done to all and administered without undue regard to procedure and technicalities.²⁰ Access to justice, especially by the marginalized, poor, uneducated and underprivileged in the society, has been hindered by several factors. These factors include, but are not

¹⁷The Constitution of Kenya 2010, under Chapter 4 on Bill of Rights

¹⁸Article 22(2) of the Constitution of Kenya 2010

¹⁹Article 22(3) of the Constitution of Kenya 2010

²⁰Article 159(2) of the Constitution of Kenya 2010

limited to, lack of infrastructure, high advocacy fees, illiteracy, lack of information, long distance to the courts and the long duration of time it takes to resolve disputes.²¹

In the past, the use of legal aid services has been utilized to promote access to justice through the courts. The legal aid services are inadequate and cannot cater for the needs of the larger population that cannot meet the legal cost. This notwithstanding, the recent enactment of the Legal Aid Act²² is laudable as it will enhance access to justice for a section of the populace.

2.0 Tracing the interface between arbitration and access to justice in Kenya

A. Promoting Access to Justice through Arbitration

The attributes of arbitration to a great extent promote the right to access to justice. The allure of arbitration mostly lies in the fact that it operates in the exclusion of courts and its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties' confidence of realizing the right for access to justice in the best way achievable.²³ This nature of arbitration finds solace especially in the resolution of international commercial and investment disputes.

Over time, arbitration has been lauded over litigation as a faster and easier method of settling disputes.²⁴ This attribute of arbitration as a means that seeks to resolve disputes without delay promotes access to justice. This in accordance with Article 159(2) (b) of the Constitution of Kenya 2010, which provides that; "...Justice shall not be delayed" as one of the principles to guide courts and tribunals in the exercise of the judicial authority.²⁵

²¹Dag Hammarskjöld Foundation " Rule of law and Equal Access to Justice <http://www.daghammarskjold.se/wp-content/uploads/2014/08/RoL_Policy-paper-layouted-final.pdf> lastly accessed on 27/06/21

²²The Legal Aid Act, No. 6 of 2016 was enacted to give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution to facilitate access to justice and social justice

²³Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 2(Published in CI Arb Kenya, Alternative Dispute Resolution Journal Volume 5, Number 2 2017)

²⁴U.N. Conference on Trade and Development, New York and Geneva, 2005, Dispute Settlement : International Commercial Arbitration, 5.1 International Commercial Arbitration, 5, U.N. Doc. UNCTAD/EDM/Misc.232/ Add.38,<http://unctad.org/en/Docs/edmmisc232add38_en.pdf> lastly accessed on 27/06/21

[Hereinafter U.N. Conference on Trade and Dev. 5.1]

²⁵Article 159(2) of the Constitution of Kenya 2010, provides for principles to guide courts and tribunals in exercise of judicial authority granted to them by the people.

In arbitration parties to a dispute have the autonomy to choose the arbitrators to arbitrate their dispute.²⁶ This allows the parties to choose arbitrators that have particular expertise and are knowledgeable in a particular field e.g. construction disputes. Such hand-picked arbitrators' with particular expertise have the capability to quickly grasp and/or comprehend the complex issues at hand.²⁷

This is of paramount importance where complex technical issues may be the subject matter of the dispute. In return the arbitrators will also be quick to dispense with the dispute, thus saving the parties' time and more importantly money.²⁸

This is unlike litigation, where the judges are arbitrarily designated. This attribute of arbitration promotes access to justice as parties to an arbitral process can exploit this attribute of arbitration for expedited resolution of disputes enhancing access to justice. As Collier and Lowe²⁹ correctly averred;

"...where the courts might appear remote, rigid, and slow and expensive in their procedures and the judges might seem unversed in the ways of commerce and the law, insensitive and ill-adapted to the exigencies of commercial life, arbitrators offered an attractive alternative. Arbitrators were originally drawn from the same commercial community as the traders, often experienced in the trade, capable of offering practical suggestions for the settlement of the dispute and of doing so informally, quickly and cheaply."

One of the seminal features of arbitration is party autonomy. Party autonomy involves the parties who have willingly submitted to an arbitral process, having the autonomy over the arbitrator and the process, making the outcome mutually acceptable to the

²⁶Kariuki Muigua, *Settling Disputes through Arbitration in Kenya*, 3rd Edition (Glenwood Publishers Ltd), Page 3.

²⁷Tsotang Tsietsi, *International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes*, page 250 to 251

²⁸Tsotang Tsietsi, *International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes* (Source: *The International Lawyer*, Vol. 47, No. 2 (FALL 2013), page 250 to 251

²⁹John G. Collier & Vaughn Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* 45-46 (1999).

parties.³⁰ In essence, party autonomy in arbitration gives parties control over the dispute resolution process by allowing them to determine by agreement, the forum, the applicable law, and the procedures to be adopted in arbitrating their dispute.³¹

Party autonomy in arbitration greatly promotes access to justice as parties in an arbitral process can customize the arbitration process to suit their needs and realize justice the best way they know-how. In essence, parties in an arbitration process can generally exploit the attribute of party autonomy as deeply entrenched in the arbitration to do away with procedural technicalities to realize substantive justice. This in compliance with Article 159(2) (d) of the Constitution of Kenya 2010, which provides that; “...Justice shall be administered without due regard to procedural technicalities” as one of the principles to guide courts and tribunals in the exercise of the judicial authority.³² This principle also binds arbitral tribunals duly constituted in accordance with the arbitration agreement entered into by parties.

Arbitration is considered to be a means of settling disputes that is flexible.³³ The flexibility lies in the fact that the parties can choose to bypass certain procedural requirements associated with litigation that could potentially lengthen the settlement of the dispute. This flexibility also contributes to the faster and cheaper resolution of disputes.³⁴

This in essence promotes access to justice as provided under, Article 159(2) (d) of the Constitution which requires justice to be administered without due regard to procedural technicalities.³⁵ Further, the faster and cheaper resolution of disputes greatly suits parties to an arbitration process that need to realize justice in an expedited manner. Arbitration

³⁰Kariuki Muigua, *Settling Disputes through Arbitration in Kenya*, 3rd Edition (Glenwood Publishers Ltd), page 3

³¹U.N. Conference on Trade and Dev. 5.1, lastly accessed on 27/06/21

³²Article 159(2) of the Constitution of Kenya 2010, provides for principles to guide courts and tribunals in exercise of judicial authority granted to them by the people.

³³Tsotang Tsietsi, *International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes* (Source: The International Lawyer, Vol. 47, No. 2 (FALL 2013), page 251

³⁴Ibid No.33

³⁵Article 159(2) (d) of the Constitution of Kenya 2010, which provides that; “...Justice shall be administered without due regard to procedural technicalities” as one of the principles to guide courts and tribunals in exercise of the judicial authority

further assures confidentiality.³⁶ The confidential character of arbitration was captured by the English Court of Appeals in *Dolling-Baker vs. Merrett*, which stated that:

“...as between parties to an arbitration, although the proceedings are consensual may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use any other purpose any documents prepared for and used in the arbitration, or closed or produced in the course of the arbitration, or transcripts or notes of evidence in the arbitration or the award, and indeed not to disclose what evidence had been given by any witness in the arbitration, save with of the other party, or pursuant to an order or leave of the court. That qualification necessary, just as in the case of the implied obligation of secrecy between banker and customer...”³⁷

The confidential nature of arbitration ensures that parties can resolve disputes without undue publicity. This is paramount, especially where parties to the dispute are engaged in the business of the provision of goods and services that heavily rely on public image and/or appearance.³⁸

Such parties will tend to shun a mode of dispute resolution that greatly expose their business to a bad public image. In event that a dispute arises between such parties, they will find solace in arbitration as the preferred mode of dispute resolution considering its confidential nature. This in turn promotes access justice as parties who consider confidentiality vital in resolving disputes can easily resolve their disputes without any inhibition.

Further, dispute resolution by way of arbitration is also commended for leading binding determination of a dispute and an award that is not subject to any appeal mechanism

³⁶U.N. Conference on Trade and Development, New York and Geneva, 2005, Dispute Settlement : International Commercial Arbitration, 5.1 International Commercial Arbitration, 5, U.N. Doc. UNCTAD/EDM/Misc.232/Add.38,<http://unctad.org/en/Docs/edmmisc232add38_en.pdf> lastly accessed on 27/06/21

³⁷*Dolling-Baker vs. Merrett*, [1990] 1 W.L.R. 1205 A.C. at 1213 [Eng.]

³⁸Leon E. Trakman, Confidentiality in International Commercial Arbitration, *Arbitration International*, Volume 18, Issue 1, 1 March 2002, Pages 1 <<https://doi.org/10.1023/A:1014277907158>>lastly accessed on 27/06/21

unless the parties have explicitly agreed to have an appeal before the delivery of the arbitral award and it is limited to points of law.³⁹ The fact that an award is not subject to appeal on the merits gives the parties added security about the finality of the resolution process.⁴⁰ This attribute to arbitration ensures dispute resolution comes to an end saving on cost, time and unnecessary inconveniences involved in lengthy dispute resolution processes. This promotes access to justice as parties are assured of a mode of dispute resolution that reduces cost, time and unnecessary inconveniences.

In essence, the finality of arbitral awards resonates highly with the principle of litigation must come to an end in litigation which is considered to promote public interests. The finality of arbitral award promotes this salient principle; *litigation must come to an end*. The principle that litigation must come to an end was elucidated by the Supreme Court of Kenya in the case of; *Tullow Oil PLC & 3 others vs. PS Ministry of Energy & 15 others [2020] eKLR (Civil Application No. 1 of 2020)* **where** the court had this to say;

“...the Applicant must be told, without reservation, that he has hit the end of the road. Litigation, however painful, must come to an end. He is flogging a dead horse and he ought to busy himself with other ventures of use to him. In other words, his Application is one for dismissal but because it was not defended, we shall make no orders as to costs.”

Buttressing the above position Bosire, J. A in *Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2007] eKLR* succinctly described the principle of finality as follows:

³⁹Section 39 (2) of the Arbitration Act No. 4 of 1995 though worded in a negative connotation provides that; Notwithstanding sections 10 and 35 **an appeal** shall lie to the Court of Appeal against a decision of the High Court under subsection (2) (a) **if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award**; or the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).

⁴⁰U.N. Conference on Trade and Development, Dispute Settlement: International Commercial Arbitration, 5.1 International Commercial Arbitration, page 8

“This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down.”

For justice to be realized in a dispute resolution process parties must be assured that they can enforce judgments or awards issued in their favour by the court or tribunals. In absence of assurance to parties that they can realize the benefits of judgments or awards issued in their favour by the court or tribunals, parties would generally shun dispute resolution through courts or tribunals. This to a great extent would inhibit access to justice.

It is then a great attribute of arbitration that international arbitration awards issued by international arbitral tribunals are easier to enforce in foreign states than judicial judgment tend to be, because of the transnational nature of international arbitration.⁴¹This promotes access to justice as parties to an international arbitration process are assured they can realize the benefits of international arbitration awards issued by international arbitral tribunals. Premised on the foregoing one can authoritatively aver that the attributes associated with arbitration can be leveraged to promote access to justice.

B. Aspects of arbitration considered to limit access to justice

It is notable that despite the various ways that arbitration is considered to promote the right to access to justice there are various ways that it is considered to inhibit access to justice. These are as stipulated hereunder;

i) High costs associated with Arbitration

In regards to costs of arbitral proceedings, Kariuki Muigua verbatim opines, *“...the arbitration process invariably involves costs and expenses and the questions of who bears the costs, how much is payable and when costs are to be awarded are very delicate questions. The costs of arbitration, also called costs of the award include the arbitrator’s fees, costs of hiring the venue of arbitration, costs of providing transcripts of the proceedings (where these have been contracted), legal fees of advocates employed to*

⁴¹Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes page 253

advise on legal issues and experts' fees, disbursements and other allowances.”⁴² This analysis illustrates the onerous nature of costs and expenses incurred in an arbitration process.

This prompts the argument that the high cost of the arbitration process inhibits access to justice, especially where one party cannot afford these costs. To put it into perspective let's consider this example;

Employment contract with an arbitration clause- The employee more often than not does not have equal bargaining power with the employer. In such a case the employer can insist on an arbitration clause in the employment contract. In the event, a dispute arises and the employer is at fault, the employee may lack the requisite financial capabilities to initiate an arbitration process. The employee also cannot institute a case in court where the fee is considerably low or minimal against the employer due to the existent of an arbitration clause in the contract of employment. This in essence limits access to justice for the employee.

ii) The private nature of arbitration proceedings limit access to information

One of the seminal rights is the right to access information as codified under *Article 35 of the Constitution of Kenya 2010*. This right to access to information is seminal where justice is to be realized especially in cases of public interest. It then raises the question of whether the confidential nature of arbitration limits access to information and in the same line limit access to justice in public interest cases. This is because parties who would ordinarily seek to be enjoined in these cases which are of public interest lack requisite information to seek joinder in such private arbitral proceedings.

iii) The lack of the principle of stare decisis in Arbitration

Stare decisis is a *Latin* term that means "*to stand by things decided*."⁴³ Stare decisis principle provides that a court should follow the precedent established by previously decided cases with similar facts and issues to provide certainty and consistency in the administration of justice. For example, a lower court is bound by the decision of a higher

⁴²Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, 3rd Edition (Glenwood Publishers Ltd) page 154

⁴³The full Latin phrase is "*stare decisis et non quieta movere*-stand by the thing decided and do not disturb the calm." See James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution, and the Supreme Court*, 66 B.U. L. Rev. 345, 347 (1986).

court in the same jurisdiction, even if the lower court judge disagrees with the reasoning or outcome of that decision.⁴⁴

This ensures certainty in the administration of justice and most importantly promotes the principle that justice shall not only be done but must be seen to be done. In arbitration stare decisis principle does not apply. As such different awards can be issued by different arbitral tribunals on similar facts or circumstances. This raises questions of whether justice has been realized especially by the party at the wrong end of the arbitral award, who had expectations based on the previous arbitral award he was aware of.

Access to justice constitutes equality before the law. In a circumstance as outlined above, the party at the wrong end of the arbitral award, despite similar facts with a previous case arbitrated will ultimately feel there was no access to justice in such a scenario.

Arbitration has to a great extent came up with mechanisms of addressing these aspects that are considered to limit access to justice. Firstly, the existence of the doctrine of arbitrability in arbitration. Arbitrability can be described as the question of whether the subject matter can be arbitrated or whether the particular dispute must be resolved in court.⁴⁵ It involves a determination of the types of disputes which may be resolved through arbitration and those which cannot be resolved through arbitration but by courts of law.

This doctrine gives leeway for a country like Kenya to come up with legislation that can demarcate the type of disputes that can be referred to arbitration for resolution. This can address the aspect of; private nature of arbitration proceedings that tend to limit access to information, especially in public interest cases. Through the doctrine of arbitrability cases that have a public interest can be excluded from being subject to arbitration.

⁴⁴Bryan A. Garner, *Black's Law Dictionary* 9th Edition page 1537, See also; William M. Lile et al., *Brief Making and the Use of Law Books* 321 (3rd Edition.1914) which provides that "...The rule of adherence to judicial precedents finds its expression in the doctrine of stare decisis. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases."

⁴⁵Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* page 68

Secondly, institutions that provide international arbitration like the International Centre for Settlement of Investment Disputes (ICSID) have the policy of publishing decisions in cases that have public interest especially cases involving states in their websites.⁴⁶

Thirdly, arbitration is a mode of dispute resolution that takes place only where parties consensually submit their dispute to an arbitral tribunal usually expressed through an arbitration agreement.⁴⁷ This ensures then that parties cannot raise the issue of high costs involved in arbitration or the none-applicability of the doctrine of *stare decisis* in arbitration after willingly submitting to an arbitration process contractually.

However, the concept of unequal bargaining power between parties can be regarded as a factor vitiating *consent* as envisaged in the arbitration as a mode of dispute resolution. To put it into perspective let's consider this example; *An investment agreement between developing countries and foreign investors (e.g. global corporations) that contains an arbitration clause.* In the competition to attract investment, developing countries are in a disadvantaged bargaining position during the negotiation process of such an investment agreement.⁴⁸

Foreign investors often request to include a provision in the investment agreement stipulating that international arbitration shall be the mode of dispute resolution of any dispute arising out of an investment.⁴⁹ Over time many powerful global corporations have been accused of taking advantage of developing countries by coercing them into entering into investment agreements, with investment arbitration dispute settlement clauses like ICSID clauses.⁵⁰ As such the concept of unequal bargaining power can be regarded as a factor vitiating consent as envisaged in arbitration.

⁴⁶ICSID website < <https://icsid.worldbank.org/en/pages/icsidocs/overview.aspx> > lastly accessed on 27/06/21

⁴⁷Khan F, *Alternative Dispute Resolution*, A paper presented to the Chartered Institute of Arbitrators-Kenya Branch Advanced arbitration Course held on 8-9th March 2007, at Nairobi (Khan-defines it as private consensual processes in which disputing parties decide to present their grievances to a third party for resolution.)

⁴⁸Olivia Chung, Note, The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration, 47 VA. J. INT'L L. 953,957 (2007) page 958

⁴⁹Background Information on the International Centre for Settlement of Investment Disputes (ICSID) page 2 <<https://icsid.worldbank.org/en/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf>> lastly accessed on 27/06/21

⁵⁰Pia Eberhardt & Cecilia Olivet, *profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, page 7 (Helen Burley ed., Corporate Eur. Observatory and the Transnational Inst. 2012).

3.0 Conclusion

Arbitration as a mode of dispute resolution can be considered to promote access to justice to a great extent. As such arbitration should be promoted in Kenya, especially considering that increased globalization has led to arbitration becoming the most preferred mechanism for settling international commercial investment disputes.⁵¹ In essence, through arbitration access to justice can be realized in Kenya.

⁵¹Franck, S.D., “The Role of International Arbitrators,” page 1
<<https://www.international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docsfranck2.pdf>> accessed on 27/06/21

References

Background Information on the International Centre for Settlement of Investment Disputes (ICSID)

Bryan, A. Garner Editor in Chief, Black's Law Dictionary 9th Edition

Dag Hammarskjöld Foundation " Rule of law and Equal Access to Justice

FRA (2016) Manuale di diritto europeo in materia di accesso alla giustizia. European Union Agency for Fundamental Rights, Wien.

Franck, S.D., "The Role of International Arbitrators,

Global Alliance Against Traffic in women(GAATW)

James C. Rehnquist, The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution, and the Supreme Court, 66 B.U. L. Rev. 345, 347 (1986)

John G. Collier & Vaughn Lowe, The Settlement of Disputes in International Law: Institutions and Procedures 45-46 (1999).

Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 2(Published in CIArb Kenya, Alternative Dispute Resolution Journal Volume 5, Number 2 2017)

Kariuki Muigua, Settling Disputes through Arbitration in Kenya 3rd Edition (*Glenwood Publishers Ltd*).

Khan F, Alternative Dispute Resolution, A paper presented to the Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi

Leon E. Trakman, Confidentiality in International Commercial Arbitration, *Arbitration International*, Volume 18, Issue 1, 1 March 2002

Lima, V., Gomez, M., 2019, Access to Justice: Promoting the Legal System as a Human Right, in Peace, Justice and Strong Institutions. Springer International Publishing Cham.

Margaret L. Moses, The principles and practice of International Commercial Arbitration, (Cambridge University Press).

M.T. Ladan, Access to justice as a human right under the ECOWAS community law ‘A paper presented at the Commonwealth Regional Conference on the theme: - The 21st Century Lawyer: Present Challenges and Future Skills, Abuja, Nigeria, 8 to 11 April 2010

Olivia Chung, Note, The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration, 47 VA. J. INT’L L. 953,957 (2007)

Pia Eberhardt & Cecilia Olivet, Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom, page 7 (Helen Burley ed., Corporate Eur. Observatory and the Transnational Inst. 2012).

Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes (Source: The International Lawyer, Vol. 47, No. 2 (FALL 2013),

UNDP (2004) Access to justice practice note (Practice note), access to justice and rule of law, Democratic Governance Group, Bureau for Development Policy, UNDP, New York

U.N. Conference on Trade and Development, New York and Geneva, 2005, Dispute Settlement: International Commercial Arbitration, 5.1 International Commercial Arbitration, 5, U.N. Doc. UNCTAD/EDM/Misc.232/ Add.38

William M. Lile et al., Brief Making and the Use of Law Books 321 (3rd Edition.1914)

Non-Lawyer Representatives in Arbitration: *My Humble Submissions*

*By: Paul Ngotho**

A. Introduction

The involvement of non-lawyers like me in arbitration is one of my pet subjects. I have written elsewhere about non-lawyers as arbitrators, expert determination and expert witnesses. Those roles are quite obvious even though they are not expressly provided for in statute. The only non-lawyer role enjoying that benefit in many jurisdictions is party representation. Yet, quite ironically, that is the role which is once in a while challenged. I was reminded about that recently, when a non-lawyer friend told me he was preparing submissions in an arbitration.

In my case, Ms. Mary King

¹ had changed counsel twice in the arbitration already. Her last lawyer, a respected senior counsel, had served the statement of claim by the time she fired her and appointed me. My notice of appointment did not attract any response from the Respondent.

Then I filed an application to amend the statement of claim by expanding the claim to include some aspects which had been left out. That was when the advocate on the other side mounted a vicious application for my disqualification. In addition, he filed a complaint at the Law Society of Kenya (LSK) accusing me of unlawful practice of law.

I fully appreciate that some learned counsel feels disoriented, like fish out of water, in arbitration generally. He or she wonder, how will I refer to his character? He is not an Advocate of the High Court of Kenya. I cannot refer him as a learned friend. I cannot wink at him when I need favours like an adjournment. What format is he going to use in his submissions? Well, it was not my role to answer those questions. My role was simply to cite the law and order to justify my client's appointment of a non-lawyer to represent her. I took that opportunity to advise the applicant that even his own client had the statutory right to fire him and replace him with a non-lawyer.

* *HSC, FCI Arb, Chartered Arbitrator, LLM (University of London), B.A. Land Econ. (University of Nairobi), Fellow of Institution of Surveyors of Kenya.*

¹ Imaginary name.

Below is a complete record of my submissions, complete with the footnotes and the authorities, in that application. I have reorganised a few paragraphs and deleted the paragraph numbering. The authorities which I cited were attached and duly highlighted.

Having considered the independent legal advice as well and the advantages and disadvantages of legal representation, Ms. King engaged me, a non-advocate to represent her in the arbitration.

She notified the changes to the Arbitral Tribunal and the Respondent, who apparently had no reason to complain about the development until 19th March 2014, soon after receiving the Claimant's Application of Leave to Amend the Statement of Claim.

For the avoidance of doubt, I am not an Advocate of the High Court of Kenya and have not claimed to be one in this or any other forum. I purposely avoid describing himself as an “advocate” even though it would be correct to do so as the word “advocate” is a generic English word with no legal connotations. He prefers the title or description of Party Representative because that has been technically defined by the International Bar Association. Refer to paragraph no. 64 below.

The Respondent has raised a Preliminary Objection (PO) or application objecting to me representing the Claimant in this arbitration primarily on the ground that my involvement amounted to “unlicensed and unauthorised practice of law”, UPL.

C. The Act

Ideally, the PO should be dismissed summarily because it flies in the face of s.25. (5) of the Arbitration Act 1995, which states that,

“At any hearing or meeting of the arbitral tribunal of which notice is required to be given under subsection (3), or in any proceedings conducted on the basis of documents or other materials, the parties may appear or act in person or may be represented by any other person of their choice.” (emphasis added)

The phrase “any other person” is written in simple English. There is no ambiguity in it or in any of the 3 rather short words which make up the phrase. The entire clause is devoid of any hidden legal meaning requiring judicial interpretation. The section means

exactly what it says. The legislators would have had no difficulty wording the clause differently if they had a different intention.

There is no specific reference to “Advocates” in that clause. The omission is significant. It means that an Advocate of the High Court of Kenya can represent a party in arbitration not because he is an “Advocate” but because he is in the category of “any other person”. There is no requirement under this Act for party representative to acquire any “licence” or “authority” from the Law Society of Kenya or from any authority.

The phrase “*any other person*” means an Advocate of the High Court of Kenya, a non-lawyer and anybody else including “every Tom, Dick and Harry”. In this particular case, it means that Ms King could lawfully be represented in this arbitration, if she chooses, by her mother, house girl, hairdresser, butcher or pastor. Even by her watchman.

The above examples are not far-fetched or meant to be disrespectful. Posner, a US Court of Appeals Circuit Court judge² contemplated what an arbitrator would do if a party represented to be represented by a pit bull in an arbitration.

The Respondent has suggested that it would be unlawful for the Claimant's non-lawyer representative to prepare pleadings, examine witnesses, etc. The same section of the Arbitration Act which allows party representation by non-lawyers is the same one allowing representation by lawyers. The lawyer and non-lawyer enter the ring on equal terms. The Respondent has not cited any law or practice which stops the non-lawyer party representative from preparing pleadings, examining witnesses or carrying out any activity which a lawyer would do when representing a party in arbitration.

Arbitration is different from litigation. Here, unlike in court, all animals are equal and none are “more equal than others”. Arbitration is a paradigm shift from the wigs, robes, intrigues, drama and rigidity which characterise litigation. Arbitration is not private litigation but a different ball game altogether. According to John H. M. Sims,

² *Sirotsky Vs NY Stock Exchange & Bernstein* at p. 43. <https://caselaw.findlaw.com/us-7th-circuit/1227110.html>

“There is a failure on the part of everyone concerned - and in this I include parties, lawyers, experts and arbitrators themselves and the Courts - to recognise that arbitration is, by its very nature, a wholly different method of dispute resolution from litigation, requiring a wholly different approach from the very onset.”³

If litigation is like an orchestra in which the players are robed and sing from a Latin song sheet or ballroom dancing in which every move is carefully measured, then arbitration is like *karaoke* or freestyle dancing where everything goes subject only to the minimal rules to ensure that no one steps on another's toes.

In arbitration there is a unique convergence of professions. It is a multi-disciplinary field in which various professionals, including Advocates of the High Court of Kenya do, or should, co-exist in harmony. *Counsel, you should live and let live.*

The Claimant's right to choose a representative of her choice is completely un-fettered. She is under no obligation to give reasons for her choice to the Respondent or to anybody else. S. 25. (5) is, in effect, a blank cheque and so it is not necessary for a party representative to submit his or her qualifications to the arbitrator or to the opposite side.

The above section also means that even the Respondent is at liberty to replace its representative and engage another Advocate or a non-advocate, instead.

C. Access to Justice

Allow me to stand on the shoulders of giants. Commenting on s.25. (5), Justice Steve Kairu is convinced that,

“The parties are at liberty to represent themselves or to be represented at the hearing, as they are indeed entitled to be represented at any stage of the proceedings, by a representative of their choice. While the object of safeguarding the right of parties to represent themselves or to be represented by persons of their choice, including representation by non-advocates, is noble

³ *The Way Ahead Adapting to Change*, The CIArb Arbitration Journal, p. 220, Nov 1990). Vol 56., Issue 4

*from the perspective of the broader principle of access to justice...*⁴ (Emphases added.)

Two concepts in the above quotation are worth further emphasis. Firstly, parties have a right, that is to say they are legally entitled to representation either by advocates or non-advocates.

Secondly, Justice Kairu links that right to the broader principle of access to justice, which is, of course a public policy issue. From this, it is fair to conclude that public policy in Kenya accepts representation of parties by non-lawyers in arbitration. It follows that barring non-lawyer representation in arbitration would be “repugnant to justice”. This is, incidentally, also Derek A Denckla's conclusion in one of the authorities⁵ submitted by the Respondent.

Justice Kairu is now a judge in the Court of Appeal. When he wrote the above, he was a part-time lecture of commercial law in the University of Nairobi and a full-time arbitrator, having closed down his law practice to concentrate on arbitration. In addition to understanding the law on party representation in arbitration, he must have seen many non-lawyers representing parties in arbitration when he was himself either the counsel representing the other side or the arbitrator. Few people in Kenya have Justice Kairu's experience in arbitration. If he does not know the law and practice of party representation in Kenya, then nobody does.

Githu Muigai, the Editor of that book, is, of course a professor of Commercial Law at the University of Nairobi. He has taken part in many arbitrations locally and internationally. He is also a Chartered Arbitrator and the Attorney General of Kenya. Being the Editor of the book, he presumably endorses Justice Kairu's views otherwise they would not have seen light of day.

D. Party Autonomy

Party autonomy is the hallmark of arbitration. The right of the parties to choose the procedure applicable in the arbitration is in s.20. (1) of the Arbitration Act. That proviso

⁴ Arbitration Law & Practice in Kenya, Editor Prof. Githu Muigai. Law Africa, 2011. Chapter 4, pages 70 & 71.

⁵ “Responses - Non-lawyers and the Unauthorised Practice of Law: An overview of the Legal and Ethical Parameters”

is a right, not an obligation. Parties in an ad hoc arbitration do not have to adopt any pre-set arbitration rules. They can make their own rules or grant the tribunal a blank cheque to conduct the arbitration in any “manner it considers appropriate” as stipulated in s. 20. (2) of the Act.

The parties adopted the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules of 2012 (the “Rules”) to govern this arbitration “by consent” during the Preliminary Meeting in which both of them were legally represented. I had no say in the choice of the rules as I had not been appointed at that point.

Rule 8. (1) is self-explanatory. I state that, “Any party may be represented or assisted by persons of their choice in the arbitration...” (emphases added).

The parties could have modified that particular rule, or even rejected all the Rules, if they had wished. They did not. Therefore, Rule 8. (1) remain applicable to these proceedings. Needless to say, the tribunal’s award would be a candidate for setting aside

In addition, since the adoption of the Rules was “by consent”, the has no jurisdiction to shift the rules of the game from those agreed by the parties.

E. The Advocates Act of Kenya

The Advocates Act s. 31. (1) stipulates that,

“Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.” Emphasis added).

Firstly, this provision refers to representation “in court”. An arbitration tribunal is not a “court” because s. 2 of the same Act says that “Court means the High Court”.

Secondly, preparing statements in arbitration or representing a party in arbitration do not amount to “practice of law”, which would in any case be allowable so long as it is carried out within the limits expressly allowed by s.25. (5) of the Arbitration Act.

Most significantly, s. 31. (1) is subservient to s. 83 of the same Act which states, under a paragraph aptly titled “Saving other Laws”, that,

“Nothing in this Act or any rules made thereunder shall affect the provisions of any other written law empowering any unqualified person to conduct, defend or otherwise act in relation to any legal proceedings.”

S. 25. (5) of the Arbitration Act does exactly what s.83 of the Advocates Act anticipates: allowing the representation of parties by “un-qualified persons” or non-lawyers in arbitration. S. 83 of this Act most deliberately leaves room for an “unqualified person” to represent a party in an arbitration under the Arbitration Act.

The Respondent has suggested that the definition of “contentious matter” in the Advocates Remuneration Order, is proof that only lawyers are qualified to represent a party in a contentious arbitration. That reasoning does not withstand serious scrutiny. All arbitrations are contentious. Indeed, the presence of a dispute is a major prerequisite for an arbitration to take place, according to s. 6. (1)(b) of the Arbitration Act.

Furthermore, the simple reading of s.83 of the Advocates Act means that the rules (for example the Advocates Remuneration Order) made under Part IX of the Advocates Act cannot stop non-advocates from representing a party where such representation is allowed by an Act of Parliament. Nothing in this arbitration turns on the definition of “contentious matter” contained under the Advocates Remuneration Order/Rules, which are obviously for fees payable to an advocate of the High Court of Kenya for acting in arbitration.

Commenting on s.83 of the Advocates Act, Justice Richard Mwongo of the High Court and seasoned Arbitrator has this to say,

“It is this provision, read with other statutes, that enables police prosecutor to undertake work in court. It also allows other special prosecutors from state departments and agencies to prosecute or to defend actions in court. Various statutes are in place to provide for this leeway”⁶

The Arbitration Act is not the only act in Kenya allowing representation of parties by non-advocates. There are numerous other laws, for example, the Labour Relations Act, 2007 which has the following provisions:

⁶ Khanjira v. Safaricom, <http://kenyalaw.org/caselaw/cases/view/82675>

“A trade dispute may only be referred to the **Industrial Court** by the authorised representative of an employer, group of employers, employers’ organisation or trade union” - s. 73. (3)

“In this Act, unless the context otherwise requires... “authorised representative” means...any person appointed in writing by an authorised representative to perform the functions of the authorised representative” (s.2) (emphases added)

Justice James Rika of The Industrial Court has stated the court's position on party representation by non-lawyers in that court as follows:

“A Trade Union can appear in Court through its authorized representative, its General Secretary. It may appear through any person appointed in writing by the authorized representative, to perform the functions of the authorized representative...”⁷

The Labour Relations Act, like the Arbitration Act, allows non-advocate representation in the proceedings. An Advocate of the High Court of Kenya appearing for a party does so under the same legal authority as a non-lawyer trade union official. An advocate and a trade union official representing different parties in the Industrial Court are *at par*: neither is superior or inferior in the eyes of the Court.

F. Complaint to the Law Society of Kenya (LSK)

LSK declined, very wisely, in the Claimant's opinion, to descend into this arena when the Respondent's learned Counsel attempted to drag it into these proceedings. It could have, out of the Respondent's imagined great interest its objection would raise, applied to be enjoined to these proceedings as an *amicus curiae*. It did not. The most it did was ask for a copy of the arbitrator's decision on the issue. That request was probably made out of courtesy to its member and or out of curiosity. It would have sprung to action immediately if it shared the Respondent's view on non-lawyer representation in arbitration.

LSK has embraced arbitration. For example, according to information available on its website, it has a course on ADR in Nairobi on 31st October 2014 to educate its members

⁷ Kenya National Private Security Workers Union v. Total Security Surveillance Ltd. <http://kenyalaw.org/caselaw/cases/view/94436>

on the various ADR procedures including arbitration. The need to teach lawyers arbitration law is informed by the fact that you can't play golf with hockey sticks, or hockey with golf clubs. Arbitration is not litigation.

Furthermore, it is public knowledge that LSK intends to start an arbitration centre in Nairobi. It must allow non-lawyers to represent parties in arbitrations held there since that is the law of the land. It follows that even the proposed Nairobi Centre for International Arbitration (NCIA)⁸ must allow party representation by non-lawyers.

G. Custom in Arbitration

Arbitration has always been the domain of traders, craftsmen, merchants etc. They drew arbitrators as well as party representatives from their lot. It is the custom and practice in Kenya for architects, quantity surveyors, accountants etc to act as arbitrators or party representatives. Anyone who has been involved in arbitration in Kenya at any level knows this.

Such custom would not be lawful if it breached the law, but as shown above the practice is legal.

H. The Law and Practice of Arbitration under the English Arbitration Act, 1996

The English Arbitration Act 1996 has been referred as “the Bentley” of arbitration acts. It deals with the issue of representation in s. 36,

“Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him.”

That short, single sentence is so simple. The hallmark of excellent draftsmanship. It allows non-lawyers to represent parties in arbitration. That also means that English cases and scholarly articles on non-lawyer representation are relevant to Kenya, where little has been written on the local arbitration legislation.

⁸ Subsequently the NCIA Arbitration Rules 2015 were issued. Rule 21.(1) stipulates that, “A party may be represented by a legal practitioner or any other representative.” <https://ncia.or.ke/wp-content/uploads/2021/02/Final-NCIA-Revised-Rules-2019.pdf>

That anyone can represent a party in arbitration is in fact presumed, as in the following article,

“Where both parties are represented by lawyers the conduct of the hearing is a fairly straightforward matter. Where both parties are represented by non-legal or lay representation ... In the event of legal representation on one side but not the other ...”⁹

The above article emphasises the place of the non-legal representation in arbitration under the English Act. English courts have taken the same position,

“By reference to recent extra-judicial opinions of two members of the English Court of Appeal, in English private commercial arbitration proceedings anyone could appear as advocate.”¹⁰

As Potter J has aptly put it,

“There is no statutory or other restrictions on the right of a party to be represented in an arbitration by the advocate of his choice, or, indeed, to employ a lay, qualified or unqualified person to represent him in the arbitration and to progress it generally.”¹¹

Let the Queen's Counsel (QCs) speak for themselves,

“There is no restriction upon who may appear as an advocate...” Para 2-701

“The Lay Advocate: Lawyers do not have the divine right, and far less a divine gift, of advocacy. Someone who is not a lawyer may act as an advocate in arbitration if a party wishes him to.” para 2-706

“In some types of cases it is wholly sensible to be represented by a lay advocate...”
para 2-707.

⁹ Colin S. Archibald, *Round and About* 1984.

¹⁰ *What is an Advocate?* Arbitration Journal, May 1989.

¹¹ Piper Double Glazing Ltd. Vs DC Contracts 91992) Ltd. – [1994] 1 All ER 177.

The three quotations above are from *Handbook of Arbitration Practice*, Sweet & Maxwell. This particular section of the book was authored by four eminent English barristers and arbitrator: Ronald Bernstein Q.C., F.C.I.Arb, Derek Wood C.B.E., Q.C., F.C.I.Arb., John Tackaberry Q.C. F.C.I.Arb., and Arthur L. Marriott, Q.C, F.C.I.Arb. This book is a respected authority on arbitration law and is used by CI Arb as the standard text in teaching its Module 3 Arbitration Course worldwide.

Russell¹² goes a step further and states that the exclusion of the representative of a party choice without good reason when their presence is desired by a party then the award “may be the subject of challenge”. It quotes an English case in which an arbitration award was set aside by court because the arbitrator had refused to allow the attendance of a party's son and shorthand writer.

I. Elsewhere in the Commonwealth

The law on non-lawyer representation in arbitration is universal in the commonwealth. An example from Nigeria will suffice:

“6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Nigeria and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Nigeria?”

... By virtue of sections 2 and 7 of the Legal Practitioners Act Cap. L11 Laws of the Federation of Nigeria 2004, a person is only entitled to practise as a barrister and solicitor in Nigeria if he has been called to the Nigerian Bar, or he is admitted by warrant of the Chief Justice on special circumstances or if he is exercising the functions of the office of the Attorney General, Solicitor General or Director of Public Prosecutions or such civil service office specified by the Attorney General.

The above restrictions do not strictly apply to the representation of parties in an arbitration. Under the ACA, parties need not be represented by lawyers or legal practitioners. Article 4 of the Arbitration Rules provides that the parties may be represented or assisted by legal practitioners of their choice. The wording of Article 4 and the use of the word “may” places no jurisdictional restrictions on persons appearing on behalf of parties before an arbitral tribunal. Further the*

¹² Russell on Arbitration, Sutton & Gill, Sweet and Maxwell, 22nd Edition, 2003.

*restriction in the Legal Practitioners Act seems clearly to be limited to appearance in "Court" and since an arbitral proceeding is not a Court proceeding, the restriction is not applicable to foreign legal practitioners appearing before an arbitral tribunal in Nigeria.”¹³ (Emphases added). Authors: Anthony Idigbe, SAN** and Omone Foy-Yamah.*

*ACA means Arbitration and Conciliation Act, Chapter 19, Laws of the Federation of Nigeria 1990.

**SAN stands for Senior Advocate of Nigeria, same as Senior Counsel in Kenya.

The position is the same in Kenya. Restriction against unlawful practice of law do not stop the representation of parties by non-lawyers in arbitration.

Lawyers do not and never had monopoly of representing parties in arbitration. Many of them routinely represent parties before non-lawyer arbitrators.

J. International Arbitration Standards and Practice

The International Bar Association (IBA) boasts to be “The Global Voice of the Legal Profession” because it has over 50,000 lawyers from 170 jurisdictions and 206 bar associations and law societies. Apparently, LSK and some Kenyan lawyers are members of IBA.

According to the IBA, website, the organisation was established in 1947 and is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world.

The IBA Guidelines on Party Representation in International Arbitration which were adopted on 25th May 2013 contain the following definition:

'Party Representative' or 'Representative' means any person, including a Party's employee, who appears in an arbitration on behalf of a Party and makes submissions, arguments or representations to the Arbitral Tribunal on behalf of

¹³ http://www.punuka.com/uploads/arbitration_agreements.pdf

*such Party, other than in the capacity as a Witness or Expert, and whether or not legally qualified or admitted to a Domestic Bar*¹⁴ (Emphasis added.)

An interesting article is found in the Frequently Asked Questions (FAQs) section of the London Maritime Arbitration Association website,

“Question: Does a party have to be represented by a lawyer in a London maritime arbitration?

*Answer: No.... LMAA arbitrators are entirely accustomed to dealing with parties who are not represented by English lawyers and there is no detriment to parties who fall into this category. The reasonable charges of representatives of a party who is successful in arbitration will normally be recoverable, whether that representative is a lawyer or not...*¹⁵

Incidentally, s. 25. (5) of the Kenyan Arbitration Act 1995 also applies in all international arbitrations in which Kenya is the designated *seat*, whether the arbitrations are actually held in Kenya or elsewhere, because the Act governs both domestic and international arbitrations according to s. 2 of the Act.

The arbitration rules of various international arbitration bodies allow non-lawyer representation of parties. As an example, according to the Kigali International Arbitration Centre Rules (KIAC) provide that,

*“Any party may be represented by legal practitioners or any other representatives. ..”*¹⁶

Non-lawyer representation is allowed in the US and internationally,

“as a matter of New York law and professional ethics, parties to international or interstate arbitration proceedings conducted in New York may be represented in

¹⁴ <http://www.ibanet.org>

¹⁵ <http://www.lmaa.org.uk/faq.aspx?pkFaqCatID=96642705-2081-4f6f-a6d4-68517454d2ec> accessed on 11th April 2014.

¹⁶ KIAC Rules Article 24, http://www.kiac.org.rw/IMG/pdf/kiac_arbitration_rules_print.pdf

such arbitration proceedings by persons of their own choosing...”¹⁷

K. Kenyan Case Law

There is a notable paucity of case law in Kenya or England on non-lawyer representation of parties in commercial arbitration. This is hardly surprising because, as noted above, the law is so clear that nobody, absolutely nobody, has attempted, nay dared, to go to court for interpretation.

L. Unauthorised Practice of Law (UPL)

The Claimant submits that it is not necessary for the arbitrator to establish whether or not the Claimant's Representative is involved in UPL since the non-lawyer representation is specifically authorised in the Arbitration Act.

The Claimant contends that it is in fact irrelevant whether or not the act of representation constitutes UPL. Courts in the United States¹⁸ have not shown much interest in splitting hairs on whether non-lawyer representation constitutes UPL. It is noteworthy that even when a court found that non-lawyer representation constituted a technical violation of the UPL, the court still allowed such representation¹⁹.

The Respondent has submitted various authorities from Florida Bar on UPL. The Claimant's response is that,

”As for the question of who may represent a party in arbitration, existing precedent and commentary indicates that arbitration is not considered unauthorised practice of law”²⁰

¹⁷ Committee On the Unauthorised Practice of Law New Jersey Supreme Court. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi0_djxm_bxAhXt1uAKHZriAoUQFjABegQIBBAD&url=https%3A%2F%2Fwww.njbarexams.org%2Fopinion-14-pdf&usg=AOvVaw0lCKjjBWfS6hszHcQeqz3B

¹⁸ Committee on UPL and ABA Standing Committee on Clients Protection. https://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonclientprotection/

¹⁹ R.I Supreme Court Hold Non-Lawyers May Represent Parties in Labor Arbitrations. *In The News*

²⁰ Committee On The Unauthorised Practice of Law, New Jersey Supreme Court. <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiv98mMnfbxAhWkxQKHdd9A4kQFjACegQIBhAD&url=https%3A%2F%2Fwww.njbarexams.org%2Fopinion-14-pdf&usg=AOvVaw0lCKjjBWfS6hszHcQeqz3B>
Similar view is expressed by the American Bar Association.

The Florida Supreme Court barred Mr Sperry, a non-lawyer representative from pursuing patent work in Florida. Reversing that decision, the U S Supreme Court said,

“did not question Florida bar's determination that Sperry's activities constituted the practice of law in Florida” and “The Court rules that a supremacy clause of the US Constitution prevented states from prohibiting a non-lawyer registered patent agent from engaging in activities authorized by the Commissioner of Patents.”²¹

Florida State laws and the Florida Bar later clearly softened their stance on non-lawyer representation in administrative bodies since the days of the two Florida bar cases (1962 and 1980), which were submitted by the Respondent. In 2005, the Bar's UPL Committee²² dismissed all UPL charges, which had been raised by 4 Florida attorneys, against Mrs Rangel-Diaz for representing parties in an administrative body.

The Respondent's apparent obsession with what constitutes “practice of law” is misplaced, irrelevant and, at best, diversionary.

The English law on non-lawyer representation is the same as in the US, even though the English rather predictably, approach the issue from the angle of “acting as a solicitor”. Reference is made to Piper Vs DC which has been cited above.

The Respondent has submitted as an authority *Representation of Parties in Arbitration by Non-Attorneys* by Constance N. Kartsoris. The views expressed in that article are not of general commercial arbitrations but within the narrow context of statutory arbitrations under subsidiary legislation. Obviously, subsidiary legislation cannot supersede statutory provisions in the US or in Kenya. In Kenya, non-lawyer representation is specifically permitted in an Act of Parliament.

Theuri v. Republic, which was presented by the Respondent, is irrelevant to this matter. Theuri had tried the short-cut of being appointed by parties under powers of attorney.

²¹ Unauthorised Practice of Law: Supreme Court Holds States Cannot Restrict authorised Activities on Non-Lawyer Patent Office Practitioner. <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1905&context=dlj>

²² A Tale of Two Advocates: State Bar Issues New Decision on Unauthorised Practice of Law. <https://www.wrightslaw.com/news/05/diaz.upl.0307.htm>

The judges in that case note that the phrase “recognised agent” is defined in the Civil Procedure Rules, which is not applicable in these proceedings. The meaning of party representative as given in the Arbitration Act is different and has not been addressed in that case. In any case, Civil Procedure Rules are subsidiary legislation which cannot ban non-lawyer representation in arbitration as that has been expressly allowed in an Act.

M. Response to the Respondent's Other Submissions

The Respondent has speculated that the Claimant might have difficulties in the High Court if she was represented by a non-advocate in the enforcement proceedings.

The Claimant has three submissions on this. First, the advice is unsolicited. It is none of the Respondent’s business how the Claimant would approach the Court. Second, enforcement proceedings are completely separate from arbitral proceedings. The Claimant will cross the bridge at the opportune time. The Respondent should not jump the gun or attempt to give unsolicited advice to the Claimant indirectly.

Third, the High Court can look after itself during the enforcement proceedings, which the Respondent seems to suggest are likely to follow this arbitration in spite of the assumption that,

“Parties to an arbitration agreement impliedly promise to perform a valid award.”
(Njoroge Regeru on *Recognition and Enforcement of Arbitral Award*, Chapter 7, *Arbitration Law & Practice in Kenya*, Editor Prof. Githu Muigai. Law Africa, 2011. Appendix O.

As the Respondent stated, The Constitution of Kenya 2010 Article 159. (3) stipulates that,

“Traditional dispute resolution mechanisms shall not be used in a way that -

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.” (Emphasis added)

The Respondent claimed that s. 159. (3) contained principals of judicial authority. It definitely does not. The universal principles are contained in s. 159. (2), which in its preamble says that,

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles...”

Back to Article. 159.(3). The provision is specifically about “traditional dispute resolution mechanisms”, which the Claimant submits do not include arbitration under the Arbitration Act. Therefore, the Respondent's citation of that article is completely irrelevant to the matter at hand. If anything, it is the barring of non-lawyers from representing parties in arbitration which would be “repugnant to justice” as discussed elsewhere above.

The Respondent suggested that party representation had to be restricted to lawyers because the work involved advising parties on their legal rights. Wrong again. If that were so, even arbitrators, who actually decide on the legal rights and obligations would have to be lawyers. It is a matter of public notoriety that many arbitrators are not lawyers.

The Respondent suggested, during the hearing on 16th May 2014, that the PO was important in determining how UPL in arbitrations would be handled in future. Nothing could be further from the truth. Arbitration awards do not create legal precedents and are, in any case, confidential.

Questions of law arising from domestic are not appealable in court without party agreement (s.39) which is absent in this case. Furthermore, whichever way the Arbitrator decides on this Application, s. 10 of the Arbitration Act prohibits courts from entertaining a challenge of that decision by providing that,

“Except as provided in this Act, no court shall intervene in matters governed by this Act. “

Thus this Application has absolutely no chance of making legal precedent, except in the context of dismissed court applications.

O. Breach of Confidentiality

The Arbitration Rules provide that,

“Unless otherwise determined by consent of the parties, the proceedings of the arbitration shall be confidential and private, and in particular no disclosure shall be made at any time, other than to the parties, of the pleadings, contents of the document bundles, witness statements (whether of fact or of opinion) records of meetings and hearings and of the award; and parties and their representatives and members of the Arbitral Tribunal and advisors and witnesses of fact and opinion and observers admitted by agreement of the parties, owe an equal duty of confidentiality and privacy to the parties.” (Emphases added). Arbitration Rule 8.3.

Arbitration proceedings are confidential. Parties do not like to wash their dirty linen in public. Confidentiality remains one of the primary reasons for parties to prefer arbitration over litigation, especially because with passage of time cost savings and simplicity of procedure are rarely available in arbitration.

The Respondent's learned advocate's letter of 2nd April 2014 to LSK states that,

“We have enclosed copies of the documents drawn and prepared by the said Paul Ngotho and filed with the arbitrator...”

LSK is a stranger to these proceedings. The Claimant submits that it was a breach of the confidentiality duty and in any case disrespectful for the Respondent to contact LSK and to give LSK confidential documents without the Claimant's prior consent.

The Respondent's learned advocate did not even have the courtesy to inform the Claimant's representative of the charges against him at LSK so that he could defend himself.

Furthermore, the Respondent's “query” to the LSK would have been complete even without the attachment of any documents, which have been described adequately in the letter as follows:

“Paul Ngotho...has drawn and prepared documents and pleadings for the

Claimant describing himself as her representative ... qualified to act for, draw, prepare documents and pleadings and represent the Claimant in the arbitration in light of Section 31 of the Advocates Act”

The Claimant seeks a declaration that the Respondent and its learned advocate breached the duty of confidentiality by submitting confidential documents to LSK without the Claimant's consent.

P. Costs

The Claimant considers the Application vexatious, raised purely to harass the Claimant and delay the proceedings. She also considers the Application frivolous because it is manifestly insufficient and futile, based on absurd legal theories, which as far as she can see from her research, no one in the history of arbitration has considered worth serious attention. Suggesting that non-lawyer representation is not allowed in arbitration in Kenya is indeed “an absurd legal theory”.

All the same, the Claimant has to defend herself, and has spent a considerable amount of time and costs preparing this submission and carrying out the necessary research locally and internationally. She requests to be awarded costs she has incurred defending herself.

Costs follow the event in arbitration, as in litigation. Choices have consequences. The Claimant submits that she is entitled to costs and that costs incurred by the Respondent in raising such an objection should be non-recoverable in any event.

In addition to compensating the Claimant for the costs, a timely award of costs would deter the Respondent from engaging the Arbitrator and the Claimant further in non-productive activities which add work for everybody without adding value.

The Respondent cannot feign ignorance of the Arbitration Act, the Advocates Act and the applicable Arbitration Rules. Since laymen cannot use ignorance of the law as a defence even when they are not legally represented, how much less so when the laymen have counsel.

Q. Closing Remarks

The unequivocal statutory authorisation of non-lawyer representation in arbitration in Kenya, a sovereign state, by the Arbitration Act is final and would be valid regardless of the statutes and case law from other jurisdictions.

Most significantly, Justice Kairu and Prof Muigai, by association, who are obviously conversant with both the legislations do not anywhere in the authority cited earlier suggest that non-lawyer representation in arbitration as allowed in the Arbitration Act breaches the provisions of the Advocates Act.

The Application and lengthy submissions are speculative, untenable, diversionary and destined to fail from the beginning because the law of arbitration in Kenya expressly allows the representation of parties in arbitration by non-lawyers. The Claimant submits that the Application was made purely to delay the proceedings and to harass her representative.

The Claimant requests the Arbitrator to be vigilant to ensure that the Respondent does not further abuse the arbitral process by employing more of what Dr. Gunther Horvath²³ and Dr. Fabian Ajogwu²⁴ refer to as *guerrilla tactics*.

The Claimant requests the Arbitrator to kindly revisit para 2.2 in Order for Directions No. 1 on Etiquette of the Tribunal which states,

'The Arbitrator will be addressed as "Sir" or "Mr. Arbitrator" and the Advocates will address each other as "my learned friend" or "Counsel".'

The order was, of course, absolutely orderly when the Claimant was being represented by an Advocate of the High Court but it would now be awkward for all in view of the change in the Claimant's Representation.

²³ The Role of Arbitral Tribunals In Combating Guerrilla Tactics in International Arbitration. Dr Gunther J.

Horvath of Freshfields Bruckhaus Deringer LLP.

²⁴ Dealing with Guerrilla Tactics in International Arbitration: Which Tools for Counsel and Arbitrators? Dr Fabian Ajogwu, SAN. https://kennapartners.com/wp-content/uploads/2019/08/Dealing-with-Guerilla-Tactics-in-International-Arbitration-which-tools-for-Counsel-and-Arbitrators_.pdf

The Claimant's Representative would be happy to refer to the Respondent's advocate as "The Respondent's Learned Counsel", but humbly requests the be addressed as "The Claimant's Representative".

The Claimant's representative would, most respectfully, have the Respondent's Learned Counsel know that he is a CIArb Accredited Tutor for Introduction to Arbitration, Module 1 and Module 2 (Law of Arbitration) and that over 90% of the students in recent arbitration classes are lawyers, magistrates and judges.

The Claimant requests the Arbitrator to dismiss the Respondent's Preliminary Objection forthwith and with costs.

Thank you. End of submissions.

I won, and my client was awarded costs. The applicant was ordered to send a copy of the award to LSK as that was one of the orders which I had sought. His learned counsel did not, as far as I know, send the award to LSK. I did not pursue the issue as it was neither here nor there.

References

Legislation

Advocates Act s. 31. (1) and s. 83

Arbitration Act of Kenya 1995 sections 10, 20. (1), 25. (5)

Chartered Institute of Arbitrators Kenya Branch Arbitration Rules, Rule 8. (1)

Constitution of Kenya 2010 Article 159. (3)

English Arbitration Act, s. 36

IBA Guidelines on Party Representation in International Arbitration.
<http://www.ibanet.org>

Kigali International Arbitration Centre Rules. KIAC Rules Article 24,
http://www.kiac.org.rw/IMG/pdf/kiac_arbitration_rules_print.pdf

Labour Relations Act, 2007 s. 73. (3)

Legal Practitioners Act Cap. L11 Laws of the Federation of Nigeria 2004, sections 2 and 7

Nairobi Centre for International Arbitration Rules 2015, Rule 21. (1).
<https://ncia.or.ke/wp-content/uploads/2021/02/Final-NCIA-Revised-Rules-2019.pdf>

Bibliography

A Tale of Two Advocates: State Bar Issues New Decision on Unauthorised Practice of Law. <https://www.wrightslaw.com/news/05/diaz.upl.0307.htm>

Colin S. Archibald, *Round and About* 1984.

Dealing with Guerilla Tactics in International Arbitration: Which Tools for Counsel and Arbitrators? Dr Fabian Ajogwu, SAN. <https://kennapartners.com/wp->

content/uploads/2019/08/Dealing-with-Guerilla-Tactics-in-International-Arbitration-which-tools-for-Counsel-and-Arbitrators_.pdf

Frequently Asked Questions (FAQs) section of the London Maritime Arbitration Association. <http://www.lmaa.org.uk/faq.aspx?pkFaqCatID=96642705-2081-4f6f-a6d4-68517454d2ec> accessed on 11th April 2014.

Kenya National Private Security Workers Union v. Total Security Surveillance Ltd. <http://kenyalaw.org/caselaw/cases/view/94436>

Khanjira v. Safaricom, <http://kenyalaw.org/caselaw/cases/view/82675>

Muigai, G. Arbitration Law & Practice in Kenya, Editor. Law Africa, 2011. Chapter 4, pages 70 & 71.

Piper Double Glazing Ltd. Vs DC Contracts 91992) Ltd. – [1994] 1 All ER 177.

Representation of Parties in Arbitration by Non-Attorneys by Constance N. Kartsoris https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjbrfko_bxAhWr3eAKHYdXAugQFjAAegQIBBAD&url=https%3A%2F%2Ffir.lawnet.fordham.edu%2Fulj%2Fvol122%2Fiss3%2F1%2F&usg=AOvVaw2RdNvG7_ehJhRabUGXhgar

Rusell on Arbitration, Sutton & Gill, Sweet and Maxwell, 22nd Edition, 2003.

Sirotzky Vs NY Stock Exchange & Bernstein at p. 43. <https://caselaw.findlaw.com/us-7th-circuit/1227110.html>

The Way Ahead Adapting to Change, The CI Arb Arbitration Journal, p. 220, Nov 1990). Vol 56,, Issue 4

What is an Advocate? Arbitration Journal, May 1989.

Handling The Reins in Mediation Within a Framework of Self-Determination

By: *Jacqueline Waihenya*

*

To be a mediator requires that one becomes a social scientist within very sensitive and dynamic environments all the while being impartial and while guiding parties to reach a mutually satisfactory solution through a process of self-determination. The legislative framework and quasi-judicial nature of mediation however seeks to down play the role of communication and emotion and their interplay within various aspects of this ADR mechanism with mediators generally being charged to diffuse the “anger” when it arises and achieve a settlement. Very little attention is given to the melting pot of emotions and communication within mediation process and practice. This paper therefore considers the role of Mediators within the Mediation process in Kenya and attempts to shed light on how to integrate best practices regarding communication and emotion within Mediation practice in Kenya whether private or within the Court Mandated Mediation Program.

1. Introduction:

It is now almost customary to define mediation as an alternative dispute resolution (ADR) process in which a third-party neutral, called a mediator, who is mutually acceptable to the parties but who has no authority to make a binding decision for them assists parties to a dispute or conflict towards a resolution that is acceptable to all of the

* *Advocate of the High Court of Kenya; LLM University of Nairobi (Public Finance & Financial Services Law); LLB (Hons) University of Nairobi; Kenya School of Law (Post Graduate) Diploma; Fellow of the Chartered Institute of Arbitrators (FCI Arb); Chartered Mediator–Institute of Chartered Mediators & Conciliators (ICMC)[2018]; Certified Advance Mediation-Mediation Training Institute [2018]; Certified Advance Mediation (Family & Divorce) - Mediation Training Institute [2015]; Certified Professional Mediator – Mediation Training Institute [2012]; Kenya Judiciary Accredited Mediator [2016]; Fellow Certified Public Secretary – Institute of Certified Public Secretaries (ICPSK); Accredited Governance Auditor ICPSK; Vice Chair – Chartered Institute of Arbitrators Kenya Branch [2017 to 2021]; Member, National Steering Committee for the Formulation of the Alternative Dispute Resolution Policy 2020/2021; Vice Chair – Kenya National Chamber of Commerce & Industry (Mombasa Chapter)[2019-2021]; Mombasa Law Society – Treasurer [2019-2021] and Associate Editor, CIARB-ADR Journal 2020/2021.*

parties.¹ This text book definition however fails to recognise the incredible dynamics that underpin any mediation process. In truth the definition of mediation is often as contextual as the conflict that is presented for resolution.² Any definition of mediation requires at the bare minimum to factor in (1) the willingness of all relevant stakeholders to work together to resolve their conflict(s); (2) the presence and availability of a skilled third-party neutral competent to handle difficult discussions; and (3) an agreement on the procedural ground rules.³ All these three elements of necessity have a strong underlying need for communication and the management of emotions as well as a power dynamic that places the mediator at the centre of the process with the ability to balance and manage the process all the while facilitating the parties' fundamental requirement for self-determination.

Mediators come in all shapes and sizes and they take on a wide range of orientations and approaches that distinguish each one of them. We can nevertheless identify a number of functions which each carries on to varying degrees within any mediation process or practice, (1) establishing a framework for cooperative decision making; (2) promoting constructive communication (3) providing appropriate evaluations; (4) empowering the parties; and (5) ensuring a minimum level of process and outcome fairness.⁴

Courts, banking, insurance and many other large institutionalized systems have now embraced mediation as a conflict management tool or strategy⁵ and the global community has increasingly come to embrace mediation as a suitable ADR mechanism to resolve a wide array of commercial conflicts and disputes.⁶ Within the Kenyan context

¹ Kariuki Muigua, *Alternative Dispute Resolution and Article 159 of the Constitution* (2018) @pg.9 Available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf> Last accessed on 10 July 2021

² Lawrence Susskind, *Arbitration vs. Mediation: The Definition of Mediation as a Problem Solving Process* (3rd May 2021) Daily Blog Program on Negotiation Harvard Law School. Available at <https://www.pon.harvard.edu/daily/mediation/mediation-as-problem-solving/> [Last accessed on 26 June 2021]

³ Lawrence Susskind Supra Ibid Note No.2

⁴ Arghavan Gerami, *Bridging the theory-and-practice gap: Mediator power in practice* (2009) 26 Conflict Resol Q 433. Available on Heinonline [Last accessed on 26 June 2021]

⁵ Spencer, David, Brogan & Michael, *Mediation Law and Practice - Mediation: Its Definition and History*, (2007) pg.3 – 41 @pg.31 Cambridge University Press. Available at <https://doi.org/10.1017/CBO9780511811005> [Last accessed on 26 June 2021]

⁶ Eric M. Runesson & Marie Lawrence Guy, *Mediating Corporate Governance Conflicts & Disputes*, Global Corporate Governance Forum (2007) International Finance Corporation. Available at <https://www.ifc.org/wps/wcm/connect/e50f6541-0df6-4c87-8c15->

the enactment of *Statute Law (Miscellaneous Amendments) Act No. 12 of 2012*⁷ established the Court Mandated Mediation creating the first formal dispute resolution framework for mediation practice in Kenya in and out of Court. Given that we are now at the eve of the first decade of formal mediation practice in the country it is only natural to consider some reflections from a mediator about the mediation principles, process and practice.⁸

2. Mediation Models:

Mediation is not a homogenous or monolithic process but rather comprises a diverse range of practices and processes which are grounded on different philosophies, styles and strategies.⁹ Different mediators will use distinct styles typically comprising critical discussion, bargaining, and therapeutic discussion or a combination of all 3 at different times during the mediation process.¹⁰ Using these techniques it is expected that each mediator will perform their function such that they (1) determine the points at issue; (2) recognize the positions that the parties adopt; (3) identify the explicit and implicit arguments; (4) analyze the argumentation structure; and (5) solicit evidence, reasoning, and counterarguments.¹¹ Mediator competence is demonstrated by their ability to choose which model to apply in any particular session as well as at a particular moment in the session and in the model s/he decides to adopt for the mediation process in question. Thus the competent mediator is judicious about the how, the when and the where a particular model is to be applied.

574865e189da/Focus4_Mediation_12.pdf?MOD=AJPERES&CVID=jtCwurJ [Last accessed on 26 June 2021]

⁷ Statute Law (Miscellaneous Amendments) Act No.12 of 2012 introduced Sections 2, 59A, 59B, 59C and 59D into the Civil Procedure Act (Cap 21) and Order 46 which defined mediation, the mediator and otherwise established for the Mediation Accreditation Committee and its mandate and provided the modalities for Court to refer matters to mediation as well as the enforcement of mediation settlement agreements arrived at through this process.

⁸ Joel Lee, *A Mediator's Journey – Reflections on Age* (15 June 2016) National University of Singapore – Faculty of Law. Available at <http://mediationblog.kluwerarbitration.com/2016/06/15/a-mediators-journey-reflections-on-age/> [Last accessed on 26 June 2021]

The writer came across this blog of Joel Lees musings on his journey and though in the final analysis the paper has evolved beyond mere musing it is the original seed for this article.

⁹ Arghavan Gerami Supra Ibid Note No.4 pg.435

¹⁰ Scott Jacobs and Mark Aakhus, *what mediators do with words: Implementing three models of rational discussion in dispute mediation* (2002) 20 Conflict Resol Q 177 @pg.185. Available on Heinonline [Last accessed on 26 June 2021]

¹¹ Scott Jacobs and Mark Aakhus Supra Ibid Note No.10

2.1 **The Primary Mediation Models/Approaches:**

The model a mediator adopts will be informed by many factors including their training, their personality, philosophical leanings and strategy. Thus, family mediation, commercial mediation and workplace mediation tend to differ significantly more so depending whether a mediator takes a facilitative, evaluative or transformative model approach.¹²

2.1.1 **Facilitative Approach:**

This refers to the original and classic mediation model in which the mediator asks questions, validates and normalizes the parties' perspectives, seeks out the interests behind the respective positions they have taken and assists them to explore and analyze the options for resolutions without making any recommendations.¹³

2.1.2 **Evaluative Approach:**

The evaluative approach occurs where the mediator hand guides parties to a resolution by drawing the parties' attention to the respective weaknesses of their cases and even hazarding what a judge might decide.¹⁴ They assist parties and their advocates evaluate their legal positions and cost-benefit analysis. Most evaluative mediators will favour caucusing and adopt a format of "shuttle diplomacy".¹⁵ They may take proposals to the other party and in many cases do have a direct bearing on the final resolution. They keep an eye out for justice and fairness in the event there is an uneven negotiating power dynamic in the dispute.¹⁶ This approach was highly criticized in *Evaluative Mediation is an*

¹² Jonathan Crowe, *Two Models of Mediation Ethic'* (2017) 39 Sydney L Rev 147. Available at Heinonline. [Last accessed on 26 June 2021]

¹³ Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation* (2000) Mediate.com. Available at [https://www.rchss.sinica.edu.tw/cibs/law/1.%20Monthly%20Seminar%20Since%202008/Papers/2009/20090211/Chen-](https://www.rchss.sinica.edu.tw/cibs/law/1.%20Monthly%20Seminar%20Since%202008/Papers/2009/20090211/Chen-Chieh%20Ting_Styles%20of%20Mediation_%20Facilitative,%20Evaluative,%20and%20Transformative%20Mediation.pdf)

[Chieh%20Ting_Styles%20of%20Mediation_%20Facilitative,%20Evaluative,%20and%20Transformative%20Mediation.pdf](https://www.rchss.sinica.edu.tw/cibs/law/1.%20Monthly%20Seminar%20Since%202008/Papers/2009/20090211/Chen-Chieh%20Ting_Styles%20of%20Mediation_%20Facilitative,%20Evaluative,%20and%20Transformative%20Mediation.pdf) Last accessed on 7 February 2021

¹⁴ Katie Shonk, *Types of Mediation: Choose the Type Best Suited to Your Conflict* (12 April 2021) Harvard Law School, Program on Negotiation, Daily Blog. Available at <https://www.pon.harvard.edu/daily/mediation/types-meditation-choose-type-best-suited-conflict/> Last accessed on 10 July 2021

¹⁵ Zena Zumeta Ibid Supra Note No.14

¹⁶ Zena Zumeta Ibid Supra Note No.14

*Oxymoron*¹⁷ because (1) it jeopardizes neutrality as a mediator's assessment can only favour one side over the other; (2) evaluative activities discourage understanding and problem solving amongst the parties. (3) evaluation tends to perpetuate or create an adversarial climate where parties' communicate their positions using confrontational and argumentative approaches; and in some cases (4) the party whose position the mediator disfavoured will simply leave the process

2.1.3 **Transformative Approach:**

Under the transformative mediation approach the parties are encouraged to deal with underlying causes of their dispute with a view to repairing their relationship as a basis for settlement.¹⁸ Conflict is seen as a culmination of negative dynamics between parties which degenerates and assumes a mutually destructive, alienating and dehumanizing character. When empowered though most people are able to shift and change the character of their interactions with each other with openness and responsiveness regenerating a positive, constructive and human engagement with their others.¹⁹ This model defines the mediator's goal to be (1) to assist the parties to identify opportunities for empowerment and recognition shifts as they arise in the parties' conversation; and (2) to choose whether and how to act upon these opportunities and thereby change their interaction from destructive to constructive. In transformative mediation, success is measured not by settlement per se, but by party shifts toward personal strength, interpersonal responsiveness, and constructive interaction. In various ways, effective practice is focused on supporting empowerment and recognition shifts by allowing and encouraging party deliberation and decision making and inter-party perspective-taking.²⁰

¹⁷ Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation Is An Oxymoron*, 14 *Alternatives* 31 (1996). Available at: <https://larc.cardozo.yu.edu/faculty-articles/280> [Last accessed on 26 June 2021]

¹⁸ Kariuki Muigua, *Making Mediation Work for All Understanding the Mediation Process* (2019)7(1) *Alternative Dispute Resolution Process* pg.120

¹⁹ Dorothy J Della Noce, *From Practice to Theory to Practice: A Brief Retrospective on the Transformative Mediation Model* (2004) 19 *Ohio St J on Disp Resol* 925 @pg.928. Available on Heinonline. [Last accessed on 27 June 2021]

²⁰ Dorothy J. Della Noce *Ibid* *Supra* Note No.17

3. Communication, Emotions and The Mediator:

The process of mediation is characterized by informality, great flexibility and there is a lack of a permanent public record.²¹ A Mediator further has greater opportunity to form an intimate engagement with the disputants than with any other ADR mechanism.²² Mediators are also driven towards settling the disputes before them particularly where they have a professional interest in achieving a high settlement ratio which therefore offers an opportunity for them to position themselves as leaders in the business of mediation. Thus, in the absence of guidelines it has been said that the practice of neutrality is actually "a function of the rhetoric of neutrality"²³ as opposed to the reality or existence of the same.

An argument has therefore been proffered to the effect that, a mediator being a central figure in the mediation process, knowingly or unwittingly exercises a significant amount of power and influence upon the decisions of the parties as well as the mediation outcome. This power arises from the various functions and roles that the mediator takes on throughout the mediation especially in regards to (1) the power, knowledge and expertise of the process; (2) the power to design and control of the process; and (3) the power of reframing as a function of pressuring the parties to settle achieved through various communication techniques, caucusing, reality checking, and threatening to withdraw.²⁴

Many mediators regardless of whether they are handling family, civil or workplace disputes will share the perspective that mediations seem to revolve more around feelings than facts and it is therefore important to consider the place of emotion in mediation, how it influences communication within the mediation and ultimately how it impacts the outcome of mediation.²⁵

However though emotional communication is an integral part of the mediation process defining emotion presents significant challenges and oft times a mediator is faced with a daunting task. It is nevertheless important for a mediator to appreciate that emotion is

²¹ Kariuki Muigua Supra Ibid Note No.2 @pg.11

²² Arghavan Gerami Supra Ibid Note No.5 pg.437

²³ Arghavan Gerami Supra Ibid Note No.5 pg.438

²⁴ Arghavan Gerami Supra Ibid Note No.5 pg.439

²⁵ Margaret S. Hermann, *The Blackwell Handbook of Mediation: Bridging Theory, Research, and Practice* (2006) Blackwell Publishing Limited pg.277

the foundation of all conflict²⁶ and that (1) the trigger for a dispute is inherently emotional and the means to uncover it is primarily emotional; (2) emotion morally frames the conflict and points at the underlying values and value systems of the disputants; and (3) emotional communication in conflict states further reflects the core identity issues that impact conflict dynamics.²⁷

Throughout the mediation process the mediator will be presented with a host of non-verbal and verbal cues which they should look out for. The key communication skills in mediation include (1) active listening; (2) listening with empathy; (3) body language and (4) asking the right questions. A mediator must be a good listener and they must understand, appreciate and express the feelings that the parties require to hear, using appropriate body language at the right times because as a general rule parties participate in mediation with varying degrees of optimism, anger, distress, confusion or even fear. Where parties feel understood they take a more active role in the resolution of their dispute. Active listening by mediator is critical and it generally entails (1) summarising the main points made by speaker; (2) reflecting by confirming the mediator has heard and understood the feelings expressed by speaker; (3) re-framing where a mediator helps the parties move from position to interests; (4) acknowledging by mediator by verbally recognizing what the speaker has said without agreeing or disagreeing; (5) deferring by postponing a discussion until later; (6) encouraging the parties if they feel upset or where there is a need to explore a certain point or issue; (7) restating through the use of reassuring statements which the mediator has heard that would develop consensus between the parties; (8) silence because silence is a critically important tool that allows the parties to reflect; (9) order by setting down the sequence of topics, claims, defences or other important issues.²⁸

Common emotions and their constructs may include (1) Anger: someone has intentionally committed a demeaning offense against a party or those close to the party; (2) Anxiety: the party is facing an uncertain threat and they are unable to make sense of the situation; (3) Disgust: a party wants to get away from someone or something that they find offensive; (4) Envy: a party wants something that someone else has; (5) Fear:

²⁶ Tricia S. Jones & Andrea Bodtker, *mediating with Heart in Mind: Addressing Emotion in Mediation Practice* (July 2001) *Negotiation Journal* Volume 17, pages 217–244. Available at <https://link.springer.com/article/10.1023/A:1013283710190> [Last accessed on 27 June 2021]

²⁷ Margaret S. Hermann *Supra* Ibid Note No.22 pg.277 - 305

²⁸ Riya Sehgal, *Significance of Communication in Mediation* (3 June 2020) Available at <https://viamediationcentre.org/readnews/MzY5/Significance-of-communication-in-mediation> [Last accessed on 27 June 2021]

a party is facing an immediate physical danger and feels powerless to prevent that danger; (6) Guilt: a party has done something or wants to do something that they know to be morally wrong; (7) Jealousy: a party holds a third party responsible for the threat of the loss of someone's affection; (8) Sadness: a party thinks they have experienced an irrevocable loss that is no one's fault, but that they cannot replace; (9) Shame: a party perceives that they have failed to live up to expectations in someone else's eyes and their identity is damaged by their own fault; (10) Compassion: a party is moved by another's suffering and wants to help them; (11) Happiness: a party is making progress toward their goals; (12) Hope: a party thinks something bad is going to happen but they want something better to happen and believe there is something they might do to make that happen; (13) Love: a party has affection for other people who may or may not be identified; (14) Pride: a party is able to take credit for something they did that they value; (15) Relief: a party has been experiencing a negative emotion and the situation changes for the better.²⁹

These emotions may be displayed verbally or through facial or physical expression, nonverbal approval or disapproval, withdrawal, avoidance, threat displays, paralinguistic or nonverbal vocal markers such as vocal withdrawal, hiding behaviors, and disorganization of thought leading to disfluency; overly soft tone, hesitations, self-interruptions, filled pauses, long pauses, silences, stammering, stuttering, mumbling, laughed words and the like.³⁰ The foregoing is not an exhaustive list but rather a start to a discussion on the question of communication and emotions within the mediation. Every mediator appreciates the challenges that may present themselves in this regard and this includes (1) emotional communication is complex; (2) cultural differences in emotion and expression; (3) strategic versus spontaneous emotional communication; and (4) the risks of emotional communication.³¹

4. The Role of the Mediator in the Process & Practice of Mediation:

As a precaution at all times, it is important to consider throughout the mediation that though there are many similarities different cultures provide differing social structures for what is an acceptable display of emotions and where dealing with disputants, advocates and interested parties it is critical to consider beforehand what these may be.

²⁹ Margaret S. Hermann Supra Ibid Note No.22 pg.277 - 305

³⁰ Margaret S. Hermann Supra Ibid Note No.22 pg.277 - 305

³¹ Margaret S. Hermann Supra Ibid Note No.22 pg.277 - 305

4.1 Pre-Mediation & The Preliminary Meeting:

This comprises the introductory meeting stage when the Mediator seeks to gain the parties and their representatives' trust. This stage primarily comprises (1) describing and explaining the mediator's role as a neutral; (2) emphasizing the confidentiality and informality of the process; (3) outlining the chronology of the process; (3) seeking to understand the broad strokes of the dispute by calling upon each disputant to describe the dispute from his or her own perspective; (4) in the event that mediation advocates are present they are often advised to allow their clients take a lead in the discussions. As mediation evolves however, mediators are encouraging mediation advocates to play an active role in testing realities within the legal framework; (5) encouraging disputants to work together to develop options for resolution which could include creative approaches not available within the adversarial system; (6) emphasizing that all participants, and specifically participants with decision making authority, are required to attend all mediation sessions and that when there they are required to treat one another with respect throughout the process.³²

From the foregoing it is self-evident that the mediator's primary role at the planning stage is to create a safe space where individuals feel protected and respected to enable them engage freely and importantly to get the parties to give a firm affirmation of their participation in the process. This will ordinarily entail having the parties execute an agreement to mediate and where necessary a non-disclosure agreement or other overt expression that they will maintain confidentiality. Within the Kenyan court annexed program the documentation to be executed comprises a statement of understanding as well as case summaries.³³

4.2 Mediation Sessions & Caucusing:

Mediation sessions may differ markedly but the critical issues to consider include ensuring that disputant parties who have the authority and capacity to resolve the matter are present during the mediation session. Once present in the mediation session considerations including the seating arrangements may have a bearing on the outcome of the mediation and it is therefore important that this

³² Ellen A Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence* (1998) 82 Marq L Rev 155 at pg.163. Available on Heinonline [Last accessed on 26 June 2021]

³³ Practice Directions on Court Annexed Mediation (Gazette Notice No.7263 of 2018)

gives the parties a feeling of fairness and due consideration.³⁴ Ultimately though, the primary role of the mediator is to ensure that the parties leave the mediation with a feeling that the Mediator was neutral, trustworthy, warm and competent and that s/he (1) treated the disputants with respect and dignity; (2) understood the issues; and (3) was interested in their dispute. To achieve this the Mediator requires to use the array of communication tools, skills and techniques outlined above so that (1) the mediation session is thorough and not hurried; (2) the session gives each of the parties an opportunity to tell their story; (3) provides a platform to explore issues; (4) utilizes language and an approach that is understandable; and (4) ultimately permits parties to have an ultimate say in the control over the process as well as the outcome.³⁵

Where emotions run high or are otherwise counterproductive the caucus becomes a very useful tool enabling the Mediator to provide a safe confidential space for these to be vented but also creating an incubator to seek solutions.³⁶ In actual fact separate meetings which is what caucuses are a communication technique that reduces psychological pressure on the disputants affording the parties an opportunity to consider and focus on real ways of resolving their conflict.³⁷

5. Conclusion

Conflict generally finds its roots in communication or miscommunication as the case may be. The mediator participating as a facilitator in a self-determination process will of necessity have to deal with emotions and communication breakdown at one time or another. This therefore behooves the mediator to equip themselves with communication skills and techniques that will enable them manage emotion within the process and practice of mediation. Literacy and competency in this area will enable the mediator manage all stages of the mediation process with competency by keeping the parties at

³⁴ Samuel A Bryant, *Seating Arrangements in Mediation* (2015) 5 Resolved: J Alternative Dispute Resolution 125 Available on Heinonline [Last accessed on 27 June 2021]

³⁵ Margaret S. Hermann Supra Ibid Note No.22 pg.277 - 305

³⁶ PON Staff, *The Mediation Process and Dispute Resolution: Understand the 6 steps necessary in the mediation process* (19th April 2021) Daily Blog Program on Negotiation Harvard Law School. Available at <https://www.pon.harvard.edu/daily/mediation/mediation-as-problem-solving/> [Last accessed on 27 June 2021]

³⁷ Claudiu Ignat, *Effective Techniques for Approaching Communication in Mediation* (2019) 12 JL & Admin Sci 83 Available on Heinonline [Last accessed on 27 June 2021]

ease, enabling them to feel that they are part of fair process and this will enable the mediator steer them to a mutually acceptable resolution of their conflict. The competencies and skills available are an infinite construct and the mediator will require to adjust these and integrate them into each mediation they undertake mandating a plural approach to mediation.

Bibliography:

Arghavan Gerami, *Bridging the theory-and-practice gap: Mediator power in practice* (2009) 26 Conflict Resol Q 433. Available on Heinonline [Last accessed on 26 June 2021]

Claudiu Ignat, *Effective Techniques for Approaching Communication in Mediation* (2019) 12 JL & Admin Sci 83 Available on Heinonline [Last accessed on 27 June 2021]

Dorothy J Della Noce, *From Practice to Theory to Practice: A Brief Retrospective on the Transformative Mediation Model* (2004) 19 Ohio St J on Disp Resol 925 @pg.928. Available on Heinonline. [Last accessed on 27 June 2021]

Ellen A Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence* (1998) 82 Marq L Rev 155 at pg.163. Available on Heinonline [Last accessed on 26 June 2021]

Eric M. Runesson & Marie Lawrence Guy, *Mediating Corporate Governance Conflicts & Disputes*, Global Corporate Governance Forum (2007) International Finance Corporation. Available at https://www.ifc.org/wps/wcm/connect/e50f6541-0df6-4c87-8c15-574865e189da/Focus4_Mediation_12.pdf?MOD=AJPERES&CVID=jtCwurJ [Last accessed on 26 June 2021]

Joel Lee, *A Mediator's Journey – Reflections on Age* (15 June 2016) National University of Singapore – Faculty of Law. Available at <http://mediationblog.kluwerarbitration.com/2016/06/15/a-mediators-journey-reflections-on-age/> [Last accessed on 26 June 2021]

Jonathan Crowe, *Two Models of Mediation Ethic'* (2017) 39 Sydney L Rev 147. Available at Heinonline. [Last accessed on 26 June 2021]

Kariuki Muigua, *Alternative Dispute Resolution and Article 159 of the Constitution* (2018) @pg.9 Available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf> Last accessed on 10 July 2021

Kariuki Muigua, *Making Mediation Work for All Understanding the Mediation Process* (2019)7(1) Alternative Dispute Resolution Process pg.120

Katie Shonk, *Types of Mediation: Choose the Type Best Suited to Your Conflict* (12 April 2021) Harvard Law School, Program on Negotiation, Daily Blog. Available at <https://www.pon.harvard.edu/daily/mediation/types-meditation-choose-type-best-suited-conflict/> Last accessed on 10 July 2021

Kimberlee K. Kovach & Lela P. Love, *Evaluative" Meditation Is An Oxymoron*, 14 *Alternatives* 31 (1996). Available at: <https://larc.cardozo.yu.edu/faculty-articles/280> [Last accessed on 26 June 2021]

Lawrence Susskind, *Arbitration vs. Mediation: The Definition of Mediation as a Problem Solving Process* (3rd May 2021) Daily Blog Program on Negotiation Harvard Law School. Available at <https://www.pon.harvard.edu/daily/mediation/mediation-as-problem-solving/> [Last accessed on 26 June 2021]

Margaret S. Hermann, *The Blackwell Handbook of Mediation: Bridging Theory, Research, and Practice* (2006) Blackwell Publishing Limited pg.277

Practice Directions on Court Annexed Mediation (Gazette Notice No.7263 of 2018)

PON Staff, *The Mediation Process and Dispute Resolution: Understand the 6 steps necessary in the mediation process* (19th April 2021) Daily Blog Program on Negotiation Harvard Law School. Available at <https://www.pon.harvard.edu/daily/mediation/mediation-as-problem-solving/> [Last accessed on 27 June 2021]

Riya Sehgal, *Significance of Communication in Mediation* (3 June 2020) Available at <https://viamediationcentre.org/readnews/MzY5/Significance-of-communication-in-meditation> [Last accessed on 27 June 2021]

Samuel A Bryant, *Seating Arrangements in Mediation* (2015) 5 *Resolved: J Alternative Disp Resol* 125 Available on Heinonline [Last accessed on 27 June 2021]

Scott Jacobs and Mark Aakhus, *What mediators do with words: Implementing three models of rational discussion in dispute mediation* (2002) 20 *Conflict Resol Q* 177 @pg.185. Available on Heinonline [Last accessed on 26 June 2021]

Spencer, David, Brogan & Michael, *Mediation Law and Practice - Mediation: Its Definition and History*, (2007) pg.3 – 41 @pg.31 Cambridge University Press. Available at <https://doi.org/10.1017/CBO9780511811005> [Last accessed on 26 June 2021]

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

Tricia S. Jones & Andrea Bodtker, *Mediating with Heart in Mind: Addressing Emotion in Mediation Practice* (July 2001) *Negotiation Journal* Volume 17, pages217–244. Available at <https://link.springer.com/article/10.1023/A:1013283710190> [Last accessed on 27 June 2021]

Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation* (2000) Mediate.com. Available at https://www.rchss.sinica.edu.tw/cibs/law/1.%20Monthly%20Seminar%20Since%2008/Papers/2009/20090211/ChenChieh%20Ting_Styles%20of%20Mediation_%20Facilitative,%20Evaluative,%20and%20Transformative%20Mediation.pdf Last accessed on 7 February 2021

Towards Effective Peacebuilding and Conflict Management in Kenya

*By: Kariuki Muigua**

Abstract

Sustainable peace is considered to be an important ingredient of sustainable development and this is also acknowledged under Sustainable Development Goal (SDGs) 16 which calls for promotion of peaceful and inclusive societies. While Kenya has been making some notable steps towards peacebuilding and effective conflict management, the country is still awash with reports of both violent and non-violent conflicts, a hindrance to achievement of sustainable development. This paper critically discusses peacebuilding and conflict management in Kenya. It offers some recommendations on how the country can move closer to achieving sustainable peace for all citizens through effective peacebuilding and conflict management.

1. Introduction

Kenya's Vision 2030¹ is grounded on three development pillars namely: economic, social and political pillars.² The Social Pillar of the Vision 2030 seeks to invest in the people where it has been pointed out that 'Kenya's journey towards widespread prosperity also involves the building of a just and cohesive society that enjoys equitable social development in a clean and secure environment'.³ Notably, the Political pillar of Vision 2030 also envisions "a democratic political system that is issue based , people-centred, result-oriented and accountable to the public" and 'a country with a democratic system reflecting the aspirations and expectations of its people, in which equality is entrenched, irrespective of one's race, ethnicity, religion, gender or socio-economic

**PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law; CASELAP [May, 2021].*

¹Republic of Kenya, Vision 2030 (Government Printer, Nairobi, 2007) <<http://vision2030.go.ke/>> accessed 1 May 2021.

² 'About Vision 2030 | Kenya Vision 2030' <<http://vision2030.go.ke/about-vision-2030/>> accessed 1 May 2021.

³ 'Social Pillar | Kenya Vision 2030' <<http://vision2030.go.ke/social-pillar/>> accessed 1 May 2021.

status; a nation that not only respects but also harnesses the diversity of its people's values, traditions and aspirations for the benefit of all'.⁴

It is worth pointing out the above inspirations are greatly linked to peacebuilding efforts, as also envisaged under United Nations 2030 Agenda for Sustainable Development (SDGs)⁵ which 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".⁶ In addition, SDGs provide that "the new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions".⁷ In line with the foregoing, SDG 16 is the substantive goal dedicated to peace and it provides that States should 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.⁸

While Kenya's efforts towards realization of sustainable development Agenda as far as economic development and even some of the social aspirations are concerned are quite commendable,⁹ the same cannot be said about the social pillar, and particularly, peacebuilding efforts. For instance, it has been observed that 'Kenya is a large multi-ethnic country, with over 40 different ethnic groups and many overlapping conflicts which range from high levels of sexual and gender-based violence and of intercommunal

⁴ 'Foundation for The Pillars | Kenya Vision 2030' <<https://vision2030.go.ke/enablers-and-macros/>> accessed 1 May 2021.

⁵ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁶ Ibid, Preamble.

⁷ Ibid, para. 35.

⁸ Ibid, SDG 16.

⁹ 'Kenya Making Steady Progress towards Attainment of SDGs, President Kenyatta Says | The Presidency' <<https://www.president.go.ke/2019/09/25/kenya-making-steady-progress-towards-attainment-of-sdgs-president-kenyatta-says/>> accessed 1 May 2021; 'Lessons From the South: Towards Sustainable Development a Green Economy in Kenya | Youthpolicy.Org' <<https://www.youthpolicy.org/blog/sustainability/kenya-green-economy-transition/>> accessed 1 May 2021; James Macharia, 'Sustainable Development in Kenya' [2019] *Horizons: Journal of International Relations and Sustainable Development* 172; 'Sustainable Development in Kenya' (CIRSD) <<http://www.cirsd.org/en/horizons/horizons-winter-2019-issue-no-13/sustainable-development-in-kenya>> accessed 1 May 2021.

violence; low levels of persistent violence; cycles of election-related violence; and increasing numbers of terrorist attacks'.¹⁰ The high levels of violence in Kenya have been attributed to a range of factors including: ethnic intolerance; border conflicts; political party zoning; competition over land and other resources; proliferation of small arms; weak security; and poverty, underdevelopment, and marginalisation.¹¹

Existing literature on causes of conflict has highlighted the fact that there is not a single developmental variable that causes conflict, but many variables that foster violence when combined in specific contexts and this may be in relation to issues such as:

*Globalisation and the transformation of societies: The first stage of democratization, when pressure is exerted on authoritarian governments, is often accompanied by violence; Economic growth and income: Economic growth may increase the risk of armed conflict in very poor economies, but decrease this risk in richer economies; Poverty and inequality: A simple link between each of these factors and conflict has been questioned as each context involves specific, complex variables; Resources: Whether environmental conflict becomes violent depends largely on the government's environmental policy. The 'war economy' debate suggests that war may be seen as an alternative way of generating profit, power and protection; and aid: The aid system can inadvertently exacerbate conflict, as it did in Rwanda, where some have gone further to suggest that donors may use aid allocation as a political instrument.*¹²

While conflict has been defined variously by different scholars, some of the most comprehensive definitions include: conflict is a struggle over values and claims to scarce status, power and resources in which the aims of the conflicting parties are to injure or eliminate their rivals; conflict is a particular relationship between states or rival factions within a state which implies subjective hostilities or tension manifested in subjective

¹⁰ 'Conflict Analysis of Kenya' (GSDRC) <<https://gsdrc.org/publications/conflict-analysis-of-kenya/>> accessed 1 May 2021.

¹¹ Ibid.

¹² Thania Paffenholz, '19 Understanding the Conflict–Development Nexus and the Contribution of Development Cooperation to Peacebuilding1' [2008] Handbook of conflict analysis and resolution 272<<https://gsdrc.org/document-library/understanding-the-conflict-development-nexus-and-the-contribution-of-development-cooperation-to-peacebuilding/>> accessed 3 May 2021.

economic or military hostilities.¹³ While there are two broad categories of conflicts, that is, on the one hand, internal conflicts (or intra- states conflict) as one in which the governmental authorities of a state are opposed by groups within that state seeking to overthrow those authorities with force of arms or one in which armed violence occurs primarily within the borders of a single states, and on the other hand, international conflicts or interstate conflicts which is between two or more nations involving forces of more than one state¹⁴, Kenya has often struggled with internal conflicts mainly relating to ethnic clashes influenced by ethnic diversity and the provision of public goods, natural resources scarcity or abundance as well as political influence,¹⁵ with a few international ones.¹⁶ The conflicts exacerbating situation has also been attributed to ‘weak or non-existent structures and institutions for conflict prevention and response’.¹⁷ This has often dragged the country in achieving its development goals and sustainability in all spheres of life.

It is against this background that this paper critically evaluates the peacebuilding efforts and conflict management initiatives in Kenya and makes recommendations on how the country can achieve its sustainable peace goals of “building peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance

¹³ AJ Olaosebikan, ‘Conflicts in Africa: Meaning, Causes, Impact and Solution’ (2010) 4 African Research Review 549, 550-551.

¹⁴ Ibid, 551.

¹⁵ Kenya Human Rights Commission, *Maasive Internal Displacements in Kenya Due to Politically Instigated Ethnic Clashes* (Kenya Human Rights Commission 2007); see also Eric Thomas Ogwora, ‘Electoral Bribery and Corruption: A Deterrent and a Game Changer towards Democratic Process and Fair Election in Kenya’ (2017) 1 Journal of Popular Education in Africa; Caroline Elkins, ‘What’s Tearing Kenya Apart? History, for One Thing’ [2008] Washington Post; Beneah M Mutsotso, ‘The Boundary Shifters of North Western Kenya’; Dominic Burbidge and Nic Cheeseman, ‘Trust, Ethnicity and Integrity in East Africa: Experimental Evidence from Kenya and Tanzania’ (2017) 2 Journal of Race, Ethnicity and Politics 88.

¹⁶ ‘Kenya Denies Role in Somalia’s Internal Conflict | Voice of America - English’ <<https://www.voanews.com/africa/kenya-denies-role-somalias-internal-conflict>> accessed 8 May 2021; Deutsche Welle (www.dw.com), ‘Stability at Risk as Somalia and Kenya Spat over Sea Border | DW | 15.03.2021’ (*DW.COM*) <<https://www.dw.com/en/kenya-somalia-border-dispute-threatens-stability/a-56879109>> accessed 8 May 2021; ‘Summaries | Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) | International Court of Justice’ <<https://www.icj-cij.org/en/case/161/summaries>> accessed 8 May 2021;

¹⁷ Lillian Mworira and J Ndiku, ‘Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies’, 163.

at all levels and on transparent, effective and accountable institutions”.¹⁸ The paper makes recommendations based on a conflict theory that advocates for non-violent and creative conflict resolution mechanisms.¹⁹

2. Peacebuilding, Conflict Management and Development

Arguably, ‘development policies should be an integral part of the peacebuilding agenda’.²⁰ 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’.²¹ 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’.²²

As already pointed out, the United Nations 2030 Agenda for Sustainable Development (SDGs)²³ 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”’.²⁴

Some scholars have argued that ‘comparative studies show that development and peacebuilding must be integrated (not just linked) at an early stage – for example by

¹⁸ see para. 35, UN 2030 Agenda for Sustainable Development Goals.

¹⁹ Veronique Dudouet, ‘Nonviolent Resistance and Conflict Transformation in Power Asymmetries’ [2008] Berghof Center for Constructive Conflict Management; ‘Principles Of Conflict Resolution’ <<https://www.hawaii.edu/powerkills/TJP.CHAP10.HTM>> accessed 8 May 2021; ‘Theories of Conflict Resolution and Their Applicability: To Protracted Ethnic Conflicts on JSTOR’ <<https://www.jstor.org/stable/44481352?seq=1>> accessed 8 May 2021; Tukumbi Lumumba-Kasongo, ‘Contemporary Theories of Conflict and Their Social and Political Implications’ [2017] *Peace, Security and Post-Conflict Reconstruction in the Great lakes Region of Africa*. Oxford: African Book Collective 29.

²⁰ ‘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 2021.

²¹ 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 2021.

²² *Ibid.*, 3.

²³ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

²⁴ *Ibid.*, Preamble.

including the political context in development policy and practice in conflict-affected fragile states and by addressing the structural causes of conflict'.²⁵

Notably, development and more so, sustainable development, is a multifaceted concept that requires to achieve certain milestones in various sectors, such as social, political, environmental and economic spheres.²⁶ 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).²⁷

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.²⁸ It has been argued that development and peacebuilding 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.²⁹ 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.³⁰ In

²⁵ Thania Paffenholz, '19 Understanding the Conflict–Development Nexus and the Contribution of Development Cooperation to Peacebuilding1' [2008] Handbook of conflict analysis and resolution 272 <<https://gsdrc.org/document-library/understanding-the-conflict-development-nexus-and-the-contribution-of-development-cooperation-to-peacebuilding/>> accessed 3 May 2021.

²⁶ 'Social Development for Sustainable Development | DISD' <<https://www.un.org/development/desa/dspd/2030agenda-sdgs.html/>> accessed 8 May 2021; 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.

²⁷ 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.

²⁸ Bernard Wood, 'Development Dimensions of Conflict Prevention and Peace-Building' [2001] UNDP. (June).

²⁹ Thania Paffenholz, '19 Understanding the Conflict–Development Nexus and the Contribution of Development Cooperation to Peacebuilding1' [2008] Handbook of conflict analysis and resolution 272.

³⁰ 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 2021.

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.³¹

3. Peacebuilding and Conflict Management in Africa: Continental Status

There have been frequent conflicts across the African continent, which are fuelled by various factors, including but not limited to natural resources, fight for political control, poverty, negative ethnicity, religion, environmental causes, and external influence, among others.³² It is also worth noting that some of the frequent ethnic conflicts have been attributed to the former colonial masters where, colonial authorities drew up local and national territorial boundaries in Africa based on a rather simplistic understanding of the nature of ethnic communities, thus forcing into political entity people who lived apart, separating people who lived together undermining the natural process of state creation and nation building.³³ This has arguably been a major source of conflict among communities in some African countries, such as Nigeria.³⁴

The African Union observes that ‘in 2013, during the 50th Anniversary of the OAU/AU, African Heads of State and Government made a Solemn Declaration committing to tackle head-on the scourge of violent conflict in Africa and pronounced their firm determination to achieve the noble goal of a conflict-free Africa, thereby making peace

³¹ Ibid.

³² ‘The Environmental Challenges in Sub Saharan Africa’ <<http://web.mit.edu/africantech/www/articles/EnvChall.htm>> accessed 8 May 2021; Macartan Humphreys, ‘Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms’ (2005) 49 *Journal of conflict resolution* 508; AJ Olaosebikan, ‘Conflicts in Africa: Meaning, Causes, Impact and Solution’ (2010) 4 *African Research Review* 549; Huma Haider, *Conflict analysis of North Eastern Kenya. K4D Emerging Issues Report* 36. Brighton, UK: Institute of Development Studies, 15 <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15570/EIR%2036_Conflict_analysis_of_Northern_Kenya.pdf?sequence=1&isAllowed=y> accessed 8 May 2021.

³³ Lillian Mworira and J Ndiku, ‘Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies’, 162.

³⁴ Ibid, 162-163; see also Simone Datzberger, ‘Civil Society as a Postcolonial Project: Challenging Normative Notions in Post-Conflict Sub-Saharan Africa’, *Negotiating Normativity* (Springer 2016).

a reality for African people, ridding the continent of wars, violent conflicts, human rights violations, humanitarian crises as well as preventing genocide'.³⁵

African Union's *Agenda 2063*, Africa's blueprint and master plan for transforming Africa into the global powerhouse of the future³⁶, seeks to achieve a peaceful and secure Africa.³⁷ It is noteworthy that the continent will not make any tangible progress in peacebuilding unless individual states commit to work towards achieving sustainable peace in their territories.

4. Peacebuilding and Conflict Management in Kenya: Towards Effective Peacebuilding and Conflict Management

4.1. Addressing Poverty, Ethnic and Social stratification

As already pointed, some of the conflicts in Kenya have been attributed to ethnic clashes as well as poverty and marginalisation of some parts of the country by successive governments.³⁸ It has been observed that 'the politicized nature of ethnicity in Kenya, and the fact that both elections and land tenure are closely associated with ethnic identity, are highlighted as key factors explaining the prevalence of violent communal conflict', with the four main drivers of conflict being: electoral politics, cattle raiding, local resources, and boundaries and local authority.³⁹ Some conflicts among neighbouring communities in Kenya such as the Turkana and Pokot who have had

³⁵ African Union, 'Silencing the Guns: Creating Conducive Conditions for Africa's Development' (*The East African*) <<https://www.theeastafrican.co.ke/tea/sponsored/silencing-the-guns-creating-conducive-conditions-for-africa-s-development-1435754>> accessed 8 May 2021.

³⁶ 'Agenda 2063: The Africa We Want. | African Union' <<https://au.int/en/agenda2063/overview>> accessed 8 May 2021.

³⁷ African Union, *Agenda 2063*, 2 < https://au.int/sites/default/files/documents/33126-doc-03_popular_version.pdf> accessed 8 May 2021.

³⁸ Friedrich Elbert Stiftung, 'Regional Disparities and Marginalisation in Kenya' [2012] Nairobi: Elite PrePress; Emma Elfversson, 'Patterns and Drivers of Communal Conflict in Kenya' in Steven Ratuva (ed), *The Palgrave Handbook of Ethnicity* (Springer 2019) <https://doi.org/10.1007/978-981-13-2898-5_50> accessed 8 May 2021.

³⁹ Emma Elfversson, 'Patterns and Drivers of Communal Conflict in Kenya' in Steven Ratuva (ed), *The Palgrave Handbook of Ethnicity* (Springer 2019) <https://doi.org/10.1007/978-981-13-2898-5_50> accessed 8 May 2021; Anne R Gakuria, 'Natural Resource Based Conflict among Pastoralist Communities in Kenya' (PhD Thesis, University of Nairobi 2013); Lillian Mworira and J Ndiku, 'Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies'.

periodic conflicts have been attributed to scarcity and competition over pasture and water as well as border disputes, and often compounded by the minimum routine interaction and communication between the two communities.⁴⁰

Poverty is a major contributing factor to insecurity and instability especially in the rural areas where communities mainly rely on scarce land based natural resources which are affected by climate change and population growth, among others. It has been observed that 'rural poverty can be caused by a combination of: living and farming in unfavourable conditions (climate, soils, access to markets, small land holdings); lack of resource access rights, legal protection or recognition; lack of ecosystem services (provisioning, regulating, cultural/spiritual, regenerative); lack of income opportunities (on- or off-farm) in local economies; and lack of investment in the (few) opportunities that exist for market-based ventures.'⁴¹

Social stratification in any society may lead to bottled up anger and bitterness which is a recipe for violent and non-violent conflicts.⁴² Despite the constitutional guarantee on freedom from non-discrimination⁴³, protection of the minority and marginalised groups including women through affirmative action,⁴⁴ it is a documented fact that inequalities

⁴⁰ Lillian Mworira and J Ndiku, 'Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies', 163.

⁴¹ Meine van Noordwijk, 'Integrated Natural Resource Management as Pathway to Poverty Reduction: Innovating Practices, Institutions and Policies' (2019) 172 *Agricultural Systems* 60, 61.

⁴² Ben Fine, *Theories of Social Capital: Researchers Behaving Badly* (Pluto press 2010); Philip Arestis, Aurelie Charles and Giuseppe Fontana, 'Power, Intergroup Conflicts and Social Stratification in the United States: What Has the Global Crisis Taught Us?' (2015) 73 *Review of Social Economy* 370.

⁴³ Article 27, Constitution of Kenya 2010.

⁴⁴ *Article 11 recognizes culture as the foundation of the nation and obliges the state to promote all forms of cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage. The state is also obliged to recognize the role of indigenous technologies in the development of the nation.*

Article 56. Minorities and marginalised groups

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

(a) participate and are represented in governance and other spheres of life;
(b) are provided special opportunities in educational and economic fields;
(c) are provided special opportunities for access to employment;
(d) develop their cultural values, languages and practices; and

are manifest in Kenya's economic, social and political arenas.⁴⁵ It has rightly been observed that 'a degree of equality in social, political, economic and cultural rights is essential for rebuilding the trust between the state and society and among social groups.'⁴⁶ It has also been suggested that there is a correlation between more inclusive and open models of negotiations and a higher likelihood that the outcome agreements will hold and prevent a relapse into conflict.⁴⁷

Under the Constitution of Kenya 2010, the devolved system of governance was meant to, *inter alia*, promote democratic and accountable exercise of power, and foster national unity by recognising diversity; give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; recognise the right of communities to manage their own affairs and to further their development; facilitate the

(e) have reasonable access to water, health services and infrastructure.

100. Promotion of representation of marginalised groups

Parliament shall enact legislation to promote the representation in Parliament of—

- (a) women;*
- (b) persons with disabilities;*
- (c) youth;*
- (d) ethnic and other minorities; and*
- (e) marginalised communities.*

177. Membership of county assembly

(1) A county assembly consists of—

- (c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;*

Article 204. Equalisation Fund

(1) There is established an Equalisation Fund into which shall be paid one half per cent of all the revenue collected by the national government each year calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.

(2) The national government shall use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.

⁴⁵ Jeremiah Owiti, 'Political Drivers of Inequality in Kenya' (2014) 57 Development 547, 548.

⁴⁶ Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UN Women 2010), 3.

⁴⁷ *Ibid*, 3.

decentralisation of State organs, their functions and services, from the capital of Kenya, Nairobi; and enhance checks and balances and the separation of powers.⁴⁸ While devolution has achieved commendable steps towards attaining equality and equity within the rural Kenya⁴⁹, the poverty levels and social, political and economic inequalities in the country are still high.⁵⁰ Rampant corruption and misallocation of political and economic resources in Kenya and especially at the county levels of governance may be some of the main factors that may be contributing to the slow pace of poverty alleviation despite the proximity of the rural areas to the devolved governance.⁵¹

There is need for stakeholders to go back to the drawing board on why devolution was introduced by the drafters of the Constitution while also ensuring that the national values and principles of governance are applied and upheld at both levels of governance, and these include: a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.⁵² Chapter six of the Constitution on leadership and integrity, Chapter Twelve on Public Finance, Values and principles of public service under Chapter Thirteen of the Constitution on Public service, *Leadership and Integrity Act*, 2012⁵³ should also be strictly enforced to ensure that there is real development at the grassroots in efforts to eradicate abject poverty. This will also potentially address the

⁴⁸ George Nyabuga, 'Devolved Power: A Critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya' (2017) 42 Africa Development / Afrique et Développement 105, 107.

⁴⁹ Michelle D'Arcy, 'Kenya Illustrates Both the Promise as Well as the Pitfalls of Devolution' (*The Conversation*) <<http://theconversation.com/kenya-illustrates-both-the-promise-as-well-as-the-pitfalls-of-devolution-96729>> accessed 8 May 2021.

⁵⁰ Brendon J Cannon and Jacob Haji Ali, 'Devolution in Kenya Four Years On: A Review of Implementation and Effects in Mandera County' (2018) 8 African Conflict and Peacebuilding Review 1.

⁵¹ Brendon J Cannon and Jacob Haji Ali, 'Devolution in Kenya Four Years On: A Review of Implementation and Effects in Mandera County' (2018) 8 African Conflict and Peacebuilding Review 1; George Nyabuga, 'Devolved Power: A Critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya' (2017) 42 Africa Development / Afrique et Développement 105.

⁵² Article 10, Constitution of Kenya 2010.

⁵³ Leadership and Integrity Act, No 19 of 2012, Laws of Kenya.

concerns on ethnic, nepotism and favouritism during employment of devolved governments' staff.⁵⁴

Some commentators have also explored the role of culture in causing ethnic conflicts especially within the North-Western region of Kenya, where cattle rustling between the Nilotic communities is the main cause of conflicts.⁵⁵ For instance, it has been argued that 'cattle rustling is a cultural aspect of the Pokot founded on their myth of origin and a belief that all cattle belong to them'.⁵⁶ While Article 11 of the Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation, the practice of such cultural activities should not violate constitutional provisions especially on the Bill of Rights. Arguably, there is a need for the stakeholders in peacebuilding to address this notion through education as an empowerment tool for more people within the community (both formal and informal education) as well as creating opportunities for alternative sources of livelihoods for these communities to supplement their income and hence have a sense of security as far as their livelihoods are concerned.

Notably, Peace Education Programme at primary and secondary schools' levels of study was introduced in 2008 whose overall goal was to promote peaceful co-existence among members of the school community hence contributing to peace and national cohesion in the country; and enhance the capacity of the education sector to promote peaceful

⁵⁴ Paul Olendo Ombanda, 'Nepotism and Job Performance in the Private and Public Organizations in Kenya' (2018) 8 International Journal of Scientific and Research Publications 474; see also Kefa Ruto Plimo, 'Assessing Determinants of Effective Human Resource Functions Devolution in County Government of West Pokot, Kenya' (PhD Thesis, COHRED-JKUAT 2017); Buagu Musazi Says, 'Ethnic Favouritism in Kenya and Uganda's Public Sector' (*Africa at LSE*, 1 August 2019) <<https://blogs.lse.ac.uk/africaatlse/2019/08/01/has-ethnic-favouritism-in-public-sector-hiring-in-kenya-and-uganda-been-exaggerated/>> accessed 8 May 2021; Mr Njagilreri and Wario Guyo, 'The Influence of the County Public Service Board (CPSB), on the Devolved Human Resources Governance in Kenya' (2018) 8 International Journal of Humanities and Social Science; Hamun A Jubase, 'Challenges of Human Resource Management in Wajir Public Service Board' (PhD Thesis, University of Nairobi 2018).

⁵⁵ David M Kimaiyo, 'Women Involvement in Cattle Rustling between the Marakwet and the Pokot Communities of North-Western Kenya' (Thesis, University of Nairobi 2016) <<http://erepository.uonbi.ac.ke/handle/11295/97405>> accessed 8 May 2021.

⁵⁶ Daniel Nganga, 'Culture as the Cause of Conflict: A Case Study in West Pokot District, Kenya' (2012) 6 Journal of Peace and Justice 51; see also Mutsotso, B. M., Kimaiyo, D., & Gaciuki, P., "The centrality of cattle in the social organization of the East Pokot pastoralists of North Western Kenya." *European Scientific Journal* 10, no. 8 (2014).

coexistence through conflict sensitive policies and programming.⁵⁷ The specific objectives of the programme include:

To promote conflict sensitive policies and programmes within the education sector; to create awareness among learners on the causes of conflict and how to constructively resolve them in their daily lives; to prepare learners to become good citizens in their communities, nation and the world and to equip them with skills that promote peace and human dignity at all levels of interaction; to use the classroom as a springboard through which global values of positive inter-dependence, social justice and participation in decision-making are learned and practiced; and to foster positive images that lead to respect for diversity to enable young people learn to live peacefully in diverse communities in the world.⁵⁸

This may be a good step towards restoring and achieving lasting and sustainable peace and cohesion among the warring communities and the country in general.

4.2. Joint and Participatory Efforts in Peacebuilding and Conflict Management

Peacebuilding for achievement of sustainable peace as a prerequisite for realising the sustainable development is an imperative that requires the concerted efforts of all groups of people in society.⁵⁹ It is important for State organs to acknowledge that peacebuilding and conflict management is and should be a joint effort involving all stakeholders. As such, their greatest efforts should be towards empowering the other relevant stakeholders to build capacity for sustainability. Within most indigenous communities, elders still play a vital role in conflict management and should thus be involved in peacebuilding efforts and conflict management. For instance, within Somali people of North Eastern Kenya, it has been observed that ‘traditional elders’ roles include negotiating application of customary law –an important source of conflict management,

⁵⁷ Kangethe, Mary Wanjiru. "The peace education programme in Kenya." *The Global Campaign for Peace Education* 121 (2015).

⁵⁸ Ibid.

⁵⁹ Office for ECOSOC Support and Coordination United Nations, *Achieving Sustainable Development and Promoting Development Cooperation: Dialogues at the Economic and Social Council* (UN 2008); ‘5 – Quest for Sustainable Peace and Development under Militarized Security Approaches’ (2030 Spotlight) <<https://www.2030spotlight.org/en/book/1730/chapter/5-quest-sustainable-peace-and-development-under-militarized-security-approaches>> accessed 9 May 2021.

conflict resolution and enforcement of peace agreements'.⁶⁰ However, elders can and have indeed been used to mobilize communities along ethnic lines and this can be a threat to sustainable peace.⁶¹ As such, it is suggested that the Government should work closely with the elected elders as well as religious leaders and positively empower them to ensure that they are only used as agents of peace and not divisive politics.

While it is widely acknowledged that violent conflict affects men and women in different ways, women and children are arguably the greatest victims in conflict situations.⁶² The disproportional burden borne by women is often attributed to the inequalities that exist between men and women in social, economic and political spheres.⁶³ Notably, Kenya ranks 109 out of 153 countries in the Global Gender Gap Report 2020, with a score of with significant inequalities between males and females in education attainment, health outcomes, representation in parliament, and labour force participation.⁶⁴ Arguably, these factors predispose women to greater losses and suffering during conflicts. They also make them vulnerable to recruitment to armed gangs such as Al-Shabaab which has been attacking Kenya frequently in the last several years. For instance, it has been observed that Al-Shabaab has been actively (and forcibly) recruiting women in Kenya, including through social media, religious indoctrination in schools, marriage, employment incentives, and abduction.⁶⁵ Just like men, their support for the terrorist group is informed by: ideology, grievances over socio-political and economic circumstances, among others, with economic pressures being an especially strong motive for women.⁶⁶ Considering that women have needs just like men which, if not met, may make women be used as tools off propagating violence and hatred, often to their detriment, women are regularly considered and should indeed be among the greatest stakeholders in peacebuilding and conflict management if sustainable peace is to be achieved.⁶⁷ Despite

⁶⁰ Huma Haider, *Conflict analysis of North Eastern Kenya*. K4D Emerging Issues Report36. Brighton, UK: Institute of Development Studies, 16.

⁶¹ *Ibid*, 16.

⁶² 'Gender in Fragile and Conflict-Affected Environments' (*GSDRC*) <<https://gsdrc.org/topic-guides/gender/gender-in-fragile-and-conflict-affected-environments/>> accessed 8 May 2021.

⁶³ Iffat Idris, *Gender, countering violent extremism and women, peace and security in Kenya*. K4D Factsheet. Brighton, UK: Institute of Development Studies <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15832/K4D_Factsheet_Ke_nya_2.4.pdf?sequence=1&isAllowed=y> accessed 8 May 2021.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

⁶⁶ *Ibid*.

⁶⁷ Clare Castillejo, 'Building a State That Works for Women: Integrating Gender in to Post-Conflict State Building' [2011] Documentos de Trabajo FRIDE 1; 'Why Women Should Have

this, statistics from many countries around the globe show that the number of women in decision-making positions remains relatively small.⁶⁸ It has also been observed that the underrepresentation of women at the peace table is much more pronounced compared to other public decision-making roles, where though women are still underrepresented the gap has been steadily narrowing.⁶⁹ Ironically, this persists despite the fact that women have been closing the gap in professions and roles that typically dominate peace talks: politician, lawyer, diplomat and member of a party to armed conflict.⁷⁰

The United Nations Security Council *Resolution 1325* (2000)⁷¹ in its Preamble reaffirms the important role of women in the prevention and resolution of conflicts and in peace-building, and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution.⁷² Kenya's *National Action Plan for the Implementation of United Nations Security Council Resolution 1325 and Related Resolutions*⁷³ (KNAP) was titled 'Kuhusisha Wanawake ni Kudumisha Amani' ('to involve women is to sustain peace') and acknowledges the changing nature of insecurity and incorporates a human security approach whose focus is on the protection of individual citizens. In addition, this broader paradigm of human security was meant to expand the meaning of security to include secure livelihoods, environmental protection, and access to resources.⁷⁴ The *Action Plan* also recognizes that security threats include social, economic, and environmental factors

a Greater Role in Peacebuilding' (*World Economic Forum*) <<https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/>> accessed 8 May 2021.

⁶⁸ 'Why Women Should Have a Greater Role in Peacebuilding' (*World Economic Forum*) <<https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/>> accessed 8 May 2021; 'Facts and Figures: Women's Leadership and Political Participation | What We Do' (*UN Women*) <<https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures>> accessed 8 May 2021.

⁶⁹ Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UN Women 2010), 3.

⁷⁰ *Ibid*, 3.

⁷¹ UN Security Council, *Security Council resolution 1325 (2000) [on women and peace and security]*, 31 October 2000, S/RES/1325 (2000).

⁷² *Ibid*, Preamble.

⁷³ Republic of Kenya, *National Action Plan for the Implementation of United Nations Security Council Resolution 1325 and Related Resolutions*, 2016–2018 <<http://peacewomen.org/sites/default/files/Kenya%20NAP-with-cover-final.pdf>> accessed 8 May 2021.

⁷⁴ *Ibid*, 11-12.

and women's vulnerability is exacerbated by unequal access to resources, services, and opportunities.⁷⁵ The Kenya National Action Plan was to be executed over a three-year period (2016–2018) and was meant to provide a comprehensive approach to the implementation of UNSCR 1325, and also enhance coordination among the relevant actors, raise awareness among stakeholders, and increase accountability among actors responsible for its implementation.⁷⁶ The KNAP also aimed to mainstream UNSCR 1325 into national conflict resolution, conflict prevention, peace promotion, and peacebuilding strategies contained in prior agreements, including the 2008 National Accord and its implementing agreements, the National Peace Policy, and relevant gender policies, among others.⁷⁷ KNAP I mainly focused on equal protection of individual citizens and endeavoured to better understand and *address the root causes of socio-economic and political inequalities around peace and security issues*, designed around four pillars: Participation and Promotion, Prevention, Protection, and Relief and Recovery (Emphasis added).⁷⁸

The second *Kenya National Action Plan for the Advancement of United Nations Security Council Resolution 1325 on Women, Peace and Security 2020–2024*⁷⁹ which was launched in May 2020 focuses on key objectives, priority actions, expected outcomes, and interventions/responsibilities of relevant actors and stakeholders and also provides clear indicators, monitoring and evaluation benchmarks, and projected targets. It is also based on the above 4 pillars.⁸⁰ The KNAP II is a commendable step towards enhancing empowerment and greater participation of women in development and in peace, security, and disaster management.

Women can participate in peace processes as: mediators or as members of mediation teams; delegates of the negotiating parties; all-female negotiating parties representing a women's agenda; signatories; representatives of women's civil society with an observer role; witnesses; in a parallel forum or movement; gender advisers to mediators,

⁷⁵ Ibid, 12.

⁷⁶ Ibid, 13.

⁷⁷ Ibid, 14.

⁷⁸ Ibid.

⁷⁹ Republic of Kenya, *Kenya National Action Plan for the Advancement of United Nations Security Council Resolution 1325 on Women, Peace and Security 2020–2024* <<http://peacewomen.org/sites/default/files/KNAP-II-digital-30-Apr.pdf>> accessed 8 May 2021.

⁸⁰ Ibid, 14.

facilitators or delegates; or as members of technical committees, or a separate table or working group devoted to gender issues.⁸¹

It has been argued that while the full impact of women's participation on peace and security outcomes remains poorly understood, existing data shows how women's inclusion helps prevent conflict, create peace, and sustain security after war ends.⁸² Women's empowerment and gender equality are also associated with peace and stability in society.⁸³ Women's participation in peace talks is also associated with the following advantages: Women promote dialogue and build trust as conflict parties may see women as less threatening because they are typically acting outside of formal power structures and are not commonly assumed to be mobilizing fighting forces; Women bridge divides and mobilize coalitions; Women raise issues that are vital for peace; and women prioritize gender equality.⁸⁴

It is, therefore, important to ensure that women are empowered and included in peacebuilding and conflict management in Kenya⁸⁵, as a step towards building peaceful, cohesive and inclusive societies as part of the bigger sustainable development agenda.⁸⁶ The civil society as well as the private sector also have a role to play in peacebuilding and conflict management in Kenya. A past report focusing on the role of the private sector in peacebuilding within the context of Kenya's 2013 election cycle observed that

⁸¹ Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UN Women 2010), 5-10.

⁸² Marie O'Reilly, 'Why Women?' [2015] *Inclusive Security* 1, 3
<<https://www.almendron.com/tribuna/wp-content/uploads/2019/02/why-women-report-2017.pdf>> accessed 8 May 2021.

⁸³ *Ibid*, 4.

⁸⁴ *Ibid*, 7-9.

⁸⁵ 'How Women in Kenya Mobilised for Peace after Surviving Violence - Kenya' (*ReliefWeb*) <<https://reliefweb.int/report/kenya/how-women-kenya-mobilised-peace-after-surviving-violence>> accessed 8 May 2021.

⁸⁶ Kariuki Muigua, 'Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya' (2020) *Journal of cmsd* Volume 4(5)
< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3834364> accessed 8 May 2021; Katie Zanoni, 'Kenyan Girls as Agents of Peace: Enhancing the Capacity of Future Women Peacebuilders' (2017) 12 *Research in Comparative and International Education* 110; Irene Cherotich Loyatum, 'The Role of Women in Peace Building in Conflicting Society: The Case of West Pokot County, Kenya, 2000-2018' (PhD Thesis, United States International University-Africa 2019); Jeanne Izabiliza, 'The Role of Women in Reconstruction: Experience of Rwanda' [2003] Source unknown.

‘the private sector undertook a sustained, systematic, and comprehensive peacebuilding campaign that almost certainly contributed to the peaceful nature of the electoral process’, where the ‘private-sector engagement influenced key political actors, spread messages of peace across the country, brought together disparate sectors of Kenyan society, prevented incitement, and ensured a return to normalcy as challenges to electoral results worked their way through the courts’.⁸⁷ The report also documented the fact that ‘the motivations for business involvement included a desire to never go back to the dark days of 2007–08; a deep concern for the people with whom they did business; an acceptance of their mandate, especially in regard to providing uninterrupted service; the allure of, and pressure to exercise, the formidable power of a united business front; and, the fact that remaining aloof to developments that have an impact on their continued existence is bad for the sector’.⁸⁸

4.3. Addressing the Weak or Non-Existent Structures and Institutions for Peacebuilding, Conflict Prevention and Response

SDG 16 calls on State Parties to promote just, peaceful and inclusive societies. The associated relevant Targets require States to, *inter alia*: promote the rule of law at the national and international levels and ensure equal access to justice for all; by 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime; develop effective, accountable and transparent institutions at all levels; ensure responsive, inclusive, participatory and representative decision-making at all levels; broaden and strengthen the participation of developing countries in the institutions of global governance; ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements; strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime; and promote and enforce non-discriminatory laws and policies for sustainable development.⁸⁹ SDG

⁸⁷ Victor Owuor and Scott Wisor, ‘The Role of Kenya’s Private Sector in Peacebuilding: The Case of the 2013 Election Cycle’ [2014] Broomfield, CO: One Earth Future Foundation’ ii <<https://www.oefresearch.org/sites/default/files/documents/publications/kenyaprivatesectorreport-digital.pdf>> accessed 3 May 2021.

⁸⁸ Ibid, 26.

⁸⁹ Martin, ‘Peace, Justice and Strong Institutions’ (*United Nations Sustainable Development*) <<https://www.un.org/sustainabledevelopment/peace-justice/>> accessed 8 May 2021.

16 is premised on the fact that ‘sustainable development cannot be achieved without peace, stability, human rights and effective governance, based on the rule of law’.⁹⁰

It is worth pointing out that while some conflicts call for use of formal systems such as national courts to deal with them, especially where criminal activities are concerned, there is a need to explore and exploit non-violent and/or non-confrontational approaches, in the spirit of the 2010 Constitution of Kenya which ‘encourages of communities to settle land disputes through recognised local community initiatives consistent with this Constitution’⁹¹, and requires that ‘in exercising judicial authority, the courts and tribunals should be guided by, *inter alia*, the principles of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)’.⁹²

The drafters of the *National Land Policy 2009*⁹³ as well as the 2010 Constitution of Kenya also acknowledged that to address some of the protracted conflicts that have afflicted some parts of Kenya, there was a need to address what is popularly referred to as present or historical land injustices. The National Land Commission⁹⁴ and the Environment and Land Court⁹⁵ are the two main institutions that are charged with

⁹⁰ ‘Sustainable Development Goals | United Nations Development Programme’ <<https://www.undp.org/sustainable-development-goals#peace-justice-and-strong-institutions>> accessed 8 May 2021.

⁹¹ See Articles 60(1)(g) & 67(2)(f), Constitution of Kenya 2010.

⁹² Article 159(2) (c) & (3), Constitution of Kenya 2010; 159 (3): Traditional dispute resolution mechanisms shall not be used in a way that—(a) contravenes the Bill of Rights;(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law; Nairobi Centre for International Arbitration, *Alternative Dispute Resolution Policy*, Draft October 2019<<https://www.ncia.or.ke/wp-content/uploads/2019/10/DRAFT-NATIONAL-ADR-POLICY.pdf>> accessed 8 May 2021; *Mediation Bill, 2020*, Kenya Gazette Supplement No. 92 (National Assembly Bills No. 17).

⁹³ Republic of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy*, August, 2009 (Government Printer, Nairobi, 2009), para. 3.6.2.

⁹⁴ Article 67 (2)(e), Constitution of Kenya 2010; see also National Land Commission Act, No. 5 of 2012, Laws of Kenya. Revised Edition 2016 [2015], sec. 15; see also *National Land Commission Citation. (Investigation of Historical Land Injustices) Regulations, 2017*, Legal Notice No. 258, Kenya Gazette Supplement No. 154, 6th October, 2017, Laws of Kenya.

⁹⁵ Environment and Land Court Act, No. 19 of 2011, Laws of Kenya. Notably, Regulation 29 of the NLC (Investigation of Historical Injustices) Regulations 2017 stipulates as follows:

addressing this problem. It is important that land issues are addressed in ways that fully address the underlying issues that have often resulted in conflicts. This is because secure rights to land are important to the development of economic activities, capital accumulation, food security, and a wide variety of other socioeconomic benefits, all important for assurance of peace.⁹⁶

Indeed, in recognition of the important role that these Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs) can play in not only addressing internal conflicts but also doing so in ways that enhance sustainable peace rather than dividing people further as would be the case with adversarial court mechanisms⁹⁷, Kenya's Judiciary has been making strides towards promoting and encouraging their use in the country, while working closely with other stakeholders in the sector.⁹⁸ This is because, more often than not, the court process fails to address the underlying real issues that brought the conflict in the first place.⁹⁹ This has been

"A person aggrieved by the decision of the Commission may, within twenty-eight days of the publication of the decisions, appeal to the Court."

Regulation 3 of the NLC (Investigation of Historical Injustices) Regulations 2017 defines "Court" to mean the Environment and Land Court established under the Environment and Land Court Act, 2011 and includes other courts having jurisdiction on matters relating to land.

⁹⁶ Unruh, Jon. "Land rights and peacebuilding: challenges and responses for the international community." *International Journal of Peace Studies* (2010): 89-125, 89.

⁹⁷ Tanja Chopra, 'Reconciling Society and the Judiciary in Northern Kenya' [2008] Justice for the Poor and Legal Resources Foundation Trust Research Report.

⁹⁸ 'List of MAC Accredited Mediators as at 1st January 2021 – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/list-of-mac-accredited-mediators-as-at-1st-january-2021/>> accessed 8 May 2021; see also 'State of the Judiciary and the Administration of Justice Annual Report 2019 – 2020 – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/state-of-the-judiciary-and-the-administration-of-justice-annual-report-2019-2020/>> accessed 8 May 2021; 'Inside the Judiciary Magazine, Edition No. 15 – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/inside-the-judiciary-magazine-edition-no-15/>> accessed 8 May 2021; 'Court Annexed Mediation Virtual Dispute Resolution – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/court-annexed-mediation-virtual-dispute-resolution/>> accessed 8 May 2021; 'Judiciary Strategic Plan 2019 - 2023 – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/judiciary-strategic-plan-2019-2023/>> accessed 8 May 2021; Nairobi Centre for International Arbitration, *Alternative Dispute Resolution Policy*, Draft October 2019< <https://www.ncia.or.ke/wp-content/uploads/2019/10/DRAFT-NATIONAL-ADR-POLICY.pdf>> accessed 8 May 2021; *Mediation Bill, 2020*, Kenya Gazette Supplement No. 92 (National Assembly Bills No. 17).

⁹⁹ Tanja Chopra, 'Reconciling Society and the Judiciary in Northern Kenya' [2008] Justice for the Poor and Legal Resources Foundation Trust Research Report, 21<

attributed to the fact that since the official law is based on a different understanding of justice, it is rarely effective in creating stability and societies are, therefore, more interested in solving conflicts through informal means - although they may ask the police to trace their cattle and the local administration to help in negotiating peace.¹⁰⁰ Arguably, local leaders prefer to deal with the conflicts of their communities as they are convinced that they have better solutions than the state can provide.¹⁰¹ In *Geoffrey Muthinja Kabiru & 2 Others -vs- Samuel Munga Henry & 1756 Others (2015) eKLR*, the Court of Appeal stated as follows regarding use of ADR and TDRMs:-

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution." ...

Use of ADR and TDRM mechanisms in addressing ethnic tensions and other intergroup conflicts in Kenya has a potential to bring the country closer to attaining sustainable peace as a step towards achieving SDG 16.¹⁰² Indeed, the Draft *Alternative Dispute Resolution Policy*, 2019 has acknowledged that 'ADR, through its reconciliatory and non-adversarial nature is a major contributor to peace and cohesion in the country.¹⁰³ It also acknowledges that 'the rule of law is essential for democracy and economic growth and is the backbone of human rights, peace, security, and development'.¹⁰⁴

<http://documents1.worldbank.org/curated/en/590971468272735172/pdf/716920ESW0P1110ry0in0Northern0Kenya.pdf>> accessed 8 May 2021.

¹⁰⁰ Ibid, 21.

¹⁰¹ Ibid, 21.

¹⁰² K Muigua, 'Institutionalising Traditional Dispute Resolution Mechanisms and Other Community Justice Systems' [2017] Nairobi: Published online< <http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf>> accessed 8 May 2021.

¹⁰³ Nairobi Centre for International Arbitration, *Alternative Dispute Resolution Policy*, Draft October 2019, 4.

¹⁰⁴ Ibid, 8.

The importance of these mechanisms is also acknowledged in Kenya's *National Policy on Peace-building and Conflict Management, 2011*¹⁰⁵ which calls for capacity building through, *inter alia*, training various stakeholders in relevant areas such as alternative conflict resolution mechanisms.¹⁰⁶

It has been argued that where there have been harsh and violent conflicts, there is usually firstly the temporary management of the conflict; which typically involves negotiation, meditation and arbitration, and rests on leaders and elites, although it still requires support by the general population, while secondly, deeper, level involves reconciliation which requires change in the societal repertoire shared by society members.¹⁰⁷ This is because reconciliation involves the formation or restoration of genuine peaceful relationships between societies and that this requires extensive changes in the socio-psychological repertoire of group members in both societies.¹⁰⁸ In addition, reconciliation is associated with socio-psychological processes consisting of changes of motivations, goals, beliefs, attitudes and emotions by the majority of society members.¹⁰⁹ This is the kind of approach that is recommended for such conflicts as the one involving Pokot and Turkana communities, among others. It is, however, acknowledged this should be accompanied with poverty eradication projects by the State since poverty and limited sources of livelihood can aggravate competition for scarce natural resources thereby contributing to instability.¹¹⁰ The State's involvement in addressing natural resources scarcity through climate change mitigation measures as well as adopting a participatory approach to resource management can potentially help in alleviating poverty and consequently address the insecurities that these communities

¹⁰⁵ Republic of Kenya, *Kenya: National Policy on Peace-building and Conflict Management, 2011*, 11 December 2011 < <https://www.refworld.org/pdfid/5a7ad25f4.pdf> > accessed 8 May 2021.

¹⁰⁶ *Ibid*, see Chapter Five.

¹⁰⁷ Daniel Bar-Tal, 'Reconciliation as a Foundation of Culture of Peace', *Handbook on building cultures of peace* (Springer 2009), 363.

¹⁰⁸ *Ibid*, 365.

¹⁰⁹ *Ibid*, 365.

¹¹⁰ Noro Aina Andrimihaja, Matthias Cinyabuguma and Shanta Devarajan, 'Stop Conflict, Reduce Fragility and End Poverty: Doing Things Differently in Fragile and Conflict-Affected Situations'; Olsson, Lennart, Maggie Opondo, Petra Tschakert, Arun Agrawal, and Siri EH Eriksen. "Livelihoods and poverty." (2014); 'Poverty and Conflict' (*GSDRC*) <<https://gsdrc.org/professional-dev/poverty-and-conflict/>> accessed 8 May 2021; Jonathan Goodhand, 'Violent Conflict, Poverty and Chronic Poverty' [2001] Chronic Poverty Research Centre Working Paper.

face as far as food security and access to resources are concerned.¹¹¹ County peace committees should be empowered through capacity building because, as some commentators have argued, County governments have better local knowledge and are likely to enjoy greater local legitimacy thus placing them at a better position to address conflicts and promote peace, in partnership with the National Government.¹¹²

Based on the foregoing, it is thus important for the State to continually promote and strengthen the use of local leadership and community peace groups in efforts to reach sustainable peace solutions in Kenya.¹¹³

5. Conclusion

As already acknowledged, peace and development are interlinked and one may not take place in the absence of the other. As Kenya strives towards achieving sustainable development agenda, this paper has argued that the stakeholders must first work towards building sustainable peace and enhancing conflict management capacity of the various relevant stakeholders in the peace sector. Unless the underlying factors that result in conflicts are fully addressed, the dream of sustainable peace will remain a mirage. Similarly, without peace, realisation of sustainable development goals in the country, alongside other development goals such as the Vision 2030 will arguably remain a pipe dream. Working Towards Effective Peacebuilding and Conflict Management in Kenya is a necessary step in the quest for Sustainable Development.

¹¹¹ Meine van Noordwijk, 'Integrated Natural Resource Management as Pathway to Poverty Reduction: Innovating Practices, Institutions and Policies' (2019) 172 *Agricultural Systems* 60.

¹¹² Huma Haider, *Conflict analysis of North Eastern Kenya. K4D Emerging Issues Report36*. Brighton, UK: Institute of Development Studies
<https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15570/EIR%2036_Conflict_analysis_of_Northern_Kenya.pdf?sequence=1&isAllowed=y> accessed 8 May 2021.

¹¹³ David Pottebaum and Christopher Lee, 'In Control of Their Future: Community-Led Reconciliation and Recovery', *World Bank workshop "Moving out of Poverty in Conflict-Affected Areas"*, available at (2007); Ervin Staub, 'Reconciliation after Genocide, Mass Killing, or Intractable Conflict: Understanding the Roots of Violence, Psychological Recovery, and Steps toward a General Theory' (2006) 27 *Political psychology* 867; Michael Wessells, 'Community Reconciliation and Post-Conflict Reconstruction for Peace', *Handbook on building cultures of peace* (Springer 2009); Daniel Bar-Tal, 'Reconciliation as a Foundation of Culture of Peace', *Handbook on building cultures of peace* (Springer 2009); Nyambura Githaiga, 'When Institutionalisation Threatens Peacebuilding: The Case of Kenya's Infrastructure for Peace' (2020) 15 *Journal of Peacebuilding & Development* 316.

References

‘5 – Quest for Sustainable Peace and Development under Militarized Security Approaches’ (2030 Spotlight) <<https://www.2030spotlight.org/en/book/1730/chapter/5-quest-sustainable-peace-and-development-under-militarized-security-approaches>> accessed 9 May 2021.

‘About Vision 2030 | Kenya Vision 2030’ <<http://vision2030.go.ke/about-vision-2030/>> accessed 1 May 2021.

‘Agenda 2063: The Africa We Want. | African Union’ <<https://au.int/en/agenda2063/overview>> accessed 8 May 2021.

‘Conflict Analysis of Kenya’ (GSDRC) <<https://gsdrc.org/publications/conflict-analysis-of-kenya/>> accessed 1 May 2021.

‘Court Annexed Mediation Virtual Dispute Resolution – The Judiciary of Kenya’ <<https://www.judiciary.go.ke/download/court-annexed-mediation-virtual-dispute-resolution/>> accessed 8 May 2021.

‘Facts and Figures: Women’s Leadership and Political Participation | What We Do’ (UN Women) <<https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures>> accessed 8 May 2021.

‘Foundation for The Pillars | Kenya Vision 2030’ <<https://vision2030.go.ke/enablers-and-macros/>> accessed 1 May 2021.

‘Gender in Fragile and Conflict-Affected Environments’ (GSDRC) <<https://gsdrc.org/topic-guides/gender/gender-in-fragile-and-conflict-affected-environments/>> accessed 8 May 2021.

‘How Women in Kenya Mobilised for Peace after Surviving Violence - Kenya’ (ReliefWeb) <<https://reliefweb.int/report/kenya/how-women-kenya-mobilised-peace-after-surviving-violence>> accessed 8 May 2021.

‘Inside the Judiciary Magazine, Edition No. 15 – The Judiciary of Kenya’ <<https://www.judiciary.go.ke/download/inside-the-judiciary-magazine-edition-no-15/>> accessed 8 May 2021.

‘Judiciary Strategic Plan 2019 -2023 – The Judiciary of Kenya’ <<https://www.judiciary.go.ke/download/judiciary-strategic-plan-2019-2023/>> accessed 8 May 2021.

‘Kenya Denies Role in Somalia’s Internal Conflict | Voice of America - English’ <<https://www.voanews.com/africa/kenya-denies-role-somalias-internal-conflict>> accessed 8 May 2021.

‘Kenya Making Steady Progress towards Attainment of SDGs, President Kenyatta Says | The Presidency’ <<https://www.president.go.ke/2019/09/25/kenya-making-steady-progress-towards-attainment-of-sdgs-president-kenyatta-says/>> accessed 1 May 2021.

‘Lessons from the South: Towards Sustainable Development a Green Economy in Kenya | Youthpolicy.Org’ <<https://www.youthpolicy.org/blog/sustainability/kenya-green-economy-transition/>> accessed 1 May 2021.

‘List of MAC Accredited Mediators as at 1st January 2021 – The Judiciary of Kenya’ <<https://www.judiciary.go.ke/download/list-of-mac-accredited-mediators-as-at-1st-january-2021/>> accessed 8 May 2021.

‘Poverty and Conflict’ (GSDRC) <<https://gsdrc.org/professional-dev/poverty-and-conflict/>> accessed 8 May 2021.

‘Social Development for Sustainable Development | DISD’ <<https://www.un.org/development/desa/dspd/2030agenda-sdgs.html/>> accessed 8 May 2021.

‘Social Pillar | Kenya Vision 2030’ <<http://vision2030.go.ke/social-pillar/>> accessed 1 May 2021.

‘State of the Judiciary and the Administration of Justice Annual Report 2019 – 2020 – The Judiciary of Kenya’ <<https://www.judiciary.go.ke/download/state-of-the-judiciary-and-the-administration-of-justice-annual-report-2019-2020/>> accessed 8 May 2021.

‘Summaries | Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) | International Court of Justice’ <<https://www.icj-cij.org/en/case/161/summaries>> accessed 8 May 2021.

‘Sustainable Development Goals | United Nations Development Programme’ <<https://www.undp.org/sustainable-development-goals#peace-justice-and-strong-institutions>> accessed 8 May 2021.

‘The Environmental Challenges in Sub Saharan Africa’ <<http://web.mit.edu/africantech/www/articles/EnvChall.htm>> accessed 8 May 2021.

‘Theories of Conflict Resolution and Their Applicability: To Protracted Ethnic Conflicts on JSTOR’ <<https://www.jstor.org/stable/44481352?seq=1>> accessed 8 May 2021.

‘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 2021.

‘Why Women Should Have a Greater Role in Peacebuilding’ (*World Economic Forum*) <<https://www.weforum.org/agenda/2015/05/why-women-should-have-a-greater-role-in-peacebuilding/>> accessed 8 May 2021.

African Union, ‘Silencing the Guns: Creating Conducive Conditions for Africa’s Development’ (*The East African*) <<https://www.theeastafrican.co.ke/tea/sponsored/silencing-the-guns-creating-conducive-conditions-for-africa-s-development-1435754>> accessed 8 May 2021.

African Union, *Agenda 2063*, 2 <https://au.int/sites/default/files/documents/33126-doc-03_popular_version.pdf> accessed 8 May 2021.

Arestis, P., Aurelie Charles and Giuseppe Fontana, ‘Power, Intergroup Conflicts and Social Stratification in the United States: What Has the Global Crisis Taught Us?’ (2015) 73 *Review of Social Economy* 370.

Bar-Tal, D., ‘Reconciliation as a Foundation of Culture of Peace’, *Handbook on building cultures of peace* (Springer 2009), 363.

Brendon J Cannon and Jacob Haji Ali, ‘Devolution in Kenya Four Years On: A Review of Implementation and Effects in Mandera County’ (2018) 8 *African Conflict and Peacebuilding Review* 1.

Buagu Musazi Says, 'Ethnic Favouritism in Kenya and Uganda's Public Sector' (*Africa at LSE*, 1 August 2019) <<https://blogs.lse.ac.uk/africaatlse/2019/08/01/has-ethnic-favouritism-in-public-sector-hiring-in-kenya-and-uganda-been-exaggerated/>> accessed 8 May 2021.

Burbidge, D. and Cheeseman N., 'Trust, Ethnicity and Integrity in East Africa: Experimental Evidence from Kenya and Tanzania' (2017) 2 *Journal of Race, Ethnicity and Politics* 88.

Caiado, R. G. G., Leal Filho, W., Quelhas, O. L. G., de Mattos Nascimento, D. L., & Ávila, L. V., 'A Literature-Based Review on Potentials and Constraints in the Implementation of the Sustainable Development Goals' (2018) 198 *Journal of cleaner production* 1276.

Castillejo, C., 'Building a State That Works for Women: Integrating Gender into Post-Conflict State Building' [2011] *Documentos de Trabajo FRIDE* 1.

Chopra, T., 'Reconciling Society and the Judiciary in Northern Kenya' [2008] *Justice for the Poor and Legal Resources Foundation Trust Research Report*.

Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

Datzberger, S., 'Civil Society as a Postcolonial Project: Challenging Normative Notions in Post-Conflict Sub-Saharan Africa', *Negotiating Normativity* (Springer 2016).

Deutsche Welle (www.dw.com), 'Stability at Risk as Somalia and Kenya Spat over Sea Border | DW | 15.03.2021' (*DW.COM*) <<https://www.dw.com/en/kenya-somalia-border-dispute-threatens-stability/a-56879109>> accessed 8 May 2021.

Dudouet, V., 'Nonviolent Resistance and Conflict Transformation in Power Asymmetries' [2008] *Berghof Center for Constructive Conflict Management; 'Principles of Conflict Resolution'* <<https://www.hawaii.edu/powerkills/TJP.CHAP10.HTM>> accessed 8 May 2021.

Elfverson, E., 'Patterns and Drivers of Communal Conflict in Kenya' in Steven Ratuva (ed), *The Palgrave Handbook of Ethnicity* (Springer 2019) <https://doi.org/10.1007/978-981-13-2898-5_50> accessed 8 May 2021.

Elkins, C., 'What's Tearing Kenya Apart? History, for One Thing' [2008] Washington Post.

Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

Fine, B., *Theories of Social Capital: Researchers Behaving Badly* (Pluto press 2010).

Friedrich Elbert Stiftung, 'Regional Disparities and Marginalisation in Kenya' [2012] Nairobi: Elite PrePress.

Gakuria, AR., 'Natural Resource Based Conflict among Pastoralist Communities in Kenya' (PhD Thesis, University of Nairobi 2013).

Githaiga, N., 'When Institutionalisation Threatens Peacebuilding: The Case of Kenya's Infrastructure for Peace' (2020) 15 *Journal of Peacebuilding & Development* 316.

Goodhand, J. 'Violent Conflict, Poverty and Chronic Poverty' [2001] Chronic Poverty Research Centre Working Paper.

Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UN Women 2010).

Hanny Cueva Beteta, Colleen Russo and Stephanie Ziebell, *Women's Participation in Peace Negotiations: Connections between Presence and Influence* (New York: UN Women 2010), 3.

Huma Haider, Conflict analysis of North Eastern Kenya. K4D Emerging Issues Report36. Brighton, UK: Institute of Development Studies, 16.

Iffat Idris, *Gender, countering violent extremism and women, peace and security in Kenya*. K4D Factsheet. Brighton, UK: Institute of Development Studies
<https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15832/K4D_Factsheet_Kenya_2.4.pdf?sequence=1&isAllowed=y> accessed 8 May 2021.

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 2021.

Ileri, N. and Guyo, W., 'The Influence of the County Public Service Board (CPSB), on the Devolved Human Resources Governance in Kenya' (2018) 8 *International Journal of Humanities and Social Science*.

Izabiliza, J., 'The Role of Women in Reconstruction: Experience of Rwanda' [2003] Source unknown.

Jubase, H.A., 'Challenges of Human Resource Management in Wajir Public Service Board' (PhD Thesis, University of Nairobi 2018).

Kangethe, M.W., "The peace education programme in Kenya." *The Global Campaign for Peace Education* 121 (2015).

Katie Zaroni, 'Kenyan Girls as Agents of Peace: Enhancing the Capacity of Future Women Peacebuilders' (2017) 12 *Research in Comparative and International Education* 110.

Kefa Ruto Plimo, 'Assessing Determinants of Effective Human Resource Functions Devolution in County Government of West Pokot, Kenya' (PhD Thesis, COHRED-JKUAT 2017).

Kenya Human Rights Commission, *Maasive Internal Displacements in Kenya Due to Politically Instigated Ethnic Clashes* (Kenya Human Rights Commission 2007).

Kimaiyo, D.M., 'Women Involvement in Cattle Rustling between the Marakwet and the Pokot Communities of North-Western Kenya' (Thesis, University of Nairobi 2016) <<http://erepository.uonbi.ac.ke/handle/11295/97405>> accessed 8 May 2021.

Leadership and Integrity Act, No 19 of 2012, Laws of Kenya.

Loyatum, I.C., 'The Role of Women in Peace Building in Conflicting Society: The Case of West Pokot County, Kenya, 2000-2018' (PhD Thesis, United States International University-Africa 2019).

Macartan H., 'Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms' (2005) 49 *Journal of conflict resolution* 508.

Macharia, J., 'Sustainable Development in Kenya' [2019] *Horizons: Journal of International Relations and Sustainable Development* 172; 'Sustainable Development in Kenya' (*CIRSD*) <<http://www.cirsd.org/en/horizons/horizons-winter-2019-issue-no-13/sustainable-development-in-kenya>> accessed 1 May 2021.

Marie O'Reilly, 'Why Women?' [2015] *Inclusive Security* 1, 3
<<https://www.almendron.com/tribuna/wp-content/uploads/2019/02/why-women-report-2017.pdf>> accessed 8 May 2021.

Martin, 'Peace, Justice and Strong Institutions' (*United Nations Sustainable Development*) <<https://www.un.org/sustainabledevelopment/peace-justice/>> accessed 8 May 2021.

Mediation Bill, 2020, Kenya Gazette Supplement No. 92 (National Assembly Bills No. 17).

Meine van Noordwijk, 'Integrated Natural Resource Management as Pathway to Poverty Reduction: Innovating Practices, Institutions and Policies' (2019) 172 *Agricultural Systems* 60.

Michelle D'Arcy, 'Kenya Illustrates Both the Promise as Well as the Pitfalls of Devolution' (*The Conversation*) <<http://theconversation.com/kenya-illustrates-both-the-promise-as-well-as-the-pitfalls-of-devolution-96729>> accessed 8 May 2021.

Muigua, K., 'Institutionalising Traditional Dispute Resolution Mechanisms and Other Community Justice Systems' [2017] Nairobi: Published online< <http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf>> accessed 8 May 2021.

....., 'Mainstreaming the Role of Women in Peacemaking and Environmental Management in Kenya' (2020) *Journal of cmsd* Volume 4(5)
< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3834364> accessed 8 May 2021.

Mutsotso, B. M., Kimaiyo, D., & Gaciuki, P., "The centrality of cattle in the social organization of the East Pokot pastoralists of North Western Kenya." *European Scientific Journal* 10, no. 8 (2014).

Mutsotso, B.M., 'The Boundary Shifters of North Western Kenya'.

Mworia, L. and Ndiku J., 'Inter Ethnic Conflict in Kenya: A Case of Tharaka-Tigania Conflict, Causes, Effects and Intervention Strategies', 163.

Nairobi Centre for International Arbitration, *Alternative Dispute Resolution Policy*, Draft October 2019 < <https://www.ncia.or.ke/wp-content/uploads/2019/10/DRAFT-NATIONAL-ADR-POLICY.pdf> > accessed 8 May 2021.

National Land Commission Act, No. 5 of 2012, Laws of Kenya. Revised Edition 2016 [2015].

National Land Commission Citation. (Investigation of Historical Land Injustices) Regulations, 2017, Legal Notice No. 258, Kenya Gazette Supplement No. 154, 6th October, 2017, Laws of Kenya.

Nganga, D., 'Culture as the Cause of Conflict: A Case Study in West Pokot District, Kenya' (2012) 6 *Journal of Peace and Justice* 51.

Noro Aina Andrimihaja, Matthias Cinyabuguma and Shanta Devarajan, 'Stop Conflict, Reduce Fragility and End Poverty: Doing Things Differently in Fragile and Conflict-Affected Situations'.

Nyabuga, G., 'Devolved Power: A Critical Interrogation of the Place, Roles and Obligations of the Media at the Grassroots in Kenya' (2017) 42 *Africa Development / Afrique et Développement* 105.

Office for ECOSOC Support and Coordination United Nations, *Achieving Sustainable Development and Promoting Development Cooperation: Dialogues at the Economic and Social Council* (UN 2008).

Ogworu, E.T., 'Electoral Bribery and Corruption: A Deterrent and a Game Changer towards Democratic Process and Fair Election in Kenya' (2017) 1 *Journal of Popular Education in Africa*.

Olaosebikan, AJ, 'Conflicts in Africa: Meaning, Causes, Impact and Solution' (2010) 4 *African Research Review* 549, 550-551.

Olsson, Lennart, Maggie Opondo, Petra Tschakert, Arun Agrawal, and Siri EH Eriksen. "Livelihoods and poverty." (2014).

Ombanda, P.O., 'Nepotism and Job Performance in the Private and Public Organizations in Kenya' (2018) 8 *International Journal of Scientific and Research Publications* 474.

Owiti, J., 'Political Drivers of Inequality in Kenya' (2014) 57 *Development* 547.

Owuor V. and Wisor, S., 'The Role of Kenya's Private Sector in Peacebuilding: The Case of the 2013 Election Cycle' [2014] Broomfield, CO: One Earth Future Foundation' ii <<https://www.oefresearch.org/sites/default/files/documents/publications/kenyaprivatesectorreport-digital.pdf>> accessed 3 May 2021.

Paffenholz, T., '19 Understanding the Conflict–Development Nexus and the Contribution of Development Cooperation to Peacebuilding1' [2008] *Handbook of conflict analysis and resolution* 272 <<https://gsdrc.org/document-library/understanding-the-conflict-development-nexus-and-the-contribution-of-development-cooperation-to-peacebuilding/>> accessed 3 May 2021.

Pottebaum D. and Lee, C., 'In Control of Their Future: Community-Led Reconciliation and Recovery', *World Bank workshop "Moving out of Poverty in Conflict-Affected Areas"*, available at (2007).

Republic of Kenya, *Kenya National Action Plan for the Advancement of United Nations Security Council Resolution 1325 on Women, Peace and Security 2020–2024* <<http://peacewomen.org/sites/default/files/KNAP-II-digital-30-Apr.pdf>> accessed 8 May 2021.

Republic of Kenya, *National Action Plan for the Implementation of United Nations Security Council Resolution 1325 and Related Resolutions, 2016–2018* <

<http://peacewomen.org/sites/default/files/Kenya%20NAP-with-cover-final.pdf>> accessed 8 May 2021.

Republic of Kenya, *Sessional Paper No. 3 of 2009 on National Land Policy*, August, 2009 (Government Printer, Nairobi, 2009).

Republic of Kenya, *Vision 2030* (Government Printer, Nairobi, 2007) <<http://vision2030.go.ke/>> accessed 1 May 2021.

Stan, F., '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 2021.

Staub, E., 'Reconciliation after Genocide, Mass Killing, or Intractable Conflict: Understanding the Roots of Violence, Psychological Recovery, and Steps toward a General Theory' (2006) 27 *Political psychology* 867.

Tukumbi Lumumba-Kasongo, 'Contemporary Theories of Conflict and Their Social and Political Implications' [2017] *Peace, Security and Post-Conflict Reconstruction in the Great lakes Region of Africa*. Oxford: African Book Collective 29.

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

UN Security Council, *Security Council resolution 1325 (2000) [on women and peace and security]*, 31 October 2000, S/RES/1325 (2000).

Unruh, Jon. "Land rights and peacebuilding: challenges and responses for the international community." *International Journal of Peace Studies* (2010): 89-125.

Wessells, M., 'Community Reconciliation and Post-Conflict Reconstruction for Peace', *Handbook on building cultures of peace* (Springer 2009).

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

The Role of Courts in Arbitration: The Kenyan Experience

By: Hon(Rtd) Justice Muga Apondi

*

Introduction

Arbitration is one of the mechanisms used in alternative dispute resolution (ADR) and in Kenya, it is governed by the Constitution of Kenya 2010, the Arbitration Act of 1995 and the Nairobi Centre for International Arbitration Act 2013. In recent times, it has become the preferred method for resolving commercial disputes especially those involving foreign investors. It should be noted however, that it can also be applied to a variety of other disputes save those generally understood as beyond the jurisdiction of arbitration, for example, criminal matters.¹ *According to Khan, arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for resolution. It is an adversarial process and in many ways resembles litigation.*² According to Stephenson, Lord Justice Raymond provided a definition some 250 years ago which is still considered valid today:

*An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they have arbitrary power; for if they observe the submission and keep within their due bonds, their sentences are definite from which there lies no appeal.*³

Some of the key attributes to arbitration are that, the arbitration is a private process that enjoys a lot of confidentiality and secondly, the panel or the individual will be chosen directly by the parties and thirdly, that the arbitration is private and consensual and hence it is possible to select an arbitrator who can devote all the time to it and thereby dispose of the case with expedition⁵. Despite this preference over the court system, the courts themselves are not completely removed from the arbitration process, in that they also have a role to play. Before analyzing this role, it is imperative to understand the nature

* **LLB. (Hon), LLM (Nrb) International Trade & Investment Laws, DIP.LAW(KSL), ACI Arb, Former Puisne Judge, High Court of Kenya, Advocate of the High Court of Kenya.**

¹Totterdill, B, *An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques.* (Sweet & Maxwell, London), P.21

²Farooq Khan, *Alternative Dispute Resolution*, A paper presented at Chartered Institute of Arbitrators Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

³Stephenson, R, *Arbitration Practice in Construction Disputes*, (Buttersworths, London, 1998, p. 123)

of the courts' jurisdiction in arbitration matters. In Kenya, this jurisdiction is encapsulated under Section 10 of the Arbitration Act of 1995 which provides,

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”

To this effect, there is a clear implication that the courts' jurisdiction is restricted to matters only provided by this Act. To buttress this point, one of the advantages of arbitration as stated above is that parties have control over the arbitration process. This is referred to as the principle of party autonomy which, according to Ansari, is the backbone of arbitration proceedings.⁴

This principle of party autonomy is provided under the UNCITRAL Model Law⁵, which has been adopted in Kenya and from which the Arbitration Act of 1995 (as amended in 2010) is based entirely on taking into account the developments in arbitration practice and procedure. Essentially, it means the “freedom of parties to construct their contractual relationship in the way they see fit”.⁶Therefore, courts are also keen on promoting other forms of dispute resolution modes where the circumstance of the case allows and the parties have agreed. We can see this in the recent ruling of *County Government of Kirinyaga v African Banking Corporation Ltd*⁷, where the attention of Article 159(2)(c) of the Constitution of Kenya was drawn and which states that,

*“In exercising judicial authority, courts and tribunals shall be guided by the following principles ---
“alternative forms of dispute resolution including reconciliation, mediation, arbitration-----shall be promoted.”*

However, this needs to be read together with other sections of the Arbitration Act which provide instances where the court can intervene when a dispute is brought before it.

⁴Dr. Kariuki Muigua, “Settling Disputes Through Arbitration In Kenya” (Glenwood Publishers Ltd). 2017 – 3rd Ed – Pg 3.

⁶Jamshed Ansari, “Party Autonomy in Arbitration: A Critical Analysis”, (2014) 6(6) *Researcher* 47-53 (ISSN:1553-9865) <http://www.sciencepub.net/researcher>

⁷United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2008* (Vienna: United Nations, 2008)

⁸Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (London: United Kingdom, Kluwer Law International, 2004) 159

⁹[2020] eKLR

Courts would therefore decline to refer a matter to arbitration even where an agreement has a clause to that effect depending on the various instances which this paper will discuss further showing their role in arbitration.

Role of courts in arbitration in Kenya

It is a general rule as provided under Section 10 of the Arbitration Act that no court shall intervene in arbitration matters on its own initiative except as provided under the Act. The following sections shall look at these instances in the three stages of arbitration, i.e. before, during and after whereby courts can intervene.

a) Before an arbitration

There are two instances where the courts can intervene before the commencement of arbitration proceedings. These are; in a stay of legal proceedings and when interim measures of protection have been issued.

i) Stay of legal proceedings

The courts have no direct power to compel an arbitration but can do so indirectly when a party to an agreement makes an application for a stay of proceedings in order to effect the arbitration. This order can be given where a matter in dispute is to be referred to arbitration but has been initiated in court by one of the parties instead, thereby breaching the arbitration agreement between them. The court can order a stay by refusing the claimant's application so that the claim may be pursued by arbitration.

Section 6(1) of the Arbitration Act of 1995 provides;

“A court before which proceedings are brought in a matter which is subject to an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other steps in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds-

- a) That the arbitration is null and void, inoperative or incapable of being performed; or
- b) That there is not in fact any dispute to the matter agreed to be referred to arbitration.”

This intervention by the court does not have to be by the courts' own motion as the duty is on the other party to bring it to the courts' attention. However, what this implies is that if the other party does not object to the application, then the court can continue the proceedings and grant reliefs as sought by the plaintiff where applicable. This is in so far as the defendant, by virtue of his failure to object and by taking steps in the suit

brought by the plaintiff, has impliedly waived his right to invoke the arbitration agreement.⁸

The defendant must object to the application *before* any further action is taken on the suit.⁹ By this it does not mean that filing a memorandum of appearance constitutes admitting to the courts' jurisdiction. Instead, a "step in the proceedings" as highlighted by Lord Denning MR in *Eagle Star Insurance Company Limited vs Yuval Insurance Company Limited*¹⁰ must be one which shows the willingness of the defendant to proceed with the determination of the courts instead of arbitration. We see this in *Fairlane Supermarket Limited v Barclays Bank Limited*¹¹ where Odunga J. held that; 'The option to refer the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence.'

The court would also have to take into consideration the conditions under Section 6(1) of the Arbitration Act. First of which is that there has to be a valid and enforceable arbitration agreement. There is in the same breath the principle of separability of arbitration clauses in agreements which allows for consideration of the arbitration agreement separately from the underlying contract in which it is contained.¹² This implies that independent factors must exist that specifically invalidate or void the arbitration clause.¹³ Therefore, any challenge to the main agreement does not affect the arbitration agreement and by virtue of Section 17(1)(a) of the Arbitration Act, the arbitration clause would survive the termination of the agreement caused by a breach. Here, the court should at least stay the proceedings pending the determination of the issue of validity.¹⁴

¹⁰Kariuki Muigua, 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya.' A paper presented at the Chartered Institute of Arbitrators course on "Advocacy in Mediation and Arbitral Proceedings", on 5th February, 2009 (Revised on 1st March 2010)

http://kmco.co.ke/wp-content/uploads/2018/08/080_role_of_court_in_arbitration_2010.pdf

¹¹*Rawal v The Mombasa Hardware Ltd* [1968] E.A. 398

¹²[1978] 1 Lloyds Rep. 357.

¹³NAI HCCC No. 102 of 2011

¹⁴Article 16(1) UNCITRAL Model Law provides that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The decision by the arbitral tribunal that the contract is null and void shall not entail ipso iure the invalidity of the arbitration clause"

¹⁵*Fiona Shipping v Privalov*[2007] EWCA Civ 20

¹⁶Muigua (n 6) 9.

The court would also consider whether there even exists a dispute between the parties with regards to matters agreed to be submitted to arbitration. In *UAP Provincial Insurance Company Ltd ('the Insurance Company') v Michael John Beckett*¹⁵, an application to stay proceedings was declined because the judge did not find any dispute capable of being referred to arbitration instead the application was for enforcement of a settlement agreement for which the defendant was pursuing a right to payment. Also, where parties have already reached a settlement, the courts would find nothing to be referred and applying this same reasoning, if a portion of a claim is not in dispute, then the courts see no reason why it should refer the entire claim to arbitration.¹⁶

Another condition is that the party seeking a stay must be a party to the arbitration agreement or a person claiming through a party e.g. a personal representative or trustee in bankruptcy, bringing in the principle of privity of contract.¹⁷In *Chevron Kenya Limited v Tamoil Kenya Limited*¹⁸, High Court Judge Azangala found that the defendant was not party to the arbitration agreement and therefore dismissed the application to stay proceedings.

The dispute in question must also fall within the ambit of the arbitration clause. The applicant may argue it was not the intention of the parties for such a dispute to be covered and here the court may refuse an application for stay of proceedings if it finds, *inter alia*, that there is not in fact any dispute to be referred to arbitration. Lastly, the defendant must not have taken any steps in the proceedings in answer of the substantive claim. This has been discussed above with regards to the defendant having to oppose the application for stay before any further steps are taken otherwise it could lead to a forfeiture of their rights to a stay of proceedings.

ii) Interim measures of protection

Interim measures of protection are “any temporary measure[s] ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided.”¹⁹These interim measures could include, attachments, injunctions, partial

¹⁷Civil Appeal 26 of 2007 available at <<http://kenyalaw.org/caselaw/cases/view/91425/>>

¹⁸*Addock Ingram East Africa Limited v Surgilinks Limited* [2012] eKLR.

¹⁹Muigua (n 6) 10

²⁰HCCC (Milimani) No. 155 of 2007

²¹Stephen M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, 12 INT’L TRADE L.J. 55 (2003).

payment of claims, and orders to deposit money in an escrow account pre-judgement.²⁰ Prior to an arbitration, the court can intervene by virtue of Section 7 of the Arbitration Act which provides;

“It is not incompatible with an arbitration agreement for a party to request for the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”

The High court has jurisdiction in granting such measures, however, it must be reluctant to make a decision that would risk prejudicing the outcome of the arbitration²¹ and possibly risk leaving very little for the arbitrators to decide on.²² This is because the arbitral tribunal also has its own powers to grant interim measures of protection.²³ It should be noted that where the court grants interim measures it is not assuming jurisdiction over matters within the purview of the arbitral tribunal.²⁴ In *Safaricom Limited’s case (infra)*, Justice Nyamu highlighted the essentials for consideration by the court before issuing interim measures of protection. These include, the existence of an arbitration agreement, whether the subject matter is under threat, which appropriate measure of protection is to be issued and for what period the measure should be given especially if requested prior to the arbitration so as to avoid usurping the tribunal’s decision-making power. The powers being granted under Section 7 of the Arbitration Act could include granting interim injunctions, interim custody or sale of goods especially where the same are perishable.

b) During an arbitration

There are various provisions which provide for a more extensive view of the courts’ intervention during arbitration proceedings. This section of the paper will examine the instances provided therein to establish the role of courts accordingly.

i) Appointment of Arbitrators

The first role the court takes on is that which facilitates the arbitration. In this sense, it is not seen as a preliminary action to arbitration because the parties have already

²²*Id.*

²³Justice Nyamu in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR.

²⁴*Channel Group v Balfour Beatty Ltd* [1993] Adj.L.R. 01/21 at p.18

²⁵Section 18 of the Arbitration Act, 1995.

²⁶GithuMuigai, “The Role of Court in Arbitration Proceedings” in GithuMuigai (ed), *Arbitration Law and Practice in Kenya* (LawAfrica) 78.

submitted to resolving their disputes by arbitration. In Section 12 of the Arbitration Act, 1995, the parties will specify the details of the arbitration in terms of the number of arbitrators to be appointed and the mode of appointing the tribunal. It goes further to spell out the steps to be taken should a party default in the appointment process and this is where the court comes in.

Where each of the party is to appoint an arbitrator and one is unwilling or fails to do so within stipulated time, the party in compliance may notify the defaulter in writing that he intends to appoint his own arbitrator as the sole arbitrator.²⁵ Where no response from the defaulter within fourteen days after notice, the compliant party may go ahead to appoint his arbitrator and notify the latter of the same.²⁶ At this point the defaulter may, upon notice to the compliant party, apply to the High Court to have this appointment set aside.²⁷ The High Court may grant the application, if good cause is shown for the default, or appoint a sole arbitrator for them, the decision of which is final and not appealable.²⁸ In *Pan African Paper Mills (East Africa) Limited (In Receivership) v First Assurance Company Limited*²⁹, the Plaintiff was unsuccessful in getting a response from the Defendant on the issue of appointment despite there being an arbitration clause to that effect. The court therefore granted orders for the appointment of a sole arbitrator.

ii) Challenging the appointment of an Arbitrator

Courts can intervene when a challenge to the appointment or composition of the arbitral tribunal, has been lodged. The tribunal has jurisdiction to decide on this challenge and where they reject it, the challenging party may apply to the High court to decide on the matter.³⁰ The grounds upon which the challenge is based have to be justified, for example, issues of prejudice, incompetence, and possible bias. The grounds should be able to justify that the judicial process will be compromised.³¹ Following this, the High Court may confirm the rejection or uphold the challenge and remove the arbitrator; decision of which is final and not subject to appeal.³²

²⁷The Arbitration Act, 1995 section 12(3)

²⁸Ibid section 12(4).

²⁹Ibid section 12(5).

³⁰Ibid section 12(6), (7) & (8).

³¹[2015] eKLR.

³²Section 14(3) of the Arbitration Act, 1995.

³³ZadockFurnitures Systems Limited & another v Central Bank of Kenya [2014] eKLR

³⁴Ibid section 14(5) & (6)

iii) Failure or impossibility to act

The court can intervene to terminate the mandate of an arbitrator upon the application by a party with regards to any dispute of the grounds set out in Section 15(1) of the Arbitration Act, 1995. The courts' decision to terminate an arbitrators mandate or dismiss the application for termination, shall be final and not subject to appeal. Following a termination, another arbitrator shall be appointed following agreed procedure for appointment. In order to ensure the arbitration process is not affected by the change of an arbitrator, any orders or rulings of the tribunal are to be upheld unless successfully challenged by the parties. The High court may also order a repayment and/or restitution by the terminated arbitrator of any monies already paid to him/her.³³

iv) Competence of arbitral tribunal to rule on its jurisdiction

Section 17(2) of the Arbitration Act provides that a plea may be raised as to the lack of jurisdiction before the submission of a statement of defense and a party may raise such a plea whether or not he appointed or participated in the appointment of an arbitrator. In keeping with the doctrine of kompetenzkompetenz,³⁴ where the tribunal determines the issue of jurisdiction in its favour, any party that is dissatisfied may apply to the High Court to decide on the matter. The courts' decision is also final and not subject to appeal. The arbitration proceedings may continue despite the application, however any award arising from it will not take effect until the determination of the jurisdiction question.³⁵

v) Interim measures of protection

This aspect differs slightly from interim measure of protection given before reference to arbitration as discussed previously in this paper in the sense that those given during the arbitration require approval from the arbitral tribunal. Courts here must be careful in their role in order not to prejudice the arbitration proceedings by limiting the power of the tribunal to order its own interim measures. This can be seen as covered in the Safaricom Limited case (*infra*) under interim measures before the arbitration.

vi) Courts' assistance in taking evidence

The courts' role in arbitration can also be seen under Section 28 of the Arbitration Act, 1995 where it assists in taking evidence upon request by the arbitral tribunal or a party with the approval of the tribunal. The reason why a court may be requested to take evidence against a particular witness is when the latter has become difficult or evasive

³⁵Muigua (n 6) 26

³⁶The doctrine provides that arbitral tribunal has the competence to rule on its own jurisdiction.

³⁷Section 17(7) & (8) of the Arbitration Act, 1995.

in appearing before the tribunal. Under those circumstances, the court may issue a warrant of arrest against that particular witness to compel him to appear and give evidence. The parties here are relying on the coercive powers of the court to summon a witness and if need be, punish a witness who has deliberately refused to give evidence. Where the witness is outside the jurisdiction of the Court, the court may order the issuance of an order for the taking of evidence by a commission or request for examination of a witness outside the jurisdiction. In contrast, the tribunal does not have the above coercive powers. In compliance with Article 159 of the Constitution of Kenya 2010, the national courts are enjoined to support and facilitate the arbitration process in order to promote the use and practice of ADR.³⁶

vii) Determination of a question of law arising from domestic arbitration

Section 39(1) of the Arbitration Act provides that an application may be made to the High Court by any party to determine any question of law during arbitration or same with regards to appealing an arbitral award. The court, shall determine the question of law or confirm, vary or set aside the arbitral award and have the matter reconsidered by the tribunal or where another has been appointed, the same.³⁷ The decision of the High court in this regard shall be subject to appeal and shall be made within the time limit prescribed by the Rules of Court³⁸ as applicable.

c) After an arbitration

There are two situations where the court has jurisdiction after an arbitration proceeding has been finalized and both have to do with the arbitral award. They include:

i) Setting aside of the award

An arbitral award can only be set aside in the High Court by virtue of Section 35 of the Arbitration Act, 1995. Section 35(2) then goes ahead to spell out the grounds to be considered before this can happen, of course upon timely application by a party. There are grounds for the applicant to prove,³⁹ however on the role of the court, the grounds as envisioned by Section 35(2)(b), are that the High court can set aside the award if it finds the disputed matter is not capable of settlement by arbitration under Kenyan law or the award is in conflict with public policy of Kenya.

³⁸Ndolo, D & Liu, M 2020, "The State of International Arbitration in Kenya", (2020) 23(1) International Arbitration Law Review 40-69.

³⁹Section 39(2) of the Arbitration Act, 1995.

⁴⁰Section 79G of the Civil Procedure Act; an appeal shall be filed within thirty (30) days of the decision being appealed against.

⁴¹Section 35(2)(a) of the Arbitration Act, 1995

ii) Recognition and enforcement of awards

In this situation the role of the court shall be, to recognize as binding a domestic arbitral award which shall be enforceable upon application to the High Court. Section 36(2) of the Arbitration Act provides that for an international arbitral award, it shall be recognized as binding and enforceable subject to the New York Convention⁴⁰ or any other for which Kenya is signatory and related.

Role of courts in arbitration in other jurisdictions

This section takes on a comparative approach looking at two jurisdictions, i.e. the UK and the USA in analyzing how their arbitration process differs with specific regards to the role of courts vis-à-vis that in Kenya. Based on the international arbitration laws, the section will examine the adoption of same in these jurisdictions and how they have been nationalized specifically with regards to the UNCITRAL Model Law and in what way the courts' role in arbitration has been highlighted.

The United Kingdom

Arbitration in the UK is governed by The Arbitration Act 1996 which came about as a result of consolidations of reforms from previous Arbitration Acts. Upon considerations as to whether to adopt the UNCITRAL Model Law, the UK on advice by the Departmental Advisory Committee (DAC) in their Mustill Report recommended against its' adoption preferring to enact the 1996 Act with selective features, some of which would have the same structure and language of the UNCITRAL.⁴¹ This applies to both domestic and international arbitration in order to make it more accessible to those familiar with the model law.⁴²

The Arbitration Act 1996 shares key principles with the Kenyan counterpart⁴³ such as the extent of the courts' intervention provided in the latter Act. In Section 1(c) of the Arbitration Act 1996, it similarly provides that-

⁴²Section 36(5) of the Arbitration At, 1995; "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.

⁴³Kariuki Muigua, "The Arbitration Acts: A Review of Arbitration Act, 1995 of Kenya vis-a-viz Arbitration Act 1996 of United Kingdom." A lecture on Arbitration Act, 1995 and Arbitration Act 1996 of UK delivered at the Chartered Institute of Arbitrators Kenya Branch Entry Course held at College of Insurance on 25-26th August 2008 (Revised on 2nd March 2010)

⁴⁴Paragraph 109 of the DAC Committee Report.

⁴⁵Section 10 of the Arbitration Act, 1995.

“...the Court [shall] not intervene except as provided in this part...”

Another similar provision with slight variations is in the consideration of stay of proceedings. The 1996 Act gives the court extraterritorial jurisdiction to order a stay even where arbitration is to be held outside of the English law jurisdiction or outside of the UK. Also with regards to appointment or removal of arbitrators, the UK courts have similar powers to the Kenyan courts except the grounds for application of such power are clearly specified, as regards removal of arbitrators.⁴⁴ Similarly, the courts also have jurisdiction in recognition and enforcement of awards and as regards right of appeals, they can hear the appeal unless the appeal itself was not intended by the parties in their agreement.

It can be seen that court intervention has been greatly limited in comparison to the Kenyan Act. Ultimately, this was the goal for both Acts, however, the UK seems to have been more successful by making sure the 1996 Act is clear enough and less prone to challenge in court thereby reducing the need for the courts’ intervention to the basic minimum.⁴⁵ An analysis of the 1996 English Arbitration Act shows that the same has succeeded in reducing the Court’s intervention by conferring upon the Court “powers exercisable in support of arbitral proceedings” with the following three provisos:

- a) If the case is one of urgency, the court may on the application of a party or proposed party to the arbitral proceedings make such orders as it thinks necessary for the purpose of preserving evidence or assets;
- b) If the case is not one of urgency, the court will only act on the application of a party to the arbitral proceedings made with the permission of the tribunal or with agreement in writing of the other parties; and
- c) In any case, the court will only act if or to the extent that the arbitral tribunal has no power or is unable for the time being to act affectively.

The United States of America

Arbitration of domestic (and international) commercial disputes in America is governed by the Federal Arbitration Act (FAA). There is a difference however, between federal and state court proceedings in that for the latter, state law applies, and this varies from state to state.⁴⁶ The US is a signatory to the New York Convention which is incorporated

⁴⁶Section 24(1) of the Arbitration Act 1996.

⁴⁷Muigua (n 39) 27.

⁴⁸Most states have adopted the Revised Uniform Arbitration Act (RUAA).

into the FAA. However, as regards the UNCITRAL Model Law, the US has not adopted it and neither is the FAA based on it. It is worthy of note however, that several US states have based parts of their legislation on the UNCITRAL.

The FAA recognizes the role of the national courts, i.e. the US district courts in arbitration and provides for their jurisdiction in various circumstances. Generally, the US district courts will have original jurisdiction, however the FAA expressly provides that courts can order a stay of court proceeding pending arbitration.⁴⁷ It is unclear though whether the court can intervene by ordering a stay of arbitration when one has commenced and there is a concurrent court proceeding already, i.e. the preclusive effect.

Similar to the Kenyan Act, the US district courts can assist in appointment of arbitrators.⁴⁸ They also have jurisdiction to recognize both domestic and international awards with varying timelines and upon application. One aspect that is unclear in the Kenyan Act is that in the FAA, the US district court can be petitioned for an order compelling parties to arbitrate where the respondent fails to participate.⁴⁹ Third parties can also be summoned to the proceedings in the same way an order of subpoena is made to testify.

Conclusion

Courts are generally supportive of and willing to promote other ADR processes and judges often encourages party to look beyond litigation. The judicial system is already overwhelmed with courts having a backlog of cases and other dispute resolution methods would help relieve some of this burden to ensure courts are able to function efficiently. As seen throughout the paper, courts intervention as envisaged by the Arbitration Act of 1995 is meant to facilitate the arbitration process and at the same time be weary of usurping the jurisdiction of the tribunal thereby also giving parties autonomy to decide how their dispute should be handled.

The practice of arbitration will continue to increase as more people trade globally resulting in a higher demand for more efficient ways of doing business, which also includes resolving disputes that arise there from. In comparison, The UK and US have evolved their arbitration procedures and fine-tuned their provisions. Also by limiting the extent to which the court can intervene to the basic minimum, has for the most part

⁴⁹Federal Arbitration Act 9 U.S.C Sections 2, 3 & 203.

⁵⁰9 U.S.C Sections 5 & 206.

⁵¹9 U.S.C Section 4.

ensured there is no ambiguity or room for abuse of power by the courts. The UNCITRAL has provided a model for which most jurisdictions have adopted and while there is no obligation to adopt it in totality, countries must ensure that the national legislation ultimately encapsulates the integral aspects in arbitration processes for which the model was fashioned.

Arbitration should be viewed broadly as complimentary to the overworked and overwhelmed judicial system in Kenya. Significantly, arbitration should be nurtured and encouraged in both domestic and international trade transactions. Needless to state, many international business men are keen to understand and enquire about how disputes can be resolved expeditiously in the event that there is any breach of contract by any of the parties. Apart from the well-established – Chartered Institute of Arbitrators, Kenya is lucky to have the Nairobi Centre for International Arbitrators. It is encouraging to note that both bodies recently signed M.O.Us with the vibrant and energetic Arbitration Committee of LSK. The latter is being chaired by a leading Chartered Arbitrator viz, John Ohaga. These bodies should work closely with each other to take arbitration to the next level both domestically and internationally.

References

Statutes

Arbitration Act, Cap 49 (No. 4 of 1995 as amended in 2012)

Civil Procedure Act and Rules (2010), Cap 21, Laws of Kenya

International Laws and Conventions

United Nations Commission on International Trade Law, UNCITRAL Model Law on *International Commercial Arbitration, 1985, with Amendments as adopted in 2008.*

Convention on the recognition and enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th of June 1958.

Primary Sources

Departmental Advisory Committee on Arbitration Report on the Arbitration Bill (dated February 1996)

Arbitration Act, 1996.

Revised Uniform Arbitration Act (RUAA).

United States Federal Arbitration Act, 1925

United States Code

Books

Totterdill, B, *An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques.* (Sweet & Maxwell, London)

Stephenson, R, *Arbitration Practice in Construction Disputes,* (Buttersworths, London, 1998, p. 123)

Stephen M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results,* 12 INT'L TRADE L.J. 55 (2003).

GithuMuigai, “The Role of Court in Arbitration Proceedings” in GithuMuigai (ed), *Arbitration Law and Practice in Kenya* (Law Africa) 78.

Journal Articles and Papers

Farooq Khan, *Alternative Dispute Resolution*, A paper presented at Chartered Institute of Arbitrators Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

Jamshed Ansari, “Party Autonomy in Arbitration: A Critical Analysis”, (2014) 6(6) *Researcher* 47-53 (ISSN:1553-9865) <http://www.sciencepub.net/researcher>

Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (London: United Kingdom, Kluwer Law International, 2004)

KariukiMuigua, 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya.' A paper presented at the Chartered Institute of Arbitrators course on “Advocacy in Mediation and Arbitral Proceedings”, on 5th February, 2009 (Revised on 1st March 2010) http://kmco.co.ke/wp-content/uploads/2018/08/080_role_of_court_in_arbitration_2010.pdf

Ndolo, D & Liu, M 2020, “The State of International Arbitration in Kenya’, (2020) 23(1) *International Arbitration Law Review* 40-69.

KariukiMuigua, “The Arbitration Acts: A Review of Arbitration Act, 1995 of Kenya vis-a-viz Arbitration Act 1996 of United Kingdom.” A lecture on Arbitration Act, 1995 and Arbitration Act 1996 of UK delivered at the Chartered Institute of Arbitrators Kenya Branch Entry Course held at College of Insurance on 25-26th August 2008 (Revised on 2nd March 2010)

List of Cases

Civil Case 3 of 2018 – County Government of Kirinyaga vs African Banking Corporation Ltd Ltd [2020] eKLR

Rawal v The Mombasa Hardware Ltd [1968] E.A. 398

Eagle Star Insurance Company Limited vs Yuval Insurance Company Limited [1978] 1 Lloyds Rep. 357

Nairobi HCCC No. 102 of 2011 - Fairlane Supermarkets Limited v Barclays Bank Of Kenya Limited [2018] eKLR

Fiona Shipping v Privalov[2007] EWCA Civ 20

Civil Appeal 26 of 2007 -UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR, available at <<http://kenyalaw.org/caselaw/cases/view/91425/>>

Addock Ingram East Africa Limited v Surgilinks Limited [2012] eKLR.

HCCC (Milimani) No. 155 of 2007 - Chevron Kenya Limited V Tamoil Kenya Limited [2007] eKLR

Civil Application 327 of 2009 – *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR.

Channel Group vs Balfour Beatty Ltd [1993] Adj. L.R 01/21 at p.18

Civil Case 315 of 2014 – Pan african Paper Mills (East Africa) Limited (In Receivership) v First Assurance Company Limited [2015] eKLR

Misc Civil Application 193 of 2014 – ZaddockFurnitures Systems Limited & another v Central Bank of Kenya [2014] eKLR

The East African Court of Justice as an Arbitration Centre: The Undiscovered Gem

*By: Emmanuel Ugirashebuja**

i. Introduction

In the year 2000, the Treaty Establishing the East African Community came into force reviving the East African Community following a series of intense negotiations amongst the original three Partner States of the Community.¹ The Partner States authorized and allowed among themselves free movement of goods and services, free movement of capital, free movement of labour and services, and the right of establishment and residence in order to benefit all the people of East Africa.² In fact, one of the overarching principle that governs the practical achievement of the objectives of the Community is that integration is people centred and market-driven.³ This freeing of movement coupled with the market-driven agenda would consequently translate into freer movement of commercial businesses and transactions. Enhanced cross-border investment was expected as a result of this new regional regulatory framework at the regional level which eased doing business in the Community. Under this new regional regulatory framework, a dispute settlement mechanism had to be devised in order to ensure that aggrieved citizens and business would seek remedy. The drafters of the Treaty, put in place a judicial mechanism which ensured that citizens and business that enjoyed the newly-found businesses would seek remedy in case they were aggrieved by the Partner States' or the community in the conduct of their cross-border transactions.⁴ Further, the Treaty also provided that the Partner States could bring cases against Partner-States that

* *Justice (former) Dr. Emmanuel Ugirashebuja, is the immediate past President of the East African Court of Justice where he was also the Presiding Judge in the Arbitration mandate of the Court. He is the Dean Emeritus of the Faculty of Law University of Rwanda.*

¹ EAC, The Treaty for the Establishment of the East African Community, (Hereinafter, The Treaty).

² *Id.* At Art. 7 (1) (c).

³ *Id.* At Art. 7(1) (a).

⁴ *Id.*, at Art. 30 (Reference by Legal of Natural Persons): "...any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."

allegedly breached among other things the freedoms established in the new regional legal framework including those of citizens and businesses.⁵

However, the drafters noted that the abovementioned remedies were not sufficient given that cross-border transactions would at times require the engagement of private commercial entities without the involvement of the State. What applicable remedy would be there at the regional level to ensure that business-to-business transactions would attain justice that is accessible, appropriate, equitable, effective and efficient? Moreover, even state-to-state disputes are at times appropriately resolved by resort to a mechanism which is not necessarily that of conventional court processes. Thanks to the ingenuity of the drafters of the EAC Treaty, arbitration was introduced as one of the possible dispute settlement mechanisms in order to ensure appropriateness, accessibility, equity, effectiveness and efficiency in resolution of disputes in the realm of private commercial transactions and state-to-state disputes. At the time when the Treaty was established there was scarcely any arbitration centre in the region that would handle disputes which were commercial in nature or state-to-state disputes. The drafters decided to grant among others the mandate of handling both state-to-state arbitration disputes and commercial related arbitration disputes to the East African Court of Justice (EACJ) which was designated as the judicial arm of the East African Community. This paper will discuss the arbitration mandate of the EACJ and why this medium of dispute resolution has yet to be optimally utilized.

II. The Mandate Arbitration Mandate of the EACJ

The arbitration mandate of the East African Court of Justice is enshrined in the Article 32 of the EAC Treaty. Article 32 entitled Arbitration Clauses and Special Agreement states:

The Court shall have jurisdiction to hear and determine any matter:

- (a) arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or
- (b) arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or

⁵ *Id.*, at Art. 28

- (c) arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.

This single Article in the Treaty is the source of the arbitration mandate of the EACJ. What is clear from the article is that the parties whose dispute they wish to submit to the EACJ for arbitration should show that “there is an arbitration clause contained in a contract or agreement” conferring such jurisdiction to the Court where the parties are the community or any of its institutions or where it involves commercial related disputes. With regards to interstate disputes that the Partner States of East African Community wish to submit to arbitration, they can do so “under a special agreement between the Partner States concerned.”

Aside from that single article granting the EACJ the mandate to arbitrate, there is no other stipulation that details how the arbitration will be conducted if filed before the Court. So how would the Court conduct an arbitration proceeding if there are no procedure? The Treaty in its Article 42” (1) provides: “The Court shall make rules of the Court which shall, subject to the provisions of this Treaty, regulate the detailed conduct of the business of the Court.” It is on the basis of this Article that the Court created the “Arbitration Rules of the East African Court of Justice” which were gazetted in March 2012, twelve years after coming into force of the EAC Treaty granting the EACJ the arbitration mandate.

III. An Overview of the Arbitration Rules of the East African Court of Justice:

Arbitration proceedings before the EACJ are not significantly distinct from those of other arbitration institutions. The EACJ Arbitration Rules provide for how the Arbitration commences to its conclusion. The Rules provide for how the arbitral tribunal is composed and its process, the conduct of proceedings, decision making, the Arbitral Award and the finality and enforceability of awards.

However, the rules do have distinct features when compared to the rules of other Arbitration centres. One such distinct feature is that of commencement of and Arbitration. Rule 3 (1) of the EACJ Arbitration Rules provides: “A Party wishing to have recourse to arbitration of a particular dispute by the Tribunal shall notify the Respondent in writing of its request for that dispute to be referred to arbitration and shall thereafter submit the request to the Registrar”. This provision departs from other institutional facilitated arbitrations which generally require that a party wishing to have

arbitration under their rules submit their requests to the arbitration institution secretariat.⁶ Rule 3 (1) of the EACJ Arbitration Rules requirements for commencement of arbitration are similar to the requirements stipulated in Article 2 of the 2000 Arbitration Rules of the Chartered Institute of Arbitrators which provides: “Any party wishing to commence an arbitration under these Rules (the Claimant) shall serve upon the other party (the Respondent) a written request for arbitration under these Rules (the arbitration notice)...”

The second distinct feature of the EACJ Arbitration Rules is the absence of party autonomy in the choice of arbitrators. Rule 8 of the EACJ Arbitration Rules whose title is “Appointment of Arbitrators” provides as follows:

Rule 8:

- (1) The appointing authority shall appoint, from among the Judges of the Court a panel to constitute the Tribunal to conduct the arbitral proceedings, unless the parties have agreed on a Sole Arbitrator who, in the like manner, shall be appointed from among the Judges of the Court.
- (2) The Chairman of the Tribunal shall be appointed by the appointing authority from among the Judges constituting the Tribunal.
- (3) In making the appointment, the appointing authority shall have due regard to the necessity to secure the appointment of independent and impartial arbitrators.

The Rule above is very clear that the authority to appoint arbitrator(s) is entrusted in the “appointing authority”. The “appointing authority” is defined in Rule (4) of the EACJ Arbitration Rules as the “the President (of the EACJ) or the Vice-President when acting on behalf of the President in his or her capacity...”. The parties to the dispute have a very narrow autonomy of deciding on a Sole arbitrator. The Parties do not even have the autonomy to choose specific judges among the judges of the EACJ to entertain their dispute. This is a departure from other institutional arbitrations which allow disputants to free choose those who will arbitrate the manner unless of course the parties fail to agree on the arbitrator(s), in which case the institution intervenes. In different arbitration conferences that the author of this article has participated in, the following suggestions

⁶ See for example, Rule 4 of the International Chamber of Commerce Arbitration Rules, at [880-4 Rules of Arbitration - Mediation Rules \(iccwbo.org\)](#) last retrieved on 2nd April 2021; Article 5 of the 2012 Kigali International Arbitration Centre Arbitration Rules, [Arbitration Booklet.indb \(kiac.org.rw\)](#) last retrieved on 2nd April 2021; Article 1 of the 2014 LCIA Arbitrations Rules, [LCIA Arbitration Rules \(2014\)](#); Rule 5 of the Nairobi Centre for International Arbitration Rules, [arbitration_rules_2016-1.pdf \(ncia.or.ke\)](#) last retrieved on 2nd April 2021;

were made in this regard: first, that the list of the arbitrators at the EACJ should be broadened in order to include other arbitrators who are not judges; and, that the party's autonomy to choose who should arbitrate on their disputes should be considered. The suggestions, without considering their merits or demerits, can only be effected by amending the Treaty Establishing the East African Community and not by amendment of the EACJ Arbitration Rules.

The third distinct feature of the EACJ Arbitration Rules is that found in Rule 37 of the Costs and Fees of the Arbitrator. Unlike other Arbitrations Centres, Rule 37 (1) is equivocal that "there shall be no fees payable to the arbitrators". The reasoning behind this rule is two-fold. First, the day-to-day costs of proceedings of the Court are borne by the Partner States in an annual budget to the Community and it would be burdening a taxpayer who is a party to an arbitration dispute to again pay costs of arbitrator who are judges of the EACJ and remunerated through the annual budget of the Court. Second, payment of arbitrators is exorbitant and can curtail access to justice which is a much-cherished principle of East African Court of Justice. In fact, the EACJ amended its Rules of the Court in 2013 in order to do away with filing fees of any of the cases before the Court in order to facilitate access to justice. Hefty costs of arbitrators may make it difficult for people of limited means to pursue their disputes in arbitration. It should be clear here that what is not payable are fees to the arbitrators. The Tribunal shall fix other administrative costs of arbitration as well as expenses of the Tribunal.

The fourth distinct feature of the EACJ Arbitration rules is that of the language of Arbitration. Rule 22 provides:

Rule 22 Language of Arbitration

- (1) The language of the Tribunal shall be English.
- (2) A document drawn in a language other than English shall be accompanied by its certified translation into the English language.
- (3) Where oral evidence is given in a language other than English such evidence shall be accompanied by simultaneous interpretation into English.

This rule is clear that English is the only language of arbitration. In other words, the Arbitration cannot be conducted in any other language other than English. Even where a document or evidence is proffered in a language other than English, certified translation should be availed to the court, or simultaneous interpretation in English

should be procured where the evidence is oral. The choice of English as the language of Arbitration before the EACJ may have stemmed from Article 37 (1) of the EAC Treaty which provides in its paragraph 1 that “the official language of the Community shall be English”. Hence, the EACJ being an organ of the Community is required to apply English in its official operations including arbitrations. This sole use of English in Arbitrations in the EACJ differs from provisions of other arbitrations centres such as ICC, LCIA, KICAC, NCIA, etc. In the Rules of those other arbitration centres, parties may agree to conduct arbitration in any language of their choice. In a very recent development, the EAC Summit of the Heads of State in its Ordinary Summit on the 27th of November 2021, adopted English, French and Kiswahili as official languages of the community and “directed the Council to expedite the implementation modalities of the directive”.⁷ The Directive by the Summit would include among other things the amendment of Article 137 of the EAC Treaty. The implementation of the Directive may extend to the amendment of Rule 22 of the EACJ Arbitration on the language of arbitration.

The fifth distinct feature of the EACJ Arbitration Rules is that the principle of confidentiality is not expressly provided for. In arbitration rules of other centres, confidentiality is expressed. The confidentiality rule does oblige the parties and the arbitral tribunal to always treat the matters relating to the proceedings and awards as confidential unless there is written consent of all parties. In practice, the principle of confidentiality is observed in all the proceedings and the final award in EACJ arbitrations. When drawing the terms of reference, the tribunal normally enquires from parties whether the final award should be published. The arbitral proceedings are also in practice held in camera and confidentiality is fully observed.

Parties who have elected the EACJ as the institution of arbitration, in a similar fashion to other rules of other arbitration centres grants parties autonomy to choose the rules applicable to the substance of a dispute⁸ and the place of arbitration⁹ unless where the parties have not provided for such. Rule 11 provides for rules applicable to the substance of a dispute as follows:

⁷ Communiqué of the 21st Ordinary Summit of the East African Community Heads of State, held on the 27th February, 2021, at COMMUNIQUÉ OF THE 21ST ORDINARY SUMMIT OF THE EAST AFRICAN COMMUNITY HEADS OF STATE (eac.int) last viewed on 2nd April 2021

⁸ EACJ, *Arbitration Rules of the East African Court of Justice*, 2012 at Rule 11.

⁹ *Id.*, at Rule 21.

- (1) The Tribunal shall decide the dispute in accordance with the law chosen by the Parties. But if the parties expressly authorize it to do so, the Tribunal shall decide on the substance of the dispute according to considerations of justice and fairness without bound by the rules of law (*amiabile compositeur* or *ex aequo et bono*).
- (2) The choice of the law or legal system of a designated State shall be construed, unless otherwise agreed by the parties, as directly referring to the substantive law of that State and not its rules of conflict of laws.
- (3) Failing a choice of the law by the parties, the Tribunal shall apply the rules of law it considers to be appropriate given all the circumstances of dispute.
- (4) In all cases, the Tribunal shall decide in accordance with the terms of the particular contract and shall take in account the usages of the trade applicable to the particular transactions.

Rule 21 which provides for place of arbitration provides:

- (1) Arbitration shall be held at a place agreed upon by the parties or in the absence of such agreement, shall be determined by the Tribunal, provided that the Tribunal may hear witnesses or hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
- (2) The Tribunal may visit any place it deems necessary for the inspection of goods, documents or other property. The parties shall be given sufficient notice to enable them to be present at such inspection.
- (3) The Award shall be deemed to be made at the place of arbitration.

It is of immense importance for parties to, when choosing the place of arbitration in their arbitration agreement, understand that such choice will determine the level of intervention of courts in the arbitral proceedings. The choice should be informed by whether the courts of a given place/seat have a history of minimally intervening in arbitral process in a supporting role.

IV. Finality and Enforcement of Awards

Enforcement of awards is an important part of the whole chain of arbitration. Otherwise, the award is not worth the paper it is written on. According to Rule 36 (1) of the EACJ Arbitration Rules, the arbitral award is final. Rule 36 (3) provides that “enforcement of arbitral awards shall be in accordance with enforcement procedures of the country in

which enforcement is sought”. Enforcement has a correlation with the place of arbitration. Parties, as earlier pointed out should give deep thought to the choice of the place of arbitration keeping in mind that enforcement may be hampered where courts unnecessarily interfere with arbitral processes. It is therefore beneficial for parties to use clear terms when referring to the intended seat in an arbitration agreement. It is not the purpose of this paper to discuss the attitude of the judiciaries of the countries of East African Community.

Suffice to note that all the Partner States of the East African Community are parties to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

V. The EACJ and Arbitration: Why Opt for EACJ Administered Arbitration

Opting for an EACJ administered arbitration has immense advantages. The advantages are as follows:

- ***The Caliber of Judges:*** Over the last 20 years of the existence of the EACJ, the judges have up to now proven that they are individually and collectively independent. This can be inferred from the contentious cases that have been decided by the Court.¹⁰ The independence is ensured by the highly qualified judges nominated by the members states. The independence is also safeguarded by the fact that the judges are nominated by all the Partner States. This makes it difficult for any country of the East African Community to influence all the judges in the court do not share the same nationality.
- ***Highly trained Judges:*** Judges appointed at the EACJ are highly trained and experienced in relevant areas relevant to arbitration such as contracts, torts, international law etc. Some judges have experience of dealing with complex arbitration disputes even before being appointed to the EACJ. The Judges come with a wealth of knowledge in either of the main legal systems, namely, common law and civil law or sometimes both. The availability of judges who

¹⁰ See generally, Gathii J. (2014). Mission Creep or a Search for Relevance: The East African Court of Justice’s Human Rights Strategy, *Duke Journal of Comparative and International Law* 24 250.

are well conversant in either or both legal system comes handy when dealing with the substance of the dispute.¹¹

Moreover, the EACJ has taken upon itself to train all judges in arbitration. The Court has an existing collaboration with the Chartered Institute of Arbitrators-Kenyan branch to train and accredit judges as arbitrators.¹²

- **Costs of Arbitration:** As earlier pointed out, there is no fee for arbitrator(s) in the EACJ administered arbitrations. In addition, parties have access to some of the highly supportive infrastructure and facilities for arbitration such as hearing premises, transcription and court recording services free of charge if required. In addition, the Court has the capability of using online technology to resolve disputes.¹³ This significantly reduces the costs of arbitrations administered by the EACJ.

VI. Why has the EACJ Arbitration not been fully Discovered?

Despite all the above advantages of resorting to EACJ administered arbitration, it is baffling that very few disputes have been submitted to the Court. To the best knowledge of the author of this paper, only four disputes have been submitted to the Court. Of the four disputes, only one has proceeded to the level of generation of an award. One other dispute was settled by parties during proceedings. Two others are still yet to be resolved. During my term as the President of the EACJ, I engaged in an exercise of understanding why lawyers in East Africa have not seized the opportunities presented by the Court as an arbitration institution. The following reasons came to the fore when lawyers were informally asked why they have not considered electing EACJ as the institution of arbitration in the arbitration agreements that they have been contracted to draft.

First, there was a clear lack of knowledge of the arbitration mandate of the EACJ amongst many legal practitioners. If there is a lack of knowledge of the arbitration

¹¹ See generally, Elsing S. and Townsend J., “Bridging the Common Law and Civil Law Divide in Arbitration”, *Arbitration International*, Vol. 18 No. 1,

¹² See for example, “EACJ Judges & Registrars Training Arbitration Sets off in Nairobi”, [EACJ Judges & Registrars training on Arbitration sets off in Nairobi](#) last reviewed on the 3rd April 2021.

¹³ This capability was utilized during the lockdowns that resulted from COVID-19 that inhibited in-person court sessions. See, “Court to Rollout Online Hearings in May 2020 after Test Run” at [Court to rollout online hearings in May 2020 after test run | East African Court of Justice \(eacj.org\)](#).

mandate of the EACJ then it is logical to conclude that the practitioners do not know of the opportunities presented by the Court administered arbitrations. The EACJ has in recent years participated in a number of arbitration conferences with a view of presenting the EACJ as an arbitration institution with immense advantages. There is a hope that such engagements will lead to lawyers electing EACJ as an institution of arbitration in the arbitration agreements that they are involved in drafting.

Second, there is a lack of appetite amongst practitioners both in the region and abroad of electing regional arbitration institutions in arbitration agreements. Foreign arbitration institutions such as ICC and the LCIA continue to dominate international arbitrations in Africa. In a 2018 survey by the Queen Mary University and White and Case, African practitioners preferred ICC and LCIA as the top two arbitration institutions.¹⁴ However, recent trends point to practitioners increasingly gaining confidence and using African arbitration institutions. According to a 2020 survey by the School of Oriental and African Studies (SOAS), the number of cases administered by the African arbitral centres has been increasingly steadily.¹⁵ There is therefore hope that this steady increase of African arbitral centres will translate into the EACJ attracting more disputes more so because of all the advantages of using the EACJ administered arbitrations highlighted in the previous section.

VII. Conclusion

The EACJ is a viable institute for administering arbitrations. It offers immense advantages both in terms of reduced costs and credibility of the process as discussed above. There is hope that arbitration practitioners will elect EACJ administered arbitrations due to the advantages it offers. It is also expected that as practitioners begin to trust the capacity of African arbitration institutions, the EACJ will consequentially also attract arbitration disputes. The projection is that where parties will not be comfortable choosing one of the available institutes based in the East African Partner States, then the parties may resort to the EACJ administered arbitrations when constructing their arbitration agreements.

¹⁴ For the survey, see, “Institutional Arbitration in Africa: Opportunities and Challenges, at <https://www.whitecase.com/publications/insight/africa-focus-autumn-2020/institutional-arbitration-opportunities-challenges> , last viewed on the 3rd April 2021.

¹⁵ The School of Oriental and African Studies (SOAS) Arbitration in Africa Survey 2020 Report: Top African Arbitral Centres and Seats, authored by Emilia Onyema (a Reader in International Commercial Law at SOAS), available at <https://eprints.soas.ac.uk/33162/>.

The East African Court of Justice as an Arbitration Centre: The Undiscovered Gem: Emmanuel Ugirashebuja (2021)9(3) *Alternative Dispute Resolution*

References

Communique of the 21st Ordinary Summit of the East African Community Heads of State, held on the 27th February, 2021, at COMMUNIQUÉ OF THE 21ST ORDINARY SUMMIT OF THE EAST AFRICAN COMMUNITY HEADS OF STATE (eac.int) last viewed on 2nd April 2021;

EACJ, *Arbitration Rules of the East African Court of Justice*, 2012;

EACJ, “Court to Rollout Online Hearings in May 2020 after Test Run” at [Court to rollout online hearings in May 2020 after test run | East African Court of Justice \(eacj.org\)](#)

EAC, *The Treaty for the Establishment of the East African Community*, Arusha. EAC: 2002;

Elsing S. and Townsend J., “Bridging the Common Law and Civil Law Divide in Arbitration” , *Arbitration International*, Vol. 18 No. 1;

Emilia Onyema, The School of Oriental and African Studies (SOAS) Arbitration in Africa Survey 2020 Report: Top African Arbitral Centres and Seats, available at <https://eprints.soas.ac.uk/33162/>.

Gathii J. (2014). Mission Creep or a Search for Relevance: The East African Court of Justice’s Human Rights Strategy, *Duke Journal of Comparative and International Law* 24 250

International Chamber of Commerce Arbitration Rules, at 880-4 Rules of Arbitration - Mediation Rules (iccwbo.org) last retrieved on 2nd April 2021;

Kigali International Arbitration Centre Arbitration Rules, *Arbitration_Booklet.indb* (kiac.org.rw) last retrieved on 2nd April 2021

London Centre of International Arbitration, 2014 Arbitrations Rules, LCIA Arbitration Rules (2014);

Nairobi Centre for International Arbitration Rules, *arbitration_rules_2016-1.pdf* (ncia.or.ke) last retrieved on 2nd April 2021;

COVID 19: Force Majeure Claim

By: *Austin Ouko**

Abstract

The Covid-19 pandemic has ended and upended lives around the globe. To combat the spread of the virus, countries have put in place unprecedented measures such as lock downs and closing their borders, thereby impeding the flow of people, goods and services. These measures have had a domino effect on every aspect of trade, business and contracting. Thus drawing the attention of contracting parties, lawyers and tribunals on the applicability of force majeure clauses where a party has been unable to fulfil their contractual obligations as a result of the pandemic. The paper examines the doctrine of force majeure and the pre-requisite elements for a Covid-19 force majeure claim. It finds that the mere existence of Covid-19 will not trigger a force majeure claim unless the doctrine's pre-requisite elements are demonstrated.

I. Introduction

On 30th January 2020, the Director-General of the World Health Organization (WHO) declared that the outbreak of Covid-19 constituted a “Public Health Emergency of International Concern”. He advised that “all countries should be prepared for containment, including active surveillance, early detection, isolation and case management, contact tracing and prevention of onward spread of infection, and to share full data with WHO”.¹ This is exactly what happened globally in the subsequent

* *Fellow Chartered Institute of Arbitrators (FCIArb), Advocate of the High Court of Kenya, Certified Public Secretary (Institute of Certified Secretaries Kenya); Master of the Science of Law (Stanford Law School, California, USA), Master of Laws (Public Finance and Financial Services law), Bachelor of Laws (Hons) (University of Nairobi); Post Graduate Diploma in International Commercial Law, College of Law of England and Wales.*

¹ See WHO, <[https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))> accessed on 14 June 2021.

months.² On 11th March 2020, WHO declared Covid-19 a pandemic.³ A pandemic is defined as an epidemic occurring worldwide or over a very wide area, crossing international boundaries and usually affecting a large number of people.⁴

As a result of the spread of Covid-19, governments world over have taken unprecedented measures to stem the spread of the virus such as closing their countries borders, imposing prohibitions on exports, and closing workplaces thereby impeding the flow of people, goods and services. The world has not experienced such a destructive event recently, and it is believed that no one could have foreseen either the duration of its existence or its effects on every level of health, business, economy, and other areas.⁵ Businesses are grappling with their inability to meet their obligations under existing contracts. The imposed measures have led to a failure of production of goods or delivery of services by contracting parties.⁶

This secondary effects of Covid-19 have brought into sharp focus the applicability of force majeure clauses in contracts.⁷ The question whether a force majeure event does in fact exist in these circumstances remains a legal issue. Once a dispute arises between contractual parties, it has to be determined by a court or arbitral tribunal in each individual case.⁸ Although force majeure claims for Covid-19 have not been brought before arbitral tribunals yet, they will soon start to show up.⁹ Given its global and

² Klaus Peter Berger and Daniel Behn, Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study (20 April 2020) 6 McGill Journal of Dispute Resolution (2019/2020) Number 4, pages 79-130, <SSRN: <https://ssrn.com/abstract=3575869> or <http://dx.doi.org/10.2139/ssrn.3575869>> accessed on 13 June 2021.

³ See speech by Dr Tedros Adhanom Ghebreyesus, WHO Director General, <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>> accessed on 16 June 2021.

⁴ International Epidemiological Association, *A dictionary of epidemiology* (5th Edn. Oxford University Press, 2008).

⁵ S. Esra Kiraz and Esra Yıldız, 'COVID-19 and force majeure clauses: an examination of arbitral tribunal's awards', 2020 Unif. L. Rev., 1–29 doi:10.1093/ulr/unaa027

⁶ Anjarwalla & Khanna, 'COVID-19 and its Impact on Contractual Relations: How to Mitigate Damages, Renegotiate Your Contracts and Avoid Disputes', (May 2020) <https://www.africalegalnetwork.com/wp-content/uploads/sites/22/2020/05/AK-Legal-Alert-Impact-of-Covid-19-on-Contractual-Relations-How-to-Mitigate-Damages-Renegotiate-Contracts-and-Avoid-Disputes_Part-1.pdf> accessed on 7 June 2021.

⁷ Berger & Behn *supra* note 2.

⁸ *Ibid.*

⁹ Kiraz & Yıldız, *supra* note 5.

unprecedented dimensions, its lethal potential and drastic effects on local and international contracts, whether long-term or not, Covid-19 pandemic will generate years, if not decades, of post-pandemic litigation and arbitration.¹⁰

International arbitral tribunals have previously dealt with several cases regarding epidemics, such as the bird flu and SARS, but Covid-19 has affected things in the world on a different level.¹¹ Whether Covid-19 results in triggering the force majeure excuse in commercial contracts is a current question that needs to be answered. As a result, force majeure disputes will probably be complex. It is therefore crucial for contractual parties and lawyers to try to predict the arbitral tribunals' attitudes and approach towards the force majeure claims.¹²

It is also noteworthy that there is relatively little Kenyan jurisprudence on the doctrine of force majeure and, as far as I am aware, there is no reported Kenyan case law on the operation of force majeure clauses in the context of epidemics or pandemics.¹³ This is also the case in jurisdictions to which Kenyan courts would have looked for precedential value, as a pandemic of this magnitude has not impacted the world in over 100 years. Accordingly, arbitral tribunals in Kenya and internationally will have to grapple with novel issues that will set new precedents. What is certain is that any analysis of the applicability of a force majeure clause will be highly contextual.¹⁴

It is against this backdrop that Section II of this paper will discuss the force majeure concept, Section III will explore the pre-requisite conditions that a party relying on Covid-19 as a force majeure event will have to fulfil after reviewing different international legal instruments, published decisions and awards of international arbitral tribunals', and court judgments. Section IV concludes by stating that for a successful force majeure claim there should be a direct link between Covid-19 and a party's' failure to perform its obligations. The mere existence of Covid-19 will not trigger the force majeure clause unless the pre-requisite conditions are met.

¹⁰ Berger & Behn *supra* note 2.

¹¹ Kiraz & Yildiz, *supra* note 5.

¹² *Ibid*

¹³ Anjarwalla & Khanna, *supra* note 6.

¹⁴ *Ibid*.

ii The Force Majeure Concept

The basic principle of contract law is that the parties are bound by their promises under a contract, which is known as *pacta sunt servanda*.¹⁵ However, it was seen as unreasonable to expect parties to perform their duties when the changed circumstances had occurred. Therefore, the doctrine of *rebus sic stantibus* was developed to initiate the possibility of releasing the obligations that become onerous by changed circumstances.¹⁶

The term force majeure is not a term of art in common law although it is well known in continental legal systems. The doctrine of force majeure had its origin in French law based on the Roman doctrine of *vis major*. The *vis major* concept was referred to as “acts of God”.¹⁷ Thus, force majeure is sometimes translated in English as an act of God, but literally translates to “superior force”.¹⁸ In its simplest form, force majeure refers to those situations outside the control of a party and which prevent the party from performing its obligations under its contract whether on a temporary or permanent basis.¹⁹ In terms of the consequences of force majeure, there is a distinction drawn between temporary and permanent impediments. If there is a temporary impediment, suspension of obligations is followed, whereas, in the case of a permanent impediment, the exclusion of the liabilities appears.²⁰

Initially a civil law concept found in the French Civil Code, force majeure found its way into English common law as far back as 1863 in the *Taylor v Caldwell* case²¹ following a fire which razed the Surrey Gardens & Music Hall to the ground leaving the owners unable to perform their contractual obligations. **Blackburn J.** while determining the matter held that “in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance”.²²

¹⁵Marel Katsivela, ‘Contracts: Force Majeure Concept or Force Majeure Clauses?’ (2007) 12 Unif.L. Rev. 101, 108 as cited in Kiraz & Yıldız, *supra* note 5.

¹⁶*Ibid.*

¹⁷ *Pankaj Transport PVT Limited v SDV Transami Kenya Limited* HCCC No. 162 of 2014 [2017] eKLR,

¹⁸ See *Thames Valley Power Ltd v Total Gas & Power Ltd*, [2005] EWHC Comm 2208 as cited in Berger & Behn *supra* note 2.

¹⁹ See Black’s Law Dictionary, (10th edn. Thomson West 2014).

²⁰ Kiraz & Yıldız, *supra* note 5.

²¹ *Taylor v Caldwell* [1863] EWHC QB J1

²² Anjarwalla & Khanna, *supra* note 6.

Force majeure is a creature of contract. Most commercial agreements have force majeure clauses whose purpose is to allocate risk and to provide notice of events that may delay or excuse performance. Parties to a contract expressly allocate their risk when they define what constitutes a force majeure event. Impediments to contract performance frequently occur. Business people are presumed to be aware of the risks they face. They are held accountable if they fail to protect themselves when contracting.²³

Thus, if an event impedes the performance one of the contractual parties after entering into a contract, this party can use the force majeure clause to excuse the non-performance under the contract.²⁴ Reliance on the doctrine will only work if there is a properly defined force majeure clause in the contract. Normally, a force majeure clause will provide a list of force majeure events, which if were to occur, would excuse a party from performing its obligations under the contract for so long as the particular event continues. The interpretation of a force majeure clause is usually strict and will depend on the wording of the clause, with due regard to the nature and general terms of the contract as a whole. Ordinarily, in addition to stipulating what will constitute a force majeure event, force majeure clauses will refer to performance being hindered, delayed or prevented.²⁵

Consequently, depending on the impediment posed by the force majeure event and its effect, the remedies available to an affected party may include:²⁶

1. Excusing the affected party from the delay in performance of its obligations and extending the time required to enable it to meet its obligations under the contract;
2. Entitling the affected party to suspend contractual performance for the duration of the force majeure event; or
3. Providing a platform for renegotiation of the contract.

As a general rule, it is for the party invoking the force majeure clause to demonstrate that the clause applies, to prove that the event falls within the clause in the contract and that the event has prevented or delayed the performance of its obligations under the

²³ Mark Augenblick and Alison B. Rousseau, “Force Majeure in Tumultuous Times: Impracticability as the New Impossibility”, (2012) 13 the Journal of World Investment & Trade.

²⁴ Kiraz & Yıldız, *supra* note 5.

²⁵ Anjarwalla & Khanna, *supra* note 6.

²⁶ *Ibid.*

contract.²⁷ This is the position taken by the High Court in *Pankaj Transport PVT Limited v SDV Transami Kenya Limited* (“Pankaj”),²⁸ where Justice E.K.O. Ogolla held that:

...a party pleading force majeure must prove that the failure to perform an obligation was a result of impediment beyond his control and that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform the contract into account at the time of the conclusion of the contract; and that he could not reasonably have avoided or overcome it or at least its effects.

From the decision in *Pankaj*, it is clear that there are pre-requisite conditions that must be fulfilled for a successful claim of force majeure namely:²⁹

- a. Non-performance was due to circumstances beyond the control of the affected party;
- b. The force majeure event was not foreseen at the time of concluding the contract; and
- c. There were no reasonable steps that the affected party could have taken to avoid or mitigate the event or its consequence.

As the obligation to demonstrate the effect of the force majeure event is on the party claiming force majeure, it is incumbent on the party making the claim to notify the counterparty of the event.³⁰ The notification is intended to allow the other party to take appropriate measures.³¹ As a result, it is important for the affected party to confirm what the notice requirements are before suspension of performance. If such a requirement exists, the affected party should comply with any set timelines and other requirements

²⁷ *Ibid.*

²⁸ *Pankaj Transport PVT Limited v SDV Transami Kenya Limited* HCCC No. 162 of 2014 [2017] eKLR,

²⁹ Anjarwalla & Khanna, *supra* note 6.

³⁰ *Ibid.*

³¹ Andre´ Janssen and Christian Johannes Wahnschaffe, ‘COVID-19 and international sale contracts: unprecedented grounds for exemption or business as usual?’ 2021 Unif. L. Rev., 1–30.

(such as to delivery) of issuing notices as most contracts will have specific notice and time-bar related clauses.³²

It should not be assumed as some commentators have attempted to argue that the obligation to notify the counterparty may no longer be required if he or she is already aware of the impediment's existence. In light of the comprehensive, almost meticulous real-time reporting on the Covid-19 pandemic, the assumption of familiarity with the impediment may seem obvious. Given the variety of conceivable impediments in an individual case, any such general assumption cannot be supported.³³ It follows that if the affected party violates its duty to notify the other side, it has not forfeited its right to invoke the force majeure exception, but the counter party is entitled to damages to compensate it for every kind of loss it could have avoided if it had been informed in time and in sufficient form and detail.³⁴

There may also be an obligation to notify the counterparty when the force majeure situation has come to an end and the affected party is able to resume performance.³⁵ A force majeure clause will also often include obligations to seek to mitigate the effects of the force majeure event. The clause may not be effective to prevent liability arising to the extent that the required efforts to mitigate have not been made. Even if there is no express obligation to mitigate, such an obligation may well be implied as a result of a requirement that the force majeure event is beyond the parties' reasonable control and/or a requirement that it prevents, hinders or delays performance. If the party could have avoided or mitigated the effects of the force majeure event, it may not be able to meet these requirements.³⁶

Accordingly, whether the Covid-19 pandemic may be regarded a force majeure event will depend on (i) the actual wording of the clause, (ii) the nature of the party's contractual obligation and (iii) the actual impact of the pandemic on that obligation.³⁷ A specific reference to an "epidemic" or a "pandemic" will make it easier to succeed on a

³² Anjarwalla & Khanna, *supra* note 6.

³³ Janssen and Wahnschaffe, *supra* note 31.

³⁴ Berger & Behn *supra* note 2.

³⁵ Neil Blake, Julie Farley and Natasha Johnson, 'When Events Intervene: Force Majeure, Frustration and Material Adverse Change', (October 2020) <<https://hsfnotes.com/litigation/wp-content/uploads/sites/7/2020/09/Contract-disputes-practical-guides-Issue-7-1-Oct-2020.pdf>> accessed 12 June 2021.

³⁶ *Ibid.*

³⁷ Anjarwalla & Khanna, *supra* note 6.

force majeure claim. However, the failure to explicitly refer to an “epidemic” or “pandemic” is not necessarily a bar to relying on such a clause.³⁸ If the clause does not use such specific language, the party will need to consider whether Covid-19 can be argued to fall under a general catch-all force majeure clause or under the concept an “act of God” or an “action by Government” if such wording is included in the contract, noting, however, that as force majeure is a creature of contract the Courts will be reticent to expand the agreed definition set out in a contract.³⁹

It is noteworthy that the force majeure event need not be Covid-19 itself. It is the consequences of Covid-19 and their impact on a party’s ability to fulfil a contractual obligation, such as the inability to deliver goods or services into a particular place, which will be relevant to any analysis.⁴⁰ Such consequences may well come about through requirements for social distancing, travel restrictions, curfews or a full lock-down which would ordinarily be deemed to be outside of a party’s control. However, such events must have translated into a physical or legal constraint to the party’s ability to perform its obligations and not merely created additional economic hardship for the party.⁴¹

It is rare, but if the parties do not have a force majeure clause in their contract or if the clause is poorly drafted more so because force majeure events are often left to boilerplate clauses, the applicable law of the contract fills in the contractual gaps to settle the dispute.⁴² The force majeure will be defined according to the rules of the applicable law, and the dispute over whether the event paves the way for a force majeure excuse, and what sort of consequences its application could bring, is solved according to the particular force majeure principle laid out under the applicable law.⁴³ In Kenya such a situation will be governed by the English Law Reform (Frustrated Contracts) Act (1943) which is applied as a statute of general application and listed in the 1st schedule to the Law of Contract Act (1961).⁴⁴

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Kiraz & Yıldız, *supra* note 5.

⁴³ Johanna Hoekstra, ‘Regulating International Contracts in a Pandemic: Application of the Lex Mercatoria and Transnational Commercial Law’ (2020) 117–25 <<http://repository.essex.ac.uk/28030/1/016.pdf>> as cited by Kiraz & Yıldız, *supra* note 5.

⁴⁴ Chapter 23 of Laws of Kenya, s 2.

The next section of the paper will discuss in detail the pre-requisite conditions that must be fulfilled by a defaulting party claiming a Covid-19 as a force majeure event in light of the Pankaj case, international legal instruments such as the United Nations Convention on Contracts for the International Sales of Goods (CISG)⁴⁵ and the International Chamber of Commerce's (ICC) 2020 Force Majeure Clause (FMC)⁴⁶, and published international arbitral tribunal decisions and awards.

iii Pre-Requisite Elements of A Force Majeure Claim

As was held in the Pankaj case, a party relying on a force majeure claim for non-performance must prove that; (a) its failure to perform was caused by an impediment beyond its reasonable control, (b) it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of conclusion of the contract, and (c) it could not reasonably have avoided or overcome the effects of the impediment.⁴⁷

a. Impediment beyond the control of the defaulting party

An impediment can be defined as a change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous.⁴⁸ The force majeure event must be seen to have happened and also perceptible with consequential impacts.⁴⁹ On 25th March 2020, the ICC released a long and short form of Force Majeure and Hardship Clauses (FMC) in response to the Covid-19 outbreak.⁵⁰ Amongst the events listed as presumed force majeure events include; plagues, epidemics, natural disasters or an extreme natural event.⁵¹ WHO's classification of Covid-19 as a pandemic means it is within the scope of contract clauses that include

⁴⁵ The United Nations Convention on the Contracts for the International Sale of Goods [11 April 1980 CISG].

⁴⁶ ICC, Force Majeure and Hardship Clauses of March 2020 (Long Form and Short Form Clauses) 2020, available at <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-force majeure-hardship-clauses-march2020.pdf> accessed on 13 June 2021. The ICC released a long and short form of force majeure and hardship clauses in March 2020 in response to the COVID-19 outbreak before the ICC's 2003 FMC had been offered.

⁴⁷ *Ibid.*

⁴⁸ CISG Advisory Council, Exemption of Liability for Damages under the Article 79 of the CISG (Cm 07, 2008) note 3.1 available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> accessed 17 June 2021.

⁴⁹ Cosmos N. Nwedu, The Rise of Force Majeure amid Coronavirus Pandemic: Legitimacy and Implications for Energy Laws and Contracts, (2021) 1, 61 Nat. Resources J.

⁵⁰ ICC Force Majeure and Hardship Clauses.

⁵¹ *Ibid.*

pandemics or even epidemics. Pandemics and especially Covid-19 are classic examples of impediments beyond parties control. Naturally, a party cannot exert influence on such events.⁵² For example, widespread cases of illness or death afflicting a party's workforce can constitute an impediment beyond the party's control.

The mere existence of the Covid-19 pandemic alone does not constitute a force majeure event, but its effects of Covid-19 can also give rise to force majeure claims. The measures imposed by governments to combat the pandemic can be alleged as a force majeure event. Government interventions are accepted as impediments causing force majeure as they are generally beyond a party's control.⁵³ Therefore, a general lockdown in a country, the closing of borders, business closures and restricting exportation or importation of specific goods should be accepted as impediments occurring during Covid-19.⁵⁴

Further, diseases like Covid- 19 may be deemed akin to an act of God, which is generally used to refer to an event caused by natural forces beyond human control.⁵⁵ If a contract does not cover a specific event for a force majeure claims, an arbitral tribunal could accept the suspensions or non-compliance of contractual obligations with regard to a natural disaster that is admitted to be covered under the "act of God" and some other circumstances beyond one's control. Similarly, it is also possible that, if the contract does not cover a pandemic as a force majeure event, Covid-19 can be interpreted as a force majeure event lying under the "act of God" clause.⁵⁶

Further, as was held in Pankaj and also provided for international legal instruments such as ICC's FMC 2020 and CISG, to invoke a force majeure clause under these instruments, the existence of an impediment is not merely enough; it is also required that the impediment must be 'beyond the control of the party'. In order to determine whether the impediment is beyond party's control or not, most commentators have recommended seeking the 'external character' of the impediment, which means the affected party had no intervention in the issue.⁵⁷ Moreover, an impediment is beyond a party's reasonable

⁵² Janssen and Wahnschaffe, *supra* note 31.

⁵³ See ICC Force Majeure and Hardship Clauses 2020.

⁵⁴ Kiraz & Yildiz, *supra* note 5.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ ICC Force Majeure and Hardship Clauses (n 16).

control if could not have been reasonably foreseen by the parties at the time of the conclusion of the contract.⁵⁸

It has also been argued that a party cannot rely on force majeure because the force majeure event was not the cause of the non-performance. Typically, this argument may be run in two different ways: the party could have performed its obligations despite the force majeure event (had some other occurrence not got in the way), so it was not the sole or effective cause of the non-performance; or the party could not have performed its obligations even if the force majeure event had not occurred – ie the party cannot meet the “but for” test of causation because it cannot be said that “but for” the force majeure event it would have been able to perform. Ultimately, the precise causation requirements in a given case will depend on the construction of the particular clause, as the demonstrated by the case law referred to below.⁵⁹

In *Classic Maritime Inc v Limbungan Makmur*⁶⁰ the Court of Appeal considered a clause in a long-term contract for shipments of iron ore pellets. The clause provided that the charterer would not be responsible for failure to deliver cargo “resulting from” causes beyond the parties’ control, provided they “directly affect the performance of either party”. The charterer failed to provide cargo for a number of shipments. The trial judge found that it was impossible for the charterer to provide cargo due to a dam burst at the relevant mine. However, if the dam burst had not occurred, the charterer would probably have defaulted anyway. The Court of Appeal rejected the submission that there was a settled line of authority which established that, where a party relies on a force majeure clause, there is no need to prove “but for” causation. The question is not one of labels, but rather how the particular clause should be interpreted. Comments in the decision do, however, suggest that, in cases of uncertainty, the court may be less likely to find that there is a requirement for “but for” causation where the effect of the clause is to relieve a party of its future obligations, rather than excuse liability for past performance. Here the court held there was a requirement to prove “but for” causation, including because of the need for the failure to “result from” a specified event which “directly affected” performance.

⁵⁸ *Ibid.*

⁵⁹ Blake & et al, *supra* note 35.

⁶⁰ SDN BHD [2019] EWCA Civ 1102.

In *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd*⁶¹, the English High Court considered a clause in a contract for the hire of an oil rig. The clause provided that neither party would be responsible for failure to perform “if and to the extent that fulfilment has been delayed or temporarily prevented by” a force majeure event. The list of events constituting force majeure included a drilling moratorium imposed by the government of Ghana. The government imposed a drilling moratorium which affected certain of the oil fields in which the company had planned to use the rig. Drilling in other fields was also prevented, but not due to the moratorium – rather, it was because the government did not approve the development plan for those fields. In the circumstances the court found that there were two effective causes of the company’s failure to perform its obligations, only one of which (the moratorium) was a force majeure event. The force majeure event delayed or prevented the company providing a drilling programme for certain fields but not others. That was not sufficient. The judge noted that this approach was consistent with the Court of Appeal’s decision in *Intertradedex v Lesieur*⁶², which he said is regarded as establishing that a force majeure event must be the sole cause of the non-performance. Ultimately, however, the question is one of construction of the relevant contract.⁶³

Similarly, as regards Covid-19, not only must it be an impediment in terms of an exemption for non-performance, but it must also be beyond the control of the parties to be able to claim force majeure. Covid-19 is acknowledged as a pandemic; thus, it can be alleged that Covid-19 is far beyond the control of not only the parties to a contract but also governments, scientists, and doctors. However, before acknowledging Covid-19 as a force majeure impediment, there should be a case-by-case analysis to come to the conclusion that it is beyond the control of the parties.⁶⁴

Economic impediments can make the performance of contractual obligations to be “excessively onerous” because they increase costs. Generally, price fluctuations such as increases or decreases in market prices of goods, changes in the currency, and economic crisis can be claimed to be a basis for economic impediments.⁶⁵ Whether Covid-19 can result in an economic impediment requires further attention due to the impact of the pandemic on businesses and economies. While examining if Covid-19 is an economic

⁶¹ [2018] EWHC 1640 (Comm).

⁶² [1978] 2 Lloyd’s Reports 509.

⁶³ Blake & et al, *supra* note 35.

⁶⁴ Kiraz & Yildiz, *supra* note 5.

⁶⁵ Carolino Aroya, ‘Change of Circumstances under the CISG’

<<http://www.gbv.de/dms/buls/734889690.pdf>> accessed 14 June 2021.

impediment within the context of force majeure, it should be noted that any changes in market prices are usually assumed to be foreseeable and a part of the business risk that all buyers and sellers have to consider.⁶⁶ According to the ICC's arbitrations, economic impediments such as currency exchange, a decrease or increase in market price, and so on cannot be accepted as a force majeure because the wave in economic circumstances must be very exceptional and rapid in effect to become an impediment.⁶⁷

For instance, In *Thames Valley Power v Total Gas & Power*⁶⁸, the UK High Court found that a force majeure clause in a gas supply contract was not triggered by a sharp rise in the market price of gas, making it uneconomic for the seller to supply the gas. The court agreed with the purchaser that the increased cost of gas did not mean the seller was unable to carry out its obligations under the agreement; it merely made the contract less profitable. This was not sufficient. The fact that a contract has become expensive to perform, or even dramatically more expensive, is not a ground to relieve a party from performance on the grounds of force majeure. Similarly, in *Tandrin Aviation Holdings v Aero Toy Store*⁶⁹, the High Court found there was no triable argument that a force majeure clause in an aircraft sale agreement was triggered by the "unanticipated, unforeseeable and cataclysmic downward spiral of the world's financial markets". The court referred to the well-established position under English law that a change in economic or market circumstances which affects the profitability of a contract or the ease with which the parties' obligations can be performed is not regarded as being a force majeure event.⁷⁰

b. Unforeseeability of the Impediment

A Covid-19 force majeure claim has to pass the foreseeability test. This assessment is based on the objective standard of a reasonable person in the position of the affected party, taking into account the specific circumstances of the case at hand.⁷¹ Courts and Arbitral tribunals reason that failure to protect oneself against a foreseeable event is an assumption of the risk of that event. Foreseeability is a question of fact for the decision maker.⁷² In many of the decisions where international tribunals have rejected a force majeure defense, the party asserting the defense could and should have identified the

⁶⁶ Kiraz & Yıldız, *supra* note 5.

⁶⁷ *Ibid.*

⁶⁸ [2005] EWHC 2208 (Comm).

⁶⁹ [2010] EWHC 40 (Comm)

⁷⁰ Blake & et al, *supra* note 35.

⁷¹ Janssen and Wahnschaffe, *supra* note 31.

⁷² Mark & Rousseau, *supra* note 23.

problem that led to non-performance and specifically allocated its risk before entering into the contract. Before entering an obligation, a party must be certain that he has the ability to perform it. If he has the slightest doubt about their ability to perform at the given time, the party must make all necessary verifications before promising performance.⁷³

As stated above, the observation of foreseeability is made according to a ‘reasonable person’ test. The reasonable person who is the focal point for the criterion is defined as “a reasonable person of the same kind as the other party would have had in the same circumstances”.⁷⁴ Hans Stoll suggests that a person between a “pessimist who foresees all sorts of disaster” and an “optimist who never anticipates the least misfortune” should be regarded as a yardstick of application of reasonableness to establish the unforeseeability.⁷⁵ However, the way unforeseeability and reasonableness will be assessed is on a case-by-case basis.⁷⁶

In *2 Entertain Video Ltd v Sony DADC Europe Ltd*⁷⁷ the High Court in the UK considered a clause in a contract to provide logistics and distribution services to the claimants, including storage of their stock at the defendant’s warehouse. The warehouse was destroyed by fire during the 2011 London riots, and the court found that this was due to the defendant’s negligence in failing to take reasonable security and fire safety measures. The defendant sought to rely on a force majeure clause, which provided that neither party would be liable for its failure or delay in performing its obligations “if such failure or delay is caused by circumstances beyond the reasonable control of the party affected including but not limited to ... fire, ... riot [etc]”. The court held that the defendant could not rely on the clause. Although the riots were “unforeseen and unprecedented”, the risk of arson was (or should have been) foreseen. If adequate measures had been taken, the attack on the warehouse would probably have been deterred or delayed and any damage significantly reduced. That meant that the fire and resulting losses were not outside the defendant’s reasonable control, and so a force majeure defence was not available.⁷⁸

⁷³ *Ibid.*

⁷⁴ See Article 8(2) of the United Nations Convention on Contracts for the International Sales of Goods (CISG),

⁷⁵ Hans Stoll, ‘Exemptions’ in Peter Schlechtriem (eds.), Geoffrey Thomas (trs.), *Commentary on the U.N. Convention on the International Sale of Goods (CISG)* (2nd ed. 1998) para 23.

⁷⁶ Kiraz & Yıldız, *supra* note 5.

⁷⁷ [2020] EWHC 972 (TCC).

⁷⁸ Blake & et al, *supra* note 35.

In *ICC Case No. 2216/1974*,⁷⁹ the market price for petrol fell dramatically after the parties entered into the contract. The respondent refused to take delivery, arguing that the fall in price was so large it excused respondent's performance, and also that intervention of government financial authorities to prevent currency losses constituted force majeure. The tribunal found that the change in market price risk was foreseeable and its risk could have been allocated. The tribunal also found that the respondent was generally aware of the legislation allowing the financial authorities to intervene, and indeed had received a letter from the relevant authority, so the change in circumstances was foreseeable. The tribunal noted that the respondent could have negotiated clauses in the contract that took into account the effects of the legislation allowing financial authorities to take such action, and that no doctrine or case law precedent held that such legislation could constitute force majeure.⁸⁰

To satisfy the requirement of unforeseeability, the time when the impediment is likely to occur should also be regarded as being of significance. The criterion in this case is the time of the conclusion of the contract that leads to the exemption. The defaulting party could not be expected to assume the risk at the time of the conclusion of the contract.⁸¹

Covid-19 was first reported in China in December 2019.⁸² Since then, China has taken serious precautions and measures to prevent the spread of the virus. In mid-January, Covid-19 started to be experienced outside China, and the WHO acknowledged the reported cases. On 30th January 2020, the WHO declared Covid-19 a public health emergency of international concern, and, by 11th March 2020, it was declared a pandemic.⁸³ Considering the progress of Covid-19, whether it is an unforeseeable impediment and when it can be deemed unforeseeable needs to be examined carefully. However, considering the vagueness of the unforeseeability criterion, its application to the issues in Covid-19 cases also turns out to be problematic.⁸⁴

⁷⁹ *ICC Case No. 2216/1974*, Award Abstract and Commentary, Digest of ICC Awards, as cited by Kiraz & Yıldız, *supra* note 5.

⁸⁰ Kiraz & Yıldız, *supra* note 5.

⁸¹ *Ibid.*

⁸² See WHO, <<https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200423-sitrep-94-covid-19.pdf>> accessed on 26 June 2021.

⁸³ WHO, "Rolling updates on coronavirus disease (COVID-19)" <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>> accessed 20 June 2021.

⁸⁴ Kiraz & Yıldız, *supra* note 5.

Commentators such as Joseph Perillo argue that:⁸⁵

Anyone who has read a bit of history or who has lived for three or more decades of the twentieth century can foresee, in a general way, the possibility of war, revolution, embargo, plague, terrorism, hyper-inflation and economic depression, among the other horrors that have afflicted the human race. If one reads science fiction, one learns of the possibility of new terrors that have not yet afflicted us, but involve possibilities that are not pure fantasy.

Others have argued that the occurrence of countless impediments in the past renders their possible recurrence foreseeable under regular circumstances.⁸⁶ These considerations generally also hold true for epidemics with the recurrence of the plague or the Spanish flu epidemics. Epidemics have also been documented in more recent times, with the first appearances of the SARS-associated coronavirus in 2002 and 2003 and the spread of MERS-CoV since 2012. It is clear that the coronavirus had already led to a significant number of infections on two different occasions since the turn of the millennium.⁸⁷ According to medical journals, it was considered a statistical certainty even prior to the Covid-19 pandemic that further local or global epidemics would occur in the future.⁸⁸ All of this points to the fact that—to preserve the terminology—an ‘ordinary’ epidemic is a foreseeable event.⁸⁹

Although that has been said, the current Covid-19 pandemic is exceptional in many ways compared to all other outbreaks of epidemics that have happened in the recent times.⁹⁰ This applies in part to its severity and distribution. By way of illustration, in 2002 and 2003 during the SARS-CoV outbreak, a total of 8,098 human infections were registered in 29 countries resulting in 774 deaths. Even fewer people were infected with MERS-

⁸⁵ Joseph M. Perillo, ‘Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts’ (1997) 5 Tul. J. Int’l & Comp. L. 5, 17 as cited by Kiraz & Yıldız, *supra* note 5.

⁸⁶ Janssen and Wahnschaffe, *supra* note 31.

⁸⁷ Emmie de Wit, Neeltje van Doremalen, Darryl Falzarano and Vincent J Munster, ‘SARS and MERS: recent insights into emerging coronaviruses’ (2016) 14 Nature Reviews Microbiology 523 as cited by Janssen and Wahnschaffe, *supra* note 31.

⁸⁸ Leslie A Reperant and Albert DME Osterhaus, ‘AIDS, Avian flu, SARS, MERS, Ebola, Zika . . . what next?’ (2017) 35 Vaccine 4470, 4474 who observe ‘an ever-increasing threat’ as cited by Leslie A Reperant and Albert DME Osterhaus, ‘AIDS, Avian flu, SARS, MERS, Ebola, Zika . . . what next?’ (2017) 35 Vaccine 4470, 4474 who observe ‘an ever-increasing threat’.

⁸⁹ Janssen and Wahnschaffe, *supra* note 31.

⁹⁰ *Ibid*

CoV.⁹¹ Covid-19 dwarfs these figures in comparison: as of 21 June 2021 according to the WHO, more than 178 million people had been diagnosed with the disease world over, and the death toll already exceeded 3,864,180.⁹²

Keeping in mind statistical uncertainties, it is also instructive to take a look beyond the mere numbers. Reactions by governments prove to be particularly revealing. The measures taken by states to stem the spread of Covid-19 have been extraordinary and quite unprecedented.⁹³ More than 2 billion people worldwide were subject to lockdown restrictions in 2020. Moreover, numerous countries limited international passenger traffic.⁹⁴

The individual market participant could not have reasonably foreseen such unprecedented measures. In view of all this, the Covid-19 pandemic appears so exceptional in its extent and consequences that, in principle, it should be classified as an unforeseeable event.⁹⁵ In the legal context of the force majeure doctrine, the Covid-19 must therefore be characterized as an event so unlikely to occur that reasonable business parties see no need to explicitly allocate the risk of its occurrence, and the impact it might have would be of such magnitude that the parties would have negotiated over it, had the event been more likely to occur.⁹⁶

Even though it can be accepted that most of the events may occur within the usual flux of life, one critical point not to be disregarded is the time of the foreseeability of the event. As stated above, foreseeability is tested objectively by examining if a reasonable person under similar circumstances can take the event into account at the time of the contract.⁹⁷ In terms of foreseeability, when the impediment exists is significant. Therefore, it is said that the foreseeability of the impediment depends upon the time of the conclusion of the contract. It might be asserted that for all of the contracts concluded before Covid-19 was reported the parties could not have estimated the potential consequences. For contracts concluded after the announcement of Covid-19 cases in China, a case-by-case analysis should be made.⁹⁸

⁹¹ *Ibid.*

⁹² See <https://covid19.who.int/>

⁹³ Janssen and Wahnschaffe, *supra* note 31.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Berger & Behn *supra* note 2.

⁹⁷ Kiraz & Yıldız, *supra* note 5.

⁹⁸ *Ibid.*

The ICC suggests that in assessing foreseeability the times of conclusion of the contract essential:⁹⁹

- (i) before 31 December 2019;
- (ii) on or after 31 December 2019 but before 11 March 2020 (pandemic declared by WHO) or when the health crisis was in the public domain in the relevant country, whichever happened first;
- (iii) during the state of emergency of the relevant jurisdiction (i.e., the period during which extraordinary measures were implemented in the jurisdiction); and
- (iv) after the state of emergency has ended.

This suggestion seems reasonable to test the foreseeability of Covid-19.¹⁰⁰ The first Covid-19 cases were reported in Wuhan, China, and, soon thereafter, the Chinese government imposed travel bans and a general lockdown within Wuhan area. If a contract was concluded after the imposition of these measures with a Chinese party that was located in Wuhan, and his undertakings were related to Wuhan, it is acceptable that the impediment was foreseeable.¹⁰¹

If the contract was concluded before the declaration of the pandemic with a Chinese party located in the area that had not been hit by Covid-19, whether the parties could foresee the impediment should be analysed on a case by case and in consideration of the general situation within the country.¹⁰² However, if the contract was concluded after the declaration of the pandemic, considering the professional capacity of the parties, the parties should have analysed the situation and taken into account the contagious nature of the virus and the additional measures taken by the government day by day. Therefore, for any contract made after the report of Covid-19 in China with a Chinese party or any involvement with China related parties or goods, Covid-19 might be deemed to be a foreseeable impediment. Similarly, the closer the jurisdiction of the places of business of the parties to a country where the health crisis is already present, the more reasonable it would have been to expect them to foresee the pandemic and its consequences on the performance of contracts.¹⁰³

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

It follows that for any contract concluded after 11th March 2020, it will be difficult to rely on Covid-19 as an excuse for non-performance. It could even be argued that before 11th March, the outbreak was already so prominent that it was foreseeable that it would create an impediment. It is also clear that the exact consequences of the pandemic could not be foreseen on 11th March and there are still more questions than answers with regards to the immediate future. But clearly the pandemic itself is now a reality and relying on it as an excuse for non-performance will be more difficult. This is not to say that it can never be relied upon but the party in breach will face a higher threshold to prove that the effects were unforeseen.¹⁰⁴

It can be deduced from the above analysis that the time of the conclusion of the contract, the parties' place of business where the virus had reached, the relationship between the contracting parties and the other parties located in the areas affected by the pandemic are of significance.¹⁰⁵ In order to offer a general foreseeability test, it must be examined when the parties had concluded their contracts, whether the countries they are located in, or connected to, had been contaminated by the virus, whether the governments in these contract-related locations had implemented measures, and what these measures were. According to the answers given to these questions, arbitral tribunals should reach a decision on the foreseeability of the force majeure event.¹⁰⁶

c. Impossibility to avoid or overcome

It is a generally accepted principle of law that a party seeking to excuse nonperformance must show it could not have avoided or overcome the impediment or its consequences.¹⁰⁷ Even if the non-performing party can prove that he could not have reasonably been expected to take the impediment into account at the time of conclusion of the contract.¹⁰⁸ The avoidance is interpreted as precautions taken before the occurrence of the event, whereas it is stated that the defaulting party can offer substitutes to enable performance in order to overcome the impediment.¹⁰⁹ The duty of care is fundamental to a force majeure claim. Thus, a party claiming force majeure defense is expected to have demonstrated a reasonably acceptable level of concern, or efforts to mitigate such an

¹⁰⁴Johanna Hoekstra, 'Regulating International Contracts in a Pandemic: Application of the Lex Mercatoria and Transnational Commercial Law' (2020) 117–25 <<http://repository.essex.ac.uk/28030/1/016.pdf>> accessed 18 June 2021.

¹⁰⁵Kiraz & Yıldız, *supra* note 5.

¹⁰⁶*Ibid.*

¹⁰⁷See ICC Clause at Section 1(c); Augenblick & Rousseau, *supra* note 23.

¹⁰⁸Kiraz & Yıldız, *supra* note 5.

¹⁰⁹*Ibid.*

event, and accompanying consequences to the fullest extent possible.¹¹⁰ This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance.¹¹¹

In other words, when asserting force majeure as a defense, the defaulting party must show that there were no reasonable alternate arrangements that would have allowed it to perform under the contract. Tribunals often require a party claiming force majeure to prove it attempted alternate performance before accepting its force majeure defense as illustrated by the following decisions.¹¹²

For instance, in *National Oil Corp. v. Libyan Sun Oil Co.*,¹¹³ the parties entered into an oil exploration and production sharing agreement in Libya. When the U.S. government banned oil imports from Libya and severely restricted oil exports to Libya, the defendant invoked force majeure and suspended performance under the contract. Defendant claimed that its personnel, all U.S. citizens, could not enter Libya because the U.S. government declared that U.S. passports were no longer valid for travel to Libya. The tribunal rejected the force majeure defense, concluding that the defendant could have hired non-U.S. personnel to perform the contract, so the ban did not constitute force majeure.¹¹⁴

Similarly, in *ICC No. 1782/1973*,¹¹⁵ the respondent was contracted to deliver a fleet of trucks to three sites in an Arab country. After defaulting on its obligations, the respondent cited force majeure as a basis for the default, claiming that its Israeli employees would have been unable to obtain visas. The tribunal determined that there was insufficient proof of force majeure, specifically noting that the delay in obtaining visas could not account for default over 26 months, and that the respondent could have hired employees without the alleged restrictions.¹¹⁶

¹¹⁰ Nwedu, *supra* note 47.

¹¹¹ Augenblick & Rousseau, *supra* note 23.

¹¹² *Ibid.*

¹¹³ Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration* (XVI, Kluwer 1991) 54–78.

¹¹⁴ See ICC Clause at Section 1(c); Augenblick & Rousseau, *supra* note 23.

¹¹⁵ Award Abstract and Commentary, *Digest of ICC Awards*.

¹¹⁶ Augenblick & Rousseau, *supra* note 23.

As these decisions illustrate, tribunals will demand evidence both that the impediment could not have been avoided and that alternate performance options were explored but were not feasible.¹¹⁷

In the case of Covid-19, it is not reasonable to anticipate that a party could have avoided the impositions of tough measures by governments. Whether the consequences could have been avoided or overcome must be examined on a case-by-case basis. For example, if the seller failed to deliver the goods due to the restrictions or prohibitions on transportation, the question as to the possibility of following an alternative route should be questioned.¹¹⁸

The case of *Macromex Srl v Globex Int'l Inc*¹¹⁹ displays similar features with the Covid-19 situation. The contract was for the purchase of chicken legs to be delivered to Romania. After the contract was concluded, an avian flu breakout started, so the Romanian government banned all chicken imports that were not certificated by a certain date. The seller claimed that the contract had no force majeure clause; therefore, the tribunal applied the CISG's Article 79 to fill the 'gap'.¹²⁰ According to the arbitral tribunal decision, the seller satisfied the first, second, and fourth elements of force majeure under the CISG (there was an impediment beyond a party's control that was unforeseeable by that party and the party's non-performance was due to that impediment). However, the tribunal found that the seller did not meet the third element that the impediment could not be reasonably overcome. Therefore, the tribunal

¹¹⁷ *Ibid.*

¹¹⁸ Kiraz & Yıldız, *supra* note 5.

¹¹⁹ 2008 U.S. Dist. LEXIS 31442 (S.D.N.Y. 2008) (award enforced in the U.S.)

¹²⁰ Article 79 CISG provides that: '(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him. (3) The exemption provided by this article has effect for the period during which the impediment exists. (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such no receipt. (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention'.

concluded that the seller could have shipped to another port in a neighbouring country, as the buyer had proposed.¹²¹

It is observed that every day a new case of the virus is found in a different county or country; thus, it is difficult to predict where the virus will occur and when these happens whether the government or countries will announce restrictions on transport.¹²² A seller might have wanted to deliver the goods using a different route or to a different place; however, after arranging the delivery according to these changes, there was a risk that the measures could have been imposed on these routes and places. Therefore, tribunals should observe if the non-performing party would still have failed to perform his obligations once all of the precautions had been taken in a timely and reasonable manner. If the answer is yes, then the tribunal should acknowledge that the impediment was unavoidable or insurmountable.¹²³

In this regard, the measures and effort taken by a defaulting party in trying to mitigate an impediment that would have hindered them from performing their obligation should be put into focus by the tribunal, in determining whether the party could have avoided or overcome the impediment.

Iv. Conclusion

Until 11th March 2020, when the WHO declared Covid-19 as a pandemic, nobody considered that Covid-19 would last more than six months and that the measures imposed by governments would be harsher by the day.¹²⁴ Not only has the virus spread around the world at great speed and claimed a devastating number of lives, but the extent to which States have taken sovereign action to deal with the pandemic is unprecedented.¹²⁵ It has created a domino effect in every aspect of trade, business and contracting thereby drawing to the attention of contractual parties, lawyers and arbitral tribunals on the drafting and applicability of force majeure clauses.

As this paper has demonstrated, although Covid-19 might be accepted as an impediment beyond the control of the parties as it was initially unforeseeable and unavoidable, its mere existence will not trigger the force majeure clause.¹²⁶

¹²¹ Kiraz & Yıldız, *supra* note 5.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Janssen and Wahnschaffe, *supra* note 31.

¹²⁶ Kiraz & Yıldız, *supra* note 5.

The defaulting party has to meet the pre-requisite elements outlined in the paper.¹²⁷ Tribunals in determining force majeure claims will have to take a case by case approach in determining the claims.¹²⁸

¹²⁷ Berger & Behn *supra* note 2.

¹²⁸ Kiraz & Yıldız, *supra* note 5.

References

Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration* (XVI, Kluwer 1991) 54–78.

Andre´ Janssen and Christian Johannes Wahnschaffe, ‘COVID-19 and international sale contracts: unprecedented grounds for exemption or business as usual?’ 2021 *Unif. L. Rev.*, 1–30.

Anjarwalla & Khanna, ‘COVID-19 and its Impact on Contractual Relations: How to Mitigate Damages, Renegotiate Your Contracts and Avoid Disputes’, (May 2020) <https://www.africalegalnetwork.com/wp-content/uploads/sites/22/2020/05/AK-Legal-Alert-Impact-of-Covid-19-on-Contractual-Relations-How-to-Mitigate-Damages-Renegotiate-Contracts-and-Avoid-Disputes_Part-1.pdf>.

Black’s Law Dictionary, (10th edn. Thomson West 2014).

Carolino Aroya, ‘Change of Circumstances under the CISG’ <http://www.gbv.de/dms/buls/734889690.pdf>.

Classic Maritime Inc v Limbungan Makmur SDN BHD [2019] EWCA Civ 1102.

Cosmos N. Nwedu, *The Rise of Force Majeure amid Coronavirus Pandemic: Legitimacy and Implications for Energy Laws and Contracts*, (2021) 1, 61 *Nat. Resources J.*

Emmie de Wit, Neeltje van Doremalen, Darryl Falzarano and Vincent J Munster, ‘SARS and MERS: recent insights into emerging coronaviruses’ (2016) 14 *Nature Reviews Microbiology* 523.

Entertain Video Ltd v Sony DADC Europe Ltd [2020] EWHC 972 (TCC).

Hans Stoll, ‘Exemptions’ in Peter Schlechtriem (eds.), Geoffrey Thomas (trs.), *Commentary on the U.N: Convention on the International Sale of Goods*.

International Epidemiological Association, *A dictionary of epidemiology* (5th Edn. Oxford University Press, 2008).

Intertradex v Lesieur [1978] 2 Lloyd's Reports 509.

ICC, Force Majeure and Hardship Clauses of March 2020 (Long Form and Short Form Clauses) 2020.

Johanna Hoekstra, 'Regulating International Contracts in a Pandemic: Application of the Lex Mercatoria and Transnational Commercial Law' (2020) 117–25 <http://repository.essex.ac.uk/id/eprint/28030>.

Joseph M. Perillo, 'Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts' (1997) 5 Tul. J. Int'l & Comp. L. 5.

Klaus Peter Berger and Daniel Behn, Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study (20 April 2020) 6 McGill Journal of Dispute Resolution (2019/2020) Number 4, pages 79-130.

Leslie A Reperant and Albert DME Osterhaus, 'AIDS, Avian flu, SARS, MERS, Ebola, Zika . . . what next?' (2017) 35 Vaccine 4470.

Marel Katsivela, 'Contracts: Force Majeure Concept or Force Majeure Clauses?' (2007) 12 Unif.L. Rev. 101.

Mark Augenblick and Alison B. Rousseau, '**Force Majeure in Tumultuous Times: Impracticability as the New Impossibility**', (2012) 13 the Journal of World Investment & Trade.

Macromex Srl v Globex Int'l Inc 2008 U.S. Dist. LEXIS 31442 (S.D.N.Y. 2008).

Neil Blake, Julie Farley and Natasha Johnson, 'When Events Intervene: Force Majeure, Frustration and Material Adverse Change', (October 2020) <<https://hsfnotes.com/litigation/wp-content/uploads/sites/7/2020/09/Contract-disputes-practical-guides-Issue-7-1-Oct-2020.pdf>>

Pankaj Transport PVT Limited v SDV Transami Kenya Limited HCCC No. 162 of 2014 [2017] eKLR,

S. Esra Kiraz and Esra Yıldız, 'COVID-19 and force majeure clauses: an examination of arbitral tribunal's awards', 2020 Unif. L. Rev., 1–29 doi:10.1093/ulr/unaa027.

Sadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] EWHC 1640 (Comm).

Tandrin Aviation Holdings v Aero Toy Store 2010] EWHC 40 (Comm).

Taylor v Caldwell [1863] EWHC QB J1.

Thames Valley Power Ltd V Total Gas & Power Ltd, [2005] EWHC Comm 2208.

The United Nations Convention on the Contracts for the International Sale of Goods [11 April 1980 CISG].

Arbitration in Land Disputes: An Empirical Study on the Role of Lawyers in the Management of Land Conflicts in Kiambu County

*By: Henry K. Murigi**

People affected by land conflict first resort to judicial process and not amicably resolving conflict through alternative dispute resolution mechanisms. The legal regime available for resolving land disputes in Kiambu County is in favor of the more binding court process although it is generally long and unwinding. The presence of only one Environment and Land Court in Kiambu County makes it hard for parties to access the judicial process to resolve land disputes hence the disputes in court take the form of money claims or criminal offences such as trespass, nuisance, assault. This study was carried out to determine the nature of land disputes and the role lawyers play in resolving land conflicts in Kiambu County¹.

Introduction

Natural resources are a great concern to sustainable development globally. Several researchers among them Homer- Dixon, (1999), Hauge and Ellingsen, (1998) and Raleigh and Urdal, (2008) find a direct relation between natural resources and violent conflicts, irrespective of whether the conflict is based on their (resources) scarcity or abundance. In Africa, the main source of conflict is natural resource related as these and other scholars have consistently argued. Among the natural resources land ownership and utilization is the main cause of Conflict in Sub- Sahara Africa. Juma and Ojwang (1996) argue that access to and ownership of land is a central aspect of African development in general and political change in particular. They argue that most of development strategies adopted by African countries are related to use of land. From a casual review of the history of Kenya through pre- and post-colonial period, it is clear that the question of land contributes to a great percentage of all discussion and issues. Land is used as a source of livelihood and also a resource but not always a factor of production.

* **PhD International Relations Candidate at USIU-A, MA Peace and Conflict Management, Post-Graduate Dip in Law from Kenya School of Law, LLB, Advocate of the High Court of Kenya.**

¹ This paper is a product of the Research work that was submitted in partial fulfilment of Master of Arts Degree in Conflict Management at Kenyatta University and was conducted in the period 2014.

Historical perspective to the Land Question

With the coming of colonial government in Kenya, it was clear that due to its fertility land was going to be a major issue of concern. Kanogo (1987) argues that when the British government declared a protectorate over what was known as Kenya, Kikuyu settlement stretched northwards of Nairobi to the slopes of Mount Kenya. She argues that this and other aspects formed the guiding factor in land alienation and the attendant creation of the White Highlands, which carved out of the most prime land in the colony and a preserve for the white settlers. Consequently, the question of land would remain a thorny issue in post-colonial Kenya, especially in Kiambu. (O'Brien, 2011) argues that when Kenya gained Independence in 1963, it inherited a highly unequal land distribution pattern that disadvantaged the African population in terms of ownership over productive land. This has resulted in pressing questions about land distribution and reform strategies up to the present day.

Although there is direct evidence that there was scarcity of land before 1914 as argued by Van Zwaneberg and King (1975), the paradox was in the justification for alienation that African land was not under full utilization. This led to the existence of squatters and landless peasants who would provide labour to British who were the white settlers. Even after the land was given back to the African there was no easy transition as some Africans had been collaborators with the white settlers which did not sit well with those who fought for independence (Sorrenson, 1967).

Research has shown that among many other sources, land conflict emanates from the lack of proper structures that address violent conflict in Kiambu whether the conflict is large scale or small scale, political or otherwise, domestic, or cultural as rightly put by Omenya and Lubaale (2012). (Urdal, 2005) finds that population growth and land scarcity are significantly and positively related. O'Brien (2011) argues that Kenya's land questions are culturally, ethnically, structurally, and economically charged, and become increasingly urgent as pressure on land increases as a result of its growing population.

Initiatives to Resolve the Land Question in Kenya

The worst moments of Kenya's history have been characterized by conflict revolving around this issue of natural resources in form of land. These include the intermittent land clashes between 1990 -1998 that were triggered by the ethnic animosity that led to killing of and infliction of grievous injuries on men women and children, displacement of thousands from their land and homes burning of rural homes among

other heinous acts which were investigated by the Commission of Inquiry famously known as the Akiwumi Commission². For the first time tribal clashes were witnessed in Kenya and at the center of it was land struggle, earning the infamous land clashes. This was to persist all through the successive electioneering periods of 1992, 1997, 2007/8 the latter being the height of it all with over 1133 deaths, over 3,561 people suffering injuries, 117,216 properties being destroyed, and population displaced and formation of internally displaced persons camps and at the center of it all was the land problem which were investigated by the commission of inquiry famously known as Waki Commission³.

There have been efforts to unearth the problem of land through initiatives such as the Commission of Inquiry that was established in 2004 famously referred to as Ndungu Commission⁴. Critics argue that Kenya remains faced with landlessness on a large scale and with recurrent land disputes among individuals and between communities even though it is one of the few African countries to make laws on individual tenure for use of indigenous land, along with redistribution of chunks of the former 'white highlands'. Government set in train a National Land Policy Formulation Process to try and sort out these underlying problems, including those thrown up by the Commission (O'Brien, 2011). There are other efforts to resolve the land question by successive governments, independent actors, parties, and participants in conflict areas. Sorrenson (1967) argues that land consolidation and registration of titles was to form the solution for some of the future problems. Some of the other efforts between 1991 - 2014 include formation of commissions of inquiry such as *Akiwumi* Commission of Inquiry, *Ndungu* Commission, *Waki* Commission et al. Also political struggle and agitation for change of governance culminated in to the enactment of the Constitution of Kenya 2010.

Even with all these efforts arbitration of land disputes was always an available mechanism of resolving land conflicts in Kenya. Article 159 of the constitution of Kenya provides for arbitration, mediation, conciliation, and traditional methods of dispute resolution. With the coming into force of the new constitution, creation of Environment and Land Court and devolution, access to courts have been made expensive and thus the need to adopt other mechanisms for resolving conflicts related to land. The Arbitration Act of parliament 1995 made arbitration more appropriate to

² See report on Judicial Commission of Inquiry into the Tribal Clashes in Kenya (1999)

³ See the Report on Commission of Inquiry into the Post-Election Violence (2008)

⁴ See the Report on Commission of Inquiry on Irregular and Illegal Allocation of Land (2004)

resolve land conflicts by allowing non-lawyers to practice it. Lawyers have also been at the center of attempting to resolve the land problem in Kiambu through alternative dispute resolution mechanisms.

From the administrative arrangement and the geopolitical and demographic statistics of the county of Kiambu it is clear that land disputes abound. Kiambu County is neighbour to Nairobi County which is the East Africa regional icon city. Kiambu County also share boundaries with Muranga, Machakos, Nyandarua and Kajiado. The population of Kiambu County inherited a culture that was very rich whereby successive generations were advised to take possession of land and fight against not easily sell it as it was a birthright, see Kenyatta (1961). Therefore, the land issue remains a thorny issue in post-colonial Kenya, especially in Kiambu. There must be a clear way of resolving land-related conflicts. The land question in Kiambu County faces a challenge since there is one Court with the requisite jurisdiction to hear land disputes. Previously parties with land disputes would either file their cases in Nairobi, Muranga or Nyeri, yet there are various general modes of resolving conflicts including arbitration, mediation conciliation, adjudication and med-arbitration among others which can be applied within Kiambu. Also, the fact that in Kiambu County has only one Land and Environment Court makes it clear that the efforts to use arbitration needs to be put into scholarly scrutiny.

Kiambu County bore the brunt of land adjudication all through history. Land has been a thorny issue in Kiambu County presenting itself in various dispute dimensions. Various strategies to resolve land disputes have been employed over the years but the societal problem seems to persist, and dynamics shift over the years. Attempts at resolution ought to change to counter this ever-changing situation but which have not received adequate scholarly attention. In this study we address this gap with a view to contributing towards this debate. The project focused on how lawyers through arbitration have contributed to resolving land disputes in Kiambu County from 1990 to 2014. This research tested the levels of use of arbitration process in land conflict resolution in Kiambu. The research tested the application of the arbitration process, to bring out findings on a clear understanding of the use of arbitration in conflict resolution mechanisms and established to the residents of Kiambu whether arbitration is an efficient model of land conflict resolution.

Existing Literature on Land Disputes and Arbitration

Arbitration has been used to resolve both international and national conflicts. It has been used in resolving disputes that emanate from struggles over natural resources to business disputes. Walton (1970) outlines the disputes that may be referred for arbitration. In his book Walton gives a detailed account of the arbitration process from the time of commencement to the end of the arbitration proceedings. His book illustrates the fact that arbitration is relevant in areas where the dispute involves parties who enter into agreement to arbitrate. Although the book is largely based on the practice of arbitration in England, that literature is much applicable in land conflicts in Kiambu as it sets out the basic tenets of arbitration practice and procedure. Kenya being a former colony of Britain and a commonwealth country it largely borrowed from their laws thus forming a great relevance to this study.

Role of Lawyers in Conflict Resolution.

Saletan, (1994) highlights three perspectives to conflict resolution which are legalist view, expressionist view, and transformative view. In his study he indicates that there are constraints in resolving dispute informally. He argues that conflict is based on the premise that society is ordered, and conflict is largely aberrational. He argues that the concept conflict tends to isolate claims from social context in which they arise. He presumes that arbitral agency primary or exclusive function is to objectively settle apparent differences between the parties not to address the underlying issues relevant to the immediate conflict. This legalist perspective according to Saletan informs the philosophy of all lawyers in the pursuit to resolve conflict. Garrett (1961) identifies the role of lawyers and categorizes it in respect to lawyers as spokesmen. His book highlights the adversary quality to often run hand in hand with a built-in zest for victory among those represented which may make it well-nigh impossible for the spokesman to conduct himself as if he were on a nature hike. He asks the question whether lawyers impede cooperation in seeking to determine their differences in arbitration and finds no evidence to answer this question in the affirmative, but most people answer this question based on their personal observation and experience.

He then focuses on the arbitrator as a judge and finds that this quality makes it hard to ascertain the role of lawyers in the arbitration. He observes that judges are lawyers and nothing wrong exist for arbitrators to act like judges. His findings are that the code of ethics that governs the role of arbitrators as judges safeguards the process of arbitration as an alternative. All these studies are still in the theory level when it comes their application in land conflicts and disputes in Kiambu County the level to which this

project considered. Lawyers have not been studied in Kiambu County and this project anticipated that the revelation to be brought out from understanding lawyers will be examined analyzed to confirm this theory.

Sorrensens (1967) extensively studied the history of land reforms in the kikuyu land. The study focuses on the genesis of the land problem in Kiambu, Muranga and Nyeri. It traces the history of the struggle of land reforms before during and after the colonial government. The author reveals that for the first time there was a law allowing use of arbitration in Land conflicts following enactment of Land Tenure Rules under the Land Consolidation Act enacted in 1956 vide gazette legal notice number 452 of 1956. However, “Although arbitration board was appointed for Kiambu under Land Tenure Rules, Gold (formerly a District Officer) appears to have considered it too cumbersome and he continued to rely on his temporary assessors in various respects there was a divergence between theory and practice of consideration” (ibid). To this end arbitration was considered cumbersome, was sidestepped and it did not take root in resolving land conflict. It is further argued by Sorrensens that Gold recommended that appeals and adjudication committee be heard by five assessors. The effect of hearing by the assessors was that appeals would go to the district officer in charge of land consolidation and not arbitration boards as appointed by the rules. To Gold other models of resolving land conflicts were more preferable since he had some element of control on who sat in for example the committee on land adjudication.

According to Sorrensens (1967) the cause of land struggle on the colonial period was the question of Land consolidation in Kiambu. Although many issues of arise out of land consolidation, the manner in which disputes arising out of this aspect has been carried on to the current situation in Kiambu county. The study by Sorrensens lays a good foundation for understating the history of the challenges in Kiambu. However, this research largely focused on land consolidation as the main cause of conflict. The study herein focused on the availability of mechanisms of resolving conflict and which the solutions will be owned by the parties as arbitration proposes and other local mechanisms. This study forms a good basis for understanding land conflicts in Kiambu.

Although Kiambu County has been studied extensively by many writers the work of Kinyanjui (2007), correctly locates the context of the Kenyan political economy and identifies the root cause of poverty to be land ownership. Her work focuses on the history of land conflict and consolidation as a major conflict in Kiambu County. It is

established that in her study the land reform strategies that have been adopted have not really succeeded in addressing the root causes of land conflict. Her work projects a good idea of Thika district and not Kiambu County as envisaged in this study. It also focuses on the roots of poverty and takes a historical account of the poverty in Thika. This study intends to look at Kiambu county in its entirety including Thika district.

Land conflict in Kiambu has been prevalent before during and after independence. Kanogo (1987) has extensively traced the history of the struggle for independence through mau mau. In her book *Squatters and the Roots of Mau Mau* it is clear that the problem of squatters was not resolved in Kiambu County. She states that by 1971, 31,000 of the squatters who had migrated to Rift Valley after the emergency crisis had been resettled however the joint problems of landlessness and inadequate land holding linger on. This problem was to be carried in the years that followed. Failure by previous governments to resolve the land conflict meant that the issue was not appropriately addressed and thus not put to an end. Although her study is helpful in understanding origin of the problem it fails to provide a solution for the land question as this study does.

Juma and Ojwang (1996) examine the relationship between land ownership and sustainable use of natural resources in the context of constitutional change in Africa. They dismiss the notion that title to land is the main solution by arguing that title does not equal security of tenure the extent to which it does depends on the quality of the little surveyed broader context of respect of law. Their study proposes a more incremental approach to change in indigenous tenure systems by focusing on for example resolving conflicts through mediation rather than litigation as opposed to arbitration which is more likely to be appropriate in resolving land disputes within Kiambu. Their study also focuses on the constitutional changes in view of land ownership but fails to address the availability of the local mechanisms that can be used to resolve conflict when it arises be it in contravention with the law or other regulations. This study proposes to look at land conflicts in Kiambu through the lens of potential solutions found through arbitration and this would help understand clarify the need to use of arbitration and other local mechanisms in land conflicts.

According to Omenya and Lubaale (2012), at independence, the government initiated a process of purchasing previously white-owned farms with a view to redistributing land to those who had lost their land during colonialism. Huge swathes of land were bought all over the country with state resources under this program. However, this land

was not redistributed as was intended; it ended up in the private hands of prominent persons in President Jomo Kenyatta's administration. This was the genesis of land conflicts in Kenya generally. This study points to the political source of conflict but fails to propose a solution as this study will do.

According to Omenya and Lubaale (2012) inequity in public sector employment was not discussed much under the Kenyatta government, when the Kikuyu dominated the civil service and the private sector; and later in Moi's regime, when these were systematically replaced with Moi's own Kalenjin people. Debate on ethnic access to natural resources such as land intensified during Kibaki's presidency more so after the 2008 post-election conflict. Omenya and Lubaale (2012) posit that Kenya has a huge housing deficit, with the housing shortage running into millions of units. The problem is more acute in Kiambu where the government stopped providing housing. This information is helpful since it highlights the area of potential conflict. Scarcity or abundance of resources has always been a source of conflict. It is therefore abundantly clear that with the growing population urban setup including those in Kiambu faces a housing deficit due to its population thus escalating the chances of conflict (ibid). The gap in this study however is that it fails to provide a mechanism for resolving this challenge as does this study. According to Omenya and Lubaale (2012) land and housing conflicts are intertwined, especially for the poor in the city and towns. They are also major causes of conflicts. Housing conditions in Kiambu are still poor. Only 19 per cent of residents live in homes built with permanent materials (The World Bank, 2006). Only 12 per cent of slums have house walls made up of permanent materials, 45 per cent live in homes with corrugated iron walls, and 98 per cent have tin roofs over their heads (Government of Kenya, 2009).

O'Brien (2011) writes extensively in his study of the cause and effect of land grabbing in Kenya. The study focuses on the historic aspect of it arguing that the displacement of Kenyans by the white settlers and later reverting of alienation mirrors a significant image of the current land grabbing problem. Although his study is conducted generally across the country, the solution to the land question it proposes goes only to the land tenure and policy theory and fails to capture the effect of availability of conflict or dispute resolution mechanism and especially arbitration as this study covers. A raft of measures on implementation of the land reforms envisaged in the constitution are advocated for in Oriens study including implementation of land policy, return or cancellation of title to illegally acquired land as per Ndungu Report (2004), return of registration system beyond digitization of registry, supervision of proper eviction

among others. This study investigated the application of arbitration as a land dispute resolution mechanism and its effect in Kiambu County.

Land and Politics in Successive Government

Konyimbi, (2001) correctly states that land issues were compounded by structural continuities over control of land from the colonial to the Kenyatta government. While previously land was vested in the person of the Queen of England, the crown, the Kenyatta administration merely exchanged the crown with the president, who assumed absolute control over public. This study focuses on the challenges that lead to the land conflicts however it does not provide solutions. Syagga, Mitullah & Karirah-Gitau (2001) explain that the president assumed all authority to make grants or dispositions of any estates, interests, or rights in or over un-alienated government land. At that time neither the Constitution nor the land statutes impose limitations on the president on his powers to allocate public land. This resulted in extensive land grabs at the Coast, the Rift Valley, Central Province and Kiambu in particular. Later in 1974 when JM Kariuki died, his death was associated with his struggles to help the landless access land through resettlement schemes. Hussein Mohamed (2011) examines various aspect of conflict in Africa's great lakes region. In Kenya he categorizes the struggle for natural resources, constitutional, secessionist problems and power sharing government issues as a major source of conflict. His book is therefore helpful in understanding the causes of conflict in Kiambu only in the broad sense and thus the need for this study as it focuses on Kiambu as an area of study.

Arbitration theory

Jerome (2009) traces the history of arbitration to around 1800 BC when the Mali Kingdom used arbitration in disputes with other kingdoms. In his study he focuses on the American history and properly locates the application of arbitration theory and practice all through various regimes to the current day application of the theory. She locates that in 300 BC Aristotle praised arbitration over courts. Although her study focuses on the application of this theory in myriad disputes, it confirms that Arbitration has been an available discourse in practice and theory. Most of the literature reviewed focuses on the development of a proper land policy, review of legislation on land, constitutional protection of ownership rights. The role of the court is always seen as part of the solution. Kameri- Mbote (2009) in addressing the land question in Kenya focused on how the legal framework brings the dilemma on the land question. She identifies the answer to that as the National Land Development framework. To this end this theory has not been tested on application level in land disputes in Kiambu.

Food and Caiger (1993) argue that the growth of arbitration has mainly developed through the medium of lawyers, the law and the routines developed every day in negotiations contracts and non-judicial forums. In their study the focus is on the juridification of construction disputes. Their study reveals that lawyers play the role of creators of the arbitration agreement and also translators of the agreement. They suggest that in construction disputes if lawyers alone controlled the process the war would not be over. Their research design is helpful since they focus on the key players in the industry. They carry out interviews with a selected list of interviewees who referred them to others. Their study arrives at important findings that many lawyers disliked arbitration as dispute resolution forum and preferred the courts because they are predictable, reliable and public.

Food and Caiger (1993) observed that in construction industry lawyers have hijacked arbitration and it is no different from going to court. They also observed that lawyers wish to colonize arbitration and convert it to a court like procedure. What stops them back besides the parties wish to resolve conflict by contract and business-based methods is their apparent unfamiliarity with the details of construction work. Their findings are that the principle of *lex mercatoria* must be observed at all times i.e., merchants are the best judges of their own affairs.

Literature reviewed reveals that lawyers have significant influence on the method of resolving conflict that warring party's use and thus ought to understand the role they play in the choice. The study was designed to consider the lawyer's role in arbitrators in Kiambu with a special focus on their interaction with warring parties to a conflict and whether this interaction influences the choice of arbitration. The knowledge gap to be researched is the citizens' acceptability of the use of the services of lawyers to resolve land disputes through arbitration.

Empirical Data on Research Conducted in 2014 to 2015

The research conducted aimed to establish three main objectives. First, the nature of land disputes in Kiambu County and from the above and established that they were transactional, boundary disputes, inheritance disputes and legal disputes. The second objective was to establish the model used in resolving land disputes in Kiambu County which we have established to be courts, arbitration. The disputants always result to other means of resolving disputes which land in Courts as civil or criminal cases. The courts thus play a more important role than arbitration. The third objective was to

establish whether lawyers play a significant role in arbitration process, and it turns out that indeed they play a critical role in land disputes in Kiambu County.

The research was carried out in Kiambu County. Interviews were carried out in Kiambu County with special focus on Lawyers, peasant farmers, surveyors, and directors of land selling companies. The gender composition was as shown below almost split by half with 55% being male and 45 % being female. The age gap captured showed that the predominant age that dealt with issues related to land were 40-49 years which scored 45% compared to the lowest age of 20-29 years which scored 25%.

The age between 30-39 was represented by the remaining 30%. For the lawyers practicing the research wanted to establish the number of years each lawyer had practiced as such. What was found was that the majority of the respondents had only practiced for 5- 20 years which had been split into two categories of 5-10 and 11-20 years which scored at 33.3% respectively. This shows that the respondent sampled were relatively informed on the practice of law.

Table 4.1. Gender Characteristics and age of the Respondents

Indicator	Frequency	Percentage
Male	11	55%
Female	9	45%
Age of Respondents		
20- 29	5	25%
30-39	6	30%
40-49	9	45%
Years of Practice For lawyers		
Less than 4 Years	1	16.7%

5-9 Years	2	33.3%
10-20 Years	2	33.3%
More 20 Years	1	16.7%

Nature of Land Disputes in Kiambu County

Primarily the study projected as demonstrated in Table 4.2. below that the disputes would be transactional boundary related, succession and criminal related disputes. From the respondents we were able to establish that majority i.e., 25% of the disputes were transactional and that was mainly due to failure by the parties to honour the agreements. Inheritance, legal and criminal disputes attracted an equal 20% which manifested themselves as succession disputes in Court, caveats or cautions on land. Only 15% of the respondents categorised the nature of land disputes in Kiambu as boundary disputes. Those who did stated that they usually arise from shared boundaries by relatives or neighbours after selling their parcels to a third party.

TABLE 4.2. Nature of land disputes in Kiambu County

Category	Number	Percentage	Comments
Transactional	5	25%	Failure to honour agreements
Boundary Dispute	3	15%	Arise from shared boundaries
Inheritance disputes	4	20%	Succession cases in Courts
Legal disputes	4	20%	Cautions and caveats on Land
Criminal related	4	20%	Assault Malicious damage general creating disturbance

Role of Lawyers in Resolving Land Disputes in Kiambu

Lawyers in Kiambu play a role in resolving land disputes from advising the clients who appear before them to representing them in Court. One of the critical roles that lawyer play while dealing with land disputes is advising on the choice of dispute resolution

mechanism. As demonstrated in table 4.3. the research sought to know whether lawyers play a critical role in the choice of forum for land dispute resolution in Kiambu. The indicators were whether the respondents agreed or disagreed or did not know. 35% of the respondents agreed that lawyers play a critical role in helping parties decide the choice of forum for resolving land disputes. However only 15% showed that they strongly agreed that the lawyer’s role is so critical. 10% of the respondents showed that they did not agree or that they did not strongly disagree. Mainly cited the cost attached to the legal advice by lawyers as the main factor for disagreeing. 30 % of the respondents did not know whether to agree or not agree.

Table 4:3. Role Lawyers play in Resolving Land Conflicts in Kiambu.

Indicator	Frequency	Percentage
Strongly agree	3	15%
Agree	7	35%
Don’t agree	2	10%
Strongly disagree.	2	10%
Don’t Know	6	30%

Following what was indicated in table 4.3. above the research sought to know where the respondents thought the services of lawyers would be important. From the research 65 % of the respondents thought that the lawyers would best offer services that would fall under the category of representation in Court. As shown in Table 4.4. below only 20% thought that the service of lawyers was necessary in representation in arbitration. Another category 15% stated that the lawyer played an important in handling disputes generally. These shows that majority of respondents thought that the lawyers are largely useful in representation in Court and not in resolving land conflicts or disputes through alternative dispute resolution mechanisms.

Table 4.4. Areas where lawyers’ services are considered crucial

Category	Number	Percentage
Representation in Court	13	65%
Representation in Arbitration	4	20%
Handling Disputes generally	3	15%
Totals	20	100%

When asked the critical areas where lawyers play a major role the arbitration process 45% of the respondent thought that it was in choosing arbitration and a similar to those who thought it would be in representation during the arbitration process. Only 10% thought that it would be after the results of the arbitration process. And 20% of the respondents stated that lawyer’s role is not critical in the arbitration process.

Table 4. 6. Critical areas where lawyers are critical in arbitration process in establishing.

Indicator	Frequency	Percentage
Choosing arbitration	5	25%
Representation during Arbitration process	5	45%
Lawyers role is not critical	4	20%
After the results of Arbitration	2	10%

The research also sought to know from the respondents what would guide the most appropriate forum for resolving land disputes in Kiambu County. Interestingly 35 % of the respondents thought that it would be important to choose the forum for resolving the dispute based on lawyer’s advice. 25% of the respondents thought that agreement of the parties should inform that decision and 20% thought it was statutory provision. Others gave varied criteria for choosing the forum making it to 20% of the respondents.

See table 4.5. below.

Choice of Dispute resolution forum	Number	Percentage
Statutory Provision	4	20%
Agreement of parties	5	25%
Advocate’s advice	7	35%
Others	4	20%
TOTAL	20	100%

4.3. Perspective from lawyers

From interviews conducted one of the respondents who is a lawyer of between 10 – 20 years of experience as advocate when asked for an opinion on the role of lawyers in resolving land conflicts in Kiambu stated as follows:

“Land laws in Kenya are very complex and it is mandatory for a lawyer to assist clients in getting justice. The complexity of arbitration process requires that the decision of the arbitrator be given sanctity by court orders. Arbitration lacks proper structures and thus unaided litigants fail miserably in pursuit for justice. Equally arbitrators need to be answerable to a disciplinary process or held accountable for their decisions. An enhanced arbitration process with accountable arbitrators in the format of the repealed land disputes tribunal in the districts or a devolved land court in the districts with simple procedures on arbitration should be set up to offer the best results in resolving land disputes in Kiambu”.

This view is in line with what Saletan, (1994) highlights as three perspectives to conflict resolution which are legalist view, expressionist view, and transformative view. He presumes that arbitral agency primary or exclusive function is to objectively settle apparent differences between the parties not to address the underlying issues relevant to the immediate conflict. This legalist perspective according to Saletan informs the philosophy of all lawyers in the pursuit to resolve conflict within arbitration.

To this end this research was guided by an understanding that lawyers will unconsciously be directed by the legalist perspective that considerably reveals the outcome of all arbitration efforts in Kiambu. The zest to win cases by lawyers including in arbitrations makes advocates guide the parties geared to one outcome winning. The participation of advocates only precipitates the smooth running of case especially for the winning side but not on an amicable settlement or resolution of the dispute at hand.

Another respondent who is a magistrate and has practiced as such for between 5-9 years in all areas of law and has been involved in resolving disputes arising from land in Kiambu and has also been an arbitrator said the following;

“Arbitration of land disputes in Kiambu County should be guided by the disputant’s agreements although this isn’t the only criteria that are generally used to select the choice of dispute resolution forum. Lawyers play a critical role in explaining to the

parties the pros and cons of dispute resolution forum they should adopt since they are able to grasp the legal issues that may arise during and after the process is completed. The lawyers influence on the process of arbitration differs from case to case and can only be judged on the merits of each case. The most appropriate forum for resolving land disputes is court and the only way to improve the process of arbitration is through concession by parties in order to expedite pending disputes in arbitration. This way the obstacles on the forum to resolve disputes will be overcome.”

The common thread seen in the above citations is that land laws are complex and invite the expertise of lawyers who assist in the choice of forum for resolving land disputes through arbitration. From this citation, it is very clear that the legal regime touching on land over the years has made it very easy for parties to need the services of a lawyer. Parties to a land dispute seem to need the services of an advocate at any given time due to the complexities involved at any stage. Therefore, the advice cannot be confined to only resolution of the conflict but the entire process including the arbitration that seeks to resolve the dispute.

Another respondent a lawyer who has practiced law between 40-49 years and has been an arbitrator in various capacities from being an arbitrator to representing parties in court to general advice stated as follows;

“From the complex land laws which were heavily borrowed from the colonial masters which laws have been repealed over the years, arbitration is the best model for resolving conflicts related to land. The procedural complexity of land disputes in Kiambu from the early settlement years going into the early 1990’s when combined with the procedural aspects of arbitration makes it unimaginable that a mere peasant farmer would be able to understand it to appreciate the process and outcome of the process thereof. Mostly boundary disputes, inheritance disputes, transactional disputes present themselves as criminal cases or civil claims before courts which lawyers are glad to be part of both for the pay and public image the cases project for them. This makes it very hard to go beyond the surface and resolve the deeper interest and needs of the warring parties who are at the Centre of the dispute so that you sympathize with them should they decide not to involve a lawyer. I therefore think we must add all concerted efforts to enlighten everyone lawyers included on the ideals of arbitration and the promise it offers”.

This in a sense validates what Food and Caiger (1993) argue that the growth of arbitration has mainly developed through the medium of lawyers, the law and the routines developed every day in negotiations contracts and non-judicial forums. Their study reveals that lawyers play the role of creators of the arbitration agreement and also translators of the agreement. This cements the fact that if lawyers alone controlled the process the war would not be over although many lawyers dislike arbitration as dispute resolution forum and preferred the courts because they are predictable, reliable, and public.

The research sought to know the nature of land conflicts that are in Kiambu County. Majority of the response gathered indicated that the land disputes are transactional. Mostly respondents complained that during the transaction many aspects of the history of land is not properly indicated such that the transaction may not be complete within the agreed time. Inheritance, criminal related and legal disputes form the lesser percentage but when put together it becomes very clear that there would be the greatest cause of land conflicts. To this end it appears that the nature of land conflicts in Kiambu are more dynamic and different in many respects.

Secondly the study sought to establish whether lawyers play a critical role in resolving land conflicts in Kiambu County. Interestingly, when respondents were asked whether lawyers play a critical role in resolving land conflicts in Kiambu majority responded that they agreed with the presupposition that lawyers play a critical role. What was observed was that land conflicts are complex in nature, and it would be very hard to expect non-lawyers to either advice or participate in the complete resolution of the land conflict. A good percentage also showed that they did not know whether they did play a critical role. Perhaps it is so since they did not think that the lawyers' role is very critical or because they did not know whether or not they play any role at all.

Thirdly the study also established that there what critical areas do the services of lawyers play a significant role during the arbitration process. It emerged that lawyers are best suited in representing parties in the arbitration process. It was very clear that the arbitration process was considered complex as to require the expertise of lawyers. As indicated unaided an ordinary litigant would find it extremely hard to appreciate and understand the quality of the outcome of arbitration. The decision as to whether to go through arbitration or not also seemed to be an area where lawyers may be engaged by the disputants. This showed that disputants have an appreciation for the advice function of the role lawyers play in arbitration.

Lastly from the inscriptions of the lawyers interviewed as to the quality of arbitration process, it emerged that an understanding that lawyers will unconsciously be directed by the legalist perspective that considerably reveals the outcome of all arbitration efforts in Kiambu. The zest to win cases by lawyers including in arbitrations makes advocates guide the parties geared to one outcome winning. The participation of advocates only precipitates the smooth running of case especially for the winning side but not on an amicable settlement or resolution of the dispute at hand.

The common thread seen in the citations is that land laws are complex and invite the expertise of lawyers who assist in the choice of forum for resolving land disputes through arbitration. Following the above citation, it is very clear that the legal regime touching on land over the years has made it very easy for parties to need the services of a lawyer. Parties to a land dispute seem to need the services of an advocate at any given time due to the complexities involved at any stage. Therefore, the advice cannot be confined to only resolution of the conflict but the entire process including the arbitration process that seeks to resolve the dispute.

The research was guided by an understanding that lawyers will unconsciously be guided by the legalist perspective that considerably reveals the outcome of all arbitration efforts in Kiambu. The zest to win cases by lawyers including in arbitrations makes advocates guide the parties geared to one outcome winning. There is no evidence to answer affirmatively the question whether lawyers impede cooperation in seeking to determine their differences in arbitration, but most respondents answered this question based on their personal observation and experience with lawyers. Land disputes in Kiambu are based on struggle for control and utilization of it. The fact that land is immovable makes it the more difficult to establish a solution for it based on other theories advanced previously. Due to complexities of conflicts and adding the fact that land in Kiambu is a very emotive issue, also that there are many legislations that govern land nationally it is important that lawyers are engaged as parties seek to resolve this all complex matter of land. Lawyers thus play a critical role in the resolution of land conflicts.

Then it is now clear that though there are many other models of resolving land conflicts in Kiambu and lawyers have encouraged parties to adopt courts as a means to resolve the land problems the utilization of arbitration as a conflict resolution model remains underused. This is so partly due to lawyer's role in the arbitration process but also due to the nature of land conflicts. The laws governing land registration and ownership as

well as arbitration make it almost mandatory for residents of Kiambu to use the services of lawyers.

Conclusion

From the above findings the following recommendation when taken up can enhance the growth of this area of study. First, there is need to sensitize the general public of the availability of arbitration as a model for resolving conflicts and even though there exist many laws governing land it would be important for the County government to develop a model for resolving local conflicts so that the parties feel they are part of the solution to land conflicts. Second, Arbitration should be modelled to fit in the context of local land conflict resolution mechanism in Kiambu County through empowering the parties to understand the role each play in resolving land disputes. This will enable the parties not to be overly reliant on advice from lawyers and they will own the decision for dispute resolution forum and as such own the outcome of the process. This may be done through sensitization of the general public. Third, County laws should be formulated to encourage the growth of arbitration as a conflict resolution model. The law should focus on giving a binding effect to the resolutions made by the parties during arbitration and thus the outcome of the entire process becomes more final. However, there has to be caution so that it doesn't become a source of conflict in and of itself. Fourth, Courts should be used by litigants to encourage more participation of the parties in resolution of conflict and promote alternative dispute resolution especially when it is obvious that parties are only in court due to the advice given by the lawyers and not necessarily due to their inclination that way. The courts should be able to separate the parties from the lawyers and encourage that they adopt arbitration or other alternative dispute resolution models. With the coming into effect of County government that deal with management of counties it would be very important to study the role the county government plays in promoting alternative dispute resolution in Kiambu County to establish whether there is a need to formulate policy and County laws that empower the parties to adopt arbitration or other alternatives to Court processes.

References

Homer-Dixon, Thomas. (1999). *Environment, Scarcity and Violent Conflict*: Princeton: Princeton University Press.

Walton Anthony (1970) *Russell on the Law of Arbitration*. (8th ed). London: Stevens & Sons Limited.

Juma Calestous and Ojwang J.B (1996) *In Land We Trust, Environment Private Property and constitutional Change*; Initiative Publishers. Nairobi.

Kameri-Mbote Patricia (2009) *The Land Question in Kenya; Legal and Ethical Dimensions*, Law Africa Publishing, Nairobi.

Kanogo T. (1987). *Squatters and the Roots of Mau Mau*; East Africa Publishers, Nairobi.

Kothari C.R. (2004). *Research Methodology Methods & Techniques*, 2nd Edition, Apprentice Hall, New Delhi.

Konyimbi, T. (2001) *Major issues of smallholder land policy: past trends and current practices in Kenya Land Reform*,

Kenyatta, Jomo. (1961) *Facing Mount Kenya: The Tribal Life of the Gikuyu*. London: Mercury Books,

Michael N. (1992). *Rationality and the Analysis of International Conflict*. Cambridge University Press.

Mugenda. M and Mugenda. G (1999). *Research Methods; Quantitative and qualitative Approaches*, Nairobi. Acts Press.

Mutai, B.K. (2000) *How to Write Quality Research Proposal: A complete and simplified recipe*. Nairobi: Thelley Publications.

Omenya A. and Lubaale G. (2012): *Understanding the Tipping Points or Urban Conflict: The case of Nairobi Kenya*; University of Manchester, United Kingdom.

Rahim M. A. (2010). *Managing Conflict in Organizations*. Transaction Publishers. Amazon.

Stormy- Annika and Milner et al, (2011) *Scarcity and Abundance Revisited: A Literature review on Natural Resources and Conflict*.

Arbitration in Land Disputes: An Empirical Study on the Role of Lawyers in the Management of Land Conflicts in Kiambu County: Henry K. Murigi (2021)9(3) *Alternative Dispute Resolution*

Seliger, H.W. and E, Shohamy (1989) *Second Language Research Methods*. Oxford; Oxford University Press.

Sorrensons M.P.K (1967) *Land Reform in Kikuyu Country, A Study in Government Policy*. Oxford University Press, London.

Syagga, P, Mitullah, W. & Karirah-Gitau, S. (2001) Slum Upgrading Initiative: Nairobi Situational Analysis. Nairobi.

Sylvester G. (1961) *Role of Lawyers in Arbitration; Arbitration in Public Policy*.

Konyimbil T.M. (2009) 'Landholding and Ethics'; *Critical Issues for Kenya's Rural Economy*. Law Africa Publishing, Nairobi.

Zwanenberg V. R. M. A. and King Anne (1975), *An Economic History of Kenya and Uganda*, London,

O'Brien. E. (2011) *Irregular and illegal land acquisition by Kenya's elites: Trends, processes, and impacts of Kenya's land-grabbing phenomenon*. The Kenya Land Alliance.

Kinyanjui F. K. (2007) *Causes of Persistent Rural, Poverty in Thika District of Kenya, c. 1953-2000*, Phd Thesis of Rhodes University.

Food J and Caiger A. (1993) 'Lawyers and Arbitration'; *The Juridification of Construction Disputes; The Modern Law Review*. Vol. 56

Hauge, Wenche and Tanja E. (1998), 'Beyond Environmental Security': *Causal Pathways to Conflict*. Journal of Peace Research 35(3): 299-317

Jerome T. B. (2009). *Alternative Dispute Resolution, The Story of a Political, Cultural and Social Movement*, Associate for Conflict Resolution.

Kipkemboi R. J. (2012) *Structural Adjustment Programmes in Kenya, The impact of structural adjustment programmes on Kenyan society; Journal of Social Development in Africa*. Vol 17 No.1

Kenneth S C. (1952). 'Law and Contemporary Problems' *Theory of the Arbitration process*. Vol 17 Autumn No 4

Arbitration in Land Disputes: An Empirical Study on the Role of Lawyers in the Management of Land Conflicts in Kiambu County: Henry K. Murigi (2021)9(3) *Alternative Dispute Resolution*

Saletan Ira (1994) 'Critical Issues and Perspectives in Conflict Resolution'. Barkeley Planning Journal.

Urdal H. and Raleigh C. 2008, 'Population, Resource and Political Violence' Journal of Conflict Resolution Vol.52 (4); 590-617.

The Law Society of Kenya (2013). www.lsk.org as of 5th December 2014

The Chartered Institute of Arbitrators. www.ciarb.org 6th December 2014

Report on Judicial Commission of Inquiry into the Tribal Clashes in Kenya (1999)

Report on Commission of Inquiry into the Post-Election Violence (2008)

Report on Commission of Inquiry on Irregular and Illegal Allocation of Land (2004)

Drafting The Arbitration Clause: Essential Components of an Arbitral Clause

*By: Endoo C. Dorcas**

Abstract

The arbitration agreement defines the authority of an arbitrator over a dispute, the manner of appointment, the number of arbitrators and spells out the scope and/or extent of the authority of the arbitrator. The parties, through the arbitration agreement, consent to refer any such disputes that may arise in the contract to an arbitral tribunal for determination. An Arbitration agreement may be incorporated in a contract as a clause or in a separate agreement. This article considers the basic elements that ought to be incorporated in an arbitral clause. The article is based on the provisions of the Kenyan Arbitration Act. It also discusses various decisions that touch on the question of validity of an arbitration clause. This article is intended for legal practitioners, lecturers and arbitrators alike.

Introduction

Arbitration is one among the various alternative dispute resolution mechanisms that is consensual and has been praised for being flexible for the parties in terms of the procedure.¹ It has been acclaimed for being, in most cases if not all, time saving.² In addition, arbitration is relatively cheap.³ Arbitration has been majorly used in international commercial disputes. It is necessary for parties to have an arbitral agreement as a prerequisite to refer all or certain disputes in respect to a defined relationship.⁴

Part II of the 1995 Arbitration Act⁵ makes provision on the form of an arbitration agreement. It provides that an arbitration agreement may be in the form of an arbitration

**LLB(Hons), LLM (Candidate), MA (Diplomacy and IR), EIA/EA expert, MCI Arb.*

¹ Ar. Gör. ^aeydaDursun, “A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent” (2012) accessed 10 June, 2021

²<http://kmco.co.ke/wp-content/uploads/2018/08/Overview-of-Arbitration-and-Mediation-in-Kenya.pdf>

³ AT&T Mobility LLC v. Concepcion, 563 U.S. 321, 329 (2011)

⁴Section 3 of the Arbitration Act, Cap 49 of the Laws of Kenya.

⁵ No. 4 of 1995 (revised in 2012)

clause or in a separate agreement. Further, where there is reference in a contract to a document containing an arbitration clause, such clause shall constitute an arbitration agreement if by such reference, the clause was intended to form part of the contract.⁶

Section 4(2) of the 1995 Arbitration Act mandatorily requires that an arbitration agreement be in writing. An arbitration agreement is created by the express intent of the parties to want to go to arbitration. Parties must have capacity to enter into the said agreements. A written agreement therefore becomes enforceable.⁷ An arbitration agreement is in writing if it is contained in a document signed by the parties, an exchange of communication and which is recorded or where it is alleged by a party and not denied by the other.⁸ Such agreement will be deemed to be in writing if; it is contained in a document signed by parties, an exchange of letters, telex, telegram or other means of telecommunications which provide a record of agreement or an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the party.⁹

Under the Law of Contract,¹⁰ it is a requirement that an agreement must be signed by an authorized party. However, as was held in *National Hospital Insurance Fund v Peter Scott (Sole Arbitrator) & another*¹¹ the court noted that a party need not ‘sign’ an arbitration agreement.

Parties entering into an arbitration agreement must be having an existing contractual relationship between themselves or a defined legal relationship. The Nairobi Center for International Arbitration Model Clause for Arbitration acknowledges that ‘any dispute, controversy or claim *out of or in connection to this contract*, or breach, termination or invalidity thereof shall be settled by arbitration in accordance with NCIA Arbitration Rules.¹²

⁶Section 4(4) of the Arbitration Act, Cap 49 of the Laws of Kenya.

⁷Standard Bent Glass Corp versus Glassrobots OY.333 F.3d 330, 449 (2003).

⁸[https://uk.practicallaw.thomsonreuters.com/5-633-8955?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-633-8955?transitionType=Default&contextData=(sc.Default)&firstPage=true)

accessed on 13th July, 2021.

⁹ Section 4 (3) Arbitration Act

¹⁰ Section 3, Cap 23 of the Laws of Kenya.

¹¹[2018] eKLR.

¹² <https://ncia.or.ke/model-arbitration-clause/> accessed on 12th July, 2021

The privity to contracts principle bars third parties from being part of proceedings.¹³ The Arbitration Act, 1995 is silent on whether third parties (those who are not parties to arbitration clause) can be treated as parties to in an arbitration proceeding, going by the strict definition of Section 3. Cherere J. in the case of *San Electricals Limited v Tumaz and Tumaz Enterprises Ltd & 2 others* [2020] eKLR confirmed the ruling in *Kenya National Highways Authority versus Masosa Construction Limited*¹⁴ and another where the Honourable judge considered the extent in which a third party can be enjoined in arbitral proceedings. The Court however considered the meaning of the agreement under Section 4(4) of the Arbitration Act and noted that where other documents signed by other parties refer to an initial document, such party may claim. Comparatively, Australia's Commercial Arbitration Act includes any person claiming through or under a party to an arbitration agreement as a party to an Arbitration agreement.¹⁵

The arbitration agreement needs to be a valid agreement entered into freely by the parties. If it is found to be null and void, such arbitral agreements may not thus be enforceable. Fraud, illegality and incapacity may also result to the annulment of an arbitration agreement. The High Court at *Kerugoya* in *County Government of Kirinyaga versus African Banking Corporation*¹⁶ found that the arbitral agreement had offended the statutory provisions of the Public Procurement and Asset Disposal Act.

Validity of arbitral agreement also requires that there must be mutual consent and parties must consent willingly to refer a dispute to arbitration. This may however not be the case in the nature of employment contracts owing to the imbalance of parties in such contracts. Employment contracts are in most cases standard for contracts. Arbitration is creature of consent and an employee cannot submit to Arbitration any dispute which he has not agreed to.¹⁷ Importantly, as held in case of *Consolidated Bank of Kenya Limited vs Arch Kamau Njendu t/a Gitutho Associates*(2015) eKLR that, a party cannot be forced into arbitration where there is no legal basis for such Arbitration.

¹³Smith, S. (1997). Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule. *Oxford Journal of Legal Studies*, 17(4), 643-663. Retrieved June 30, 2021, from <http://www.jstor.org/stable/764754>.

¹⁴ See also *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited* [2017] eKLR

¹⁵Section 2(1), Commercial Arbitration Agreement Act, 2010 (Australia).

¹⁶[2020] eKLR.

¹⁷*United Steelworkers versus Warrior & Gulf Navig. Co.* 363 U.S. 574, 582 (1960).

Elements of Arbitration Clause

i. Number of arbitrators

Parties freely determine the number of arbitrators and may agree to refer the matter to a single arbitrator or that each party will choose an arbitrator and an umpire. An arbitral clause should be certain on the number of arbitrators and seek to ensure that they be odd numbers (one, three or five).¹⁸

The parties are also free to determine the mode of appointment failing to which section 12 (2) provides for the mode of appointment. The Arbitral clause may specify that each party shall so appoint an arbitrator who upon appointment, they shall proceed to appoint an umpire. Where the parties do not agree, they may elect that the Chairperson of the Chartered Institute of Arbitrators shall appoint an arbitrator or as the case may be, a head of a (professional) institution. An arbitrator must be impartial, independent and has a duty to determine the matter efficiently and expeditiously.

Parties may choose to specify in the arbitration clause the qualifications of an arbitrator.¹⁹ This may be in line of the years of practice or expertise in a given field. This may not be necessary as arbitrators can seek technical advice should some aspect of the dispute so require.²⁰ Parties may also bring expert evidence during proceedings.

It is necessary that an arbitration clause specifies the timelines within which parties are expected to appoint an arbitrator. This will enable parties to observe timelines and expedite the appointment process. The Arbitration Act provides a time limit of fourteen (14) days within which a party will be in default of appointing an arbitrator.

In investment disputes between states and other parties, or where parties choose to refer their matters to specific rules of arbitration, the number of arbitrators is subject to those rules. For instance, in the ICC Rules,²¹ the number of arbitrators is one or three and if parties cannot agree, the court shall appoint a single arbitrator. The UNCITRAL

¹⁸ Thomas H. Oehmke and Joan M. Brovins, *Arbitrator Selection and Service*, 97 AM. JUR. TRIALS 319 (2005)

¹⁹ Jamshed Ansari, "Party Autonomy in Arbitration: "A Critical Analysis" (2014) 6(6) *Researcher* 47, 53 (ISSN: 1553-9865). accessed 12 May, 2021.

²⁰ B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 2006).

²¹ Article 12, ICC Rules of Arbitration

Arbitration Rules provide that if within 30 days parties have not agreed, three arbitrators shall be appointed.²² The Nairobi Center for International Arbitration Rules provide that a dispute subject to arbitration under its Rules shall be decided by a sole arbitrator unless the parties agree that the dispute be decided by three arbitrators.²³

ii. Scope of dispute

This specifies the subject matter and/ or dispute that is being referred to arbitration. In most circumstances, parties may only refer a dispute arising from a clause of the contract or the entire contract. Where the dispute arises from a clause, parties may agree to proceed with their obligations under the contract.

An arbitrator must be certain about the scope of the dispute as it informs the scope of the authority of the arbitrator. Owing to the unforeseeability of the nature of dispute, the arbitrator must always seek the authority of parties in order to obtain power over disputes falling outside the scope of the agreement.

The High court of Australia in *Rinehart & Another versus Hancock Prospecting Pty ltd and Others*²⁴ held that the phrase “any dispute under this deed” in an arbitration clause was sufficiently broad in the context of the deeds in questions encompassing disputes about validity of the arbitration agreement as substantive claims.

iii. Procedural and Substantive Law

This procedural law refers to the law that provides for the internal procedure and dictates the external interference of courts.²⁵ Appointment procedures, form of pleadings, the hearing process and issuance of an award are governed by the procedural law. It is critical however to make provision for the **seat** of the arbitration as it determines the substantive rules. The seat of arbitration refers to the juridical seat. Some conventions or institutions such as the ICC rules determine the seat unless parties have agreed. The arbitral tribunal may also determine the seat if the parties fail to agree as designated by law.²⁶In the absence of agreement by parties or such designation, the courts may determine the seat.

²²Article 7, UNCITRAL Arbitration Rules.

²³Rule 7, NCIA Arbitration Rules, 2015.

²⁴*Rinehart&Anor v HancockProspecxting Pty Ltd &Others* [2019] HCA 13

²⁵ *Network Capital Funding Corp. v. Papke*, 230 Cal. App. 4th 503, 518, 178 Cal. Rptr. 3d 658, 670 (2014)

²⁶ Article 16(1) UNCITRAL Arbitration Rules

Determining the seat is essential in international arbitration for ease of signing, recognition and enforcement of awards. Secondly, choice of seat of arbitration will help the parties avoid forum shopping for a suitable jurisdiction thus providing a territorial delinkage. Parties will institute various arbitration proceedings in various jurisdictions. An arbitration may be rendered invalid if it offends the laws of the seat.²⁷

On the venue of the arbitration, parties need not limit themselves but ought to consider accessibility and affordability as this will be apportioned as a cost in arbitration. situations such as the covid-19 pandemic has forced parties to consider online proceedings. It is noteworthy that not all international arbitral proceedings may be conducted in one location and the award may in some circumstances be signed in a different place.

The substantive law on the other hand refers to the law that is applicable as expressed in the contract. The arbitral tribunal determines the substance of a dispute based on the applicable law chosen by the parties.

iv. Language

While exercising party autonomy, parties may agree to include the language to be used in the arbitral proceeding and in which the decision of the arbitrator shall be.²⁸As provided in Section 23 of the 1995 Arbitration Act, failing such agreement, the arbitral tribunal may determine the language to be use, taking into account parties' rights to fair hearing and equal treatment.²⁹Parties are free to choose the language to be used nonetheless. The tribunal is guided by practical and legal issues in determining issues such as the language of the contract of the parties.³⁰

Choice of language will guide the arbitral tribunal to direct any translations on documents and use during the hearing.³¹Most importantly, the award will be written in the agreed language of the parties. Section 36 (4) 1995 Arbitration Act requires that

²⁷ Hwang, M. S. C and Lim, K. "Corruption in Arbitration – Law and Reality" (Asian International Arbitration Journal, 2011).

²⁸ Section 23(1) Arbitration Act, 1995.

²⁹ Article 17, UNCITRAL Arbitration Rules.

³⁰ Julian D. M. Lew, *Applicable Law in International Commercial Arbitration* (Oceana, 1978) para 439.

³¹ Lew, J.D., Mistelis, L. A. & Kroll, S. M., *Comparative International Commercial Arbitration* (Amsterdam, 2003)

where the arbitration agreement is not made in the English agreement, the party shall furnish a duly certified translation of it into the English language.³²

Under the UNCITRAL Arbitration Rules, the arbitral tribunal shall determine the language promptly upon appointment.³³ This rule is generally applied in international arbitration proceedings. The arbitral tribunal will consider the practical and legal issues in determining the language. In most cases, the arbitral tribunal is guided by the language of the contract and other documents such as correspondences.

Choice of language is central in access to justice through arbitration.³⁴ Choice or determination of language by parties or arbitral tribunal should be efficient in ensuring natural justice is achieved by the parties through submission process. The right to be heard and equal treatment must be protected.³⁵

v. *Costs of the arbitration*

Many arbitral clauses are silent on who bears the cost of the arbitration and it is not fatal. Parties may bring it up in the reference. As a matter of principle, costs follow the event, and an arbitrator will as such decide. However, parties ought to specify whether an arbitrator has authority to determine a dispute on issues of costs or if such authority is limited to a specific amount. Under Section 32B of 1995 Arbitration Act, the arbitral tribunal may determine and apportion the costs and expenses related to the arbitration.

vi. *Binding nature to the clause*

The parties agree on whether an award shall be binding so that a losing party complies as a legal obligation with the award,³⁶ independent of any procedural obstacles.³⁷ This also prevents a court of law from deciding on the same subject matter or from reviewing an award. As such, awards are final.

³²Wileky, M., *The Practicalities of Cross-Cultural Arbitration* in Frommel, S. & Rider, B. (eds) *Conflicting Legal Cultures in Commercial Arbitration* (Amsterdam, 1999).

³³Article 17(1), UNCITRAL Arbitration Rules.

³⁴*See generally* Kariuki, M., *ADR: The Road to Justice in Kenya* (March, 2014)

³⁵Scherer, Maxi and Prasad, Dharshini and Prokic, Dina, *The Principle of Equal Treatment in International Arbitration* (September 3, 2018). Available at SSRN: <https://ssrn.com/abstract=3377237> or <http://dx.doi.org/10.2139/ssrn.3377237> accessed on 17 June, 2021.

³⁶Article 53 of ICSID Convention.

³⁷United Nations, 2003 'International Centre for Settlement of Investment Disputes: 2.9 – Binding Force and Enforcement'.

Absence of An Arbitration Clause in the Contract

An agreement to refer a dispute to arbitration may not always be express as seen in *Sonact Group Limited v Premuda Spa*³⁸. As such, parties need not worry when there is no arbitration clause in a main contract. As they may agree, parties may draft an arbitration agreement in respect to a dispute arising from the contract to submit to arbitration.³⁹ Other informal agreements such as emails amount to agreements as they evidence the intentions of parties to submit to arbitration. The reading of Section 4 of the Arbitration Act provides for the various forms of arbitration agreement.

Alternative Dispute Resolution

Increasingly, parties have resolved to consider other dispute resolution mechanisms before deciding to refer a dispute to arbitration such as conciliation, mediation, and construction adjudication.⁴⁰ Mediation is increasingly being adopted in international commercial disputes. An arbitral clause must clearly state the procedure of such mechanism so as not to render an arbitral reference as premature.⁴¹

Any procedural pre-requirement to arbitration must be practical and fulfilled before a matter is referred to arbitration. Enforcing an award that a condition precedent is not fulfilled can be curtailed.⁴² An arbitrator must therefore ensure that any such provision in the clause is satisfied. These precedent requirements should also specify timelines and hierarchy of reference of disputes.⁴³

The English High Court in the case of *Republic of Sierra Leone v. SL Mining Ltd*,⁴⁴ held that the alleged non-compliance was a question of admissibility of the claim and not one challenging the jurisdiction of the tribunal. Where a challenge is in respect to jurisdiction, it goes to the existence and power of the tribunal to determine the dispute. On the other hand, admissibility concerns with the ability of the arbitral tribunal to

³⁸[2018] EWHC 3820.

³⁹ Susan Blake and others, *A Practical Approach to Alternative Dispute Resolution*, (London: Oxford University Press, 2011) 432.

⁴⁰Muigua K., *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012)

⁴¹[https://uk.practicallaw.thomsonreuters.com/5-633aule&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-633aule&contextData=(sc.Default)&firstPage=true)

⁴² Ahmed, T. Lane, C. & Mufti, *The Nature of Pre-Arbitration Procedural Requirements in Pakistan: mandatory of Optional?* (Young ICCA, January, 2019).

⁴³See *Pak. U.K. Association (Pvt.) Ltd. v. Hashemite Kingdom of Jordan* [2017 CLC 599].

⁴⁴[2021] EWHC 286 (Comm).

exercise its power. In the case of *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd*,⁴⁵ the court held that the tribunal had jurisdiction as the pre-condition had been satisfied. Going by the above cases, courts may treat non-compliance with precedent requirements as procedural issues.⁴⁶

After the award is rendered, a party may challenge the award in court as to its substantive jurisdiction in accordance with the provisions of Section 35 of the 1995 Arbitration Act. This is to mean that the award is being challenged on the grounds of validity of the arbitration agreement, if the tribunal was properly constituted or whether the matters were submitted in accordance with the arbitration agreement.⁴⁷

However, legal issues remain unaddressed where a court may determine and render an arbitral award unenforceable for failure to satisfy pre-condition requirements. The question is whether the parties shall begin with the pre-conditions in resolving the dispute and whether a fresh arbitral proceeding will commence without offending *res judicata* principle.⁴⁸ The courts may however be guided by Section 35 (5) in making such determination on an application challenging an award.

Ordinarily, before an award is rendered, an application may be made by a party seeking to stay court proceedings pending the arbitral process in accordance with Section 6 of the Arbitration Act. However, a party may waive this right if they defend a suit in court.⁴⁹ Appreciably, the 1995 Arbitration Act specifies and limits the intervention by courts of laws in arbitral proceedings. Additionally, pursuant to Article 159 of the Constitution, the court is mandated to promote alternative dispute resolutions.⁵⁰ Where parties have an arbitration clause and one goes to court before the arbitral process, the other party may make an application seeking to have the matter referred to arbitration first.

⁴⁵[2015] 1 WLR 1145

⁴⁶Chartered Institute of Arbitrators, “International Arbitration Practice Guideline: Jurisdictional Challenges”.

⁴⁷*ObrasconHuarte Lain S.A. v Qatar Foundation for Education* [2020] EWHC 1643 (Comm).

⁴⁸Louis Flannery and Robert Merkin, ‘Emirates Trading, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition?’, in William W. Park (ed), *Arbitration International* (© The Author(s); Oxford University Press 2015, Volume 31 Issue 1).

⁴⁹ See *Rene Industries Limited v County Government of Kitui* [2019] eKLR

⁵⁰ Constitution of Kenya, 2010

Separability of the Arbitration Clause

The separability doctrine provides that an arbitration agreement remains valid even after termination of a contract.⁵¹Section 17(1) of the Arbitration Act provides that an arbitrator has the authority to determine jurisdiction on the existence or validity of an arbitration agreement. Such agreement shall be treated as an agreement independent of the other parts of a contract.

The question is whether an invalid agreement invalidates an arbitral clause, considering the fact that the question of validity of the agreement may be contemplated to be referred to arbitration as a dispute. A party under Section 6(1) of the Arbitration Act may make an Application for stay of proceedings unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Gitari J, in *County Government of Kirinyaga versus African Banking Corporation*⁵², noted that an invalid contract is illegal *ab initio* and unenforceable.⁵³In *Wringles Company (East Africa) versus Attorney General and 3 others* the court held:⁵⁴

“that courts cannot re-write what has already been agreed upon by the parties as set out in the agreement. The parties had agreed that in the case of a dispute arising as to the validity of the agreement, then the same would be subject to arbitration and the court cannot re-write the same.”

Further, in the case of *Kenya Airports Parking Services Ltd and Another versus Municipal council of Mombasa*⁵⁵, the court decided that:

“it is in this courts view that where there exists an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawfully and therefore invalid, such view does not invalidate the arbitration clause in the agreement.”

The Court of Appeal in the case of *Niazons (K) Ltd versus china Road and Bridge*⁵⁶ held

⁵¹*Nedermar Technology Ltd v Kenya Anti-Corruption Commission & Another*, [2006] eKLR

⁵² [2020] eKLR

⁵³ See Peter –v- Singh (2) 1987 KLR 585

⁵⁴ [2013]eKLR

⁵⁵ [2010] eKLR

⁵⁶ [20010 eKLR

“Whether or not an arbitration clause or agreement is valid is a matter the court seized of a suit in which a stay is sought is duty bound to decide. The afore quoted section does not expressly state at what stage it should do so. However, a careful reading of the section leaves no doubt that the court must hear that application to come to a decision one way or the other. It appears to me that all an applicant is obliged to do is to bring his application promptly. The Court will then be obliged to consider three basic aspects. First, whether the applicant has taken any step in the proceeding other than the steps allowed by the said section. Second, whether there are any legal impediments on the validity, operation or performance of the arbitration agreement. Third, whether the suit indeed concerns a matter agreed to be referred.”

The arbitration clause cannot however be treated independently if it forms part of an agreement that contravenes a statute, is illegal and invalid.

The Court of Appeal decision in the case of ***Njogu & Company Advocates –v- National Bank of Kenya Ltd*** where the court stated –

“Since the appellant and the respondent had clearly agreed on the above provisions, it is evident that they were both party to the agreement, it is evident that they were both party to an agreement that is illegal as the terms of the agreement contravened the law. “

Lastly, in the case of ***JaikishanDass Mull –v- LuchhiminarainKanoria& Co.***, the court held that: -

“Now, there can be no doubt that if a contract is illegal and void an arbitration clause which is one of the terms thereof must also perish along with it -----“

As the Court of Appeal held in the case of ***Ann MumbiHinga v Victoria NjokiGathara***⁵⁷, court should restrain from interfering with arbitration process save for public policy.

⁵⁷ [2009] eKLR

Conclusion

Considering that arbitration agreements in most cases if not all, are embedded in contracts, it may not be an easy option for a party to opt-out. Indeed, a case in point is online Terms and Conditions Agreement, where a party clicking “agree” waives their right to be heard in court.⁵⁸In the foregoing, drafting an arbitral agreement clause is critical in determining the process and even the success of arbitration process. The arbitration clause should largely reflect the principle of party autonomy. Parties’ interests must thus be protected from this stage forward. It is critical that these components are highlighted as rules by parties to solve potential disputes *ex ante*.⁵⁹

⁵⁸<https://www.cnn.com/2019/08/21/apple-card-arbitration-agreement-how-to-opt-out.html>
accessed on 28 June, 2021.

⁵⁹Drahozal, C. R. and S. J. Ware (2010). Why Do Businesses Use (or Not Use) Arbitration Clauses? *Ohio State Journal on Dispute Resolution* 25(2), 433–476

Bibliography

Ahmed, T. Lane, C. & Mufti, The Nature of Pre-Arbitration Procedural Requirements in Pakistan: mandatory of Optional? (Young ICCA, January, 2019).

Ar. Gör. ^aeydaDursun, “A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of Its Role and Extent” (2012) accessed 10 June, 2021

B. Cheng, General Principles of Law as applied by International Courts and Tribunals (Cambridge: Cambridge University Press, 2006).

Chartered Institute of Arbitrators, “International Arbitration Practice Guideline: Jurisdictional Challenges” (2016).

Commercial Arbitration Agreement Act, 2010 (Australia).

Constitution of Kenya, 2010

Drahozal, C. R. and S. J. Ware (2010). Why Do Businesses Use (or Not Use) Arbitration Clauses? Ohio State Journal on Dispute Resolution 25(2), 433–476

<http://kmco.co.ke/wp-content/uploads/2018/08/Overview-of-Arbitration-and-Mediation-in-Kenya.pdf>

<https://ncia.or.ke/model-arbitration-clause/> accessed on 12th July, 2021

[https://uk.practicallaw.thomsonreuters.com/5-633ault&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-633ault&contextData=(sc.Default)&firstPage=true)

[https://uk.practicallaw.thomsonreuters.com/5-6338955?transitionType=Default&contextData=\(sc.Default\) &firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-6338955?transitionType=Default&contextData=(sc.Default) &firstPage=true) accessed on 13th July, 2021.

<https://www.cnbc.com/2019/08/21/apple-card-arbitration-agreement-how-to-opt-out.html> accessed on 28 June, 2021.

Hwang, M. S. C and Lim, K. “Corruption in Arbitration – Law and Reality” (Asian International Arbitration Journal, 2011).

ICC Rules of Arbitration

ICSID Convention.

Jamshed Ansari, "Party Autonomy in Arbitration: "A Critical Analysis" (2014) 6(6) *Researcher* 47, 53 (ISSN: 1553-9865). accessed 12 May, 2021.

Julian D. M. Lew, *Applicable Law in International Commercial Arbitration* (Oceana, 1978) para 439.

Kariuki, M., *ADR: The Road to Justice in Kenya* (March, 2014)

Lew, J.D., Mistelis, L. A. & Kroll, S. M., *Comparative International Commercial Arbitration* (Amsterdam, 2003)

Louis Flannery and Robert Merkin, 'Emirates Trading, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition?' in William W. Park (ed), *Arbitration International* (The Author(s); Oxford University Press 2015, Volume 31 Issue 1).

Muigua K., *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012)

NCIA Arbitration Rules, 2015.

Network Capital Funding Corp. v. Papke, 230 Cal. App. 4th 503, 518, 178 Cal. Rptr. 3d 658, 670 (2014)

Pak. U.K. Association (Pvt.) Ltd. v. Hashemite Kingdom of Jordan [2017 CLC 599].

Scherer, Maxi and Prasad, Dharshini and Prokic, Dina, *The Principle of Equal Treatment in International Arbitration* (September 3, 2018). Available at SSRN: <https://ssrn.com/abstract=3377237> or <http://dx.doi.org/10.2139/ssrn.3377237> accessed on 17 June, 2021.

Smith, S. (1997). *Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule*. *Oxford Journal of Legal Studies*, 17(4), 643-663. Retrieved June 30, 2021, from <http://www.jstor.org/stable/764754>.

Standard Bent Glass Corp versus Glassrobots OY. 333 F.3d 330, 449 (2003).

Drafting The Arbitration Clause: Essential Components of an (2021)9(3) *Alternative Dispute Resolution*
Arbitral Clause: Endoo C. Dorcas

Susan Blake and others, *A Practical Approach to Alternative Dispute Resolution*, (London: Oxford University Press, 2011) 432.

Thomas H. Oehmke and Joan M. Brovins, *Arbitrator Selection and Service*, 97 AM. JUR. TRIALS 319 (2005)

UNCITRAL Arbitration Rules.

United Nations, 2003 ‘International Centre for Settlement of Investment Disputes: 2.9 – Binding Force and Enforcement’.

United Steelworkers versus Warrior & Gulf Navig. Co. 363 U.S. 574, 582 (1960).

Wileky, M., *The Practicalities of Cross-Cultural Arbitration* in Frommel, S. & Rider, B. (eds) *Conflicting Legal Cultures in Commercial Arbitration* (Amsterdam, 1999).

Enhancing Access to Justice through Administrative Tribunals in Kenya.

By: **Peter Mwangi Muriithi***

Abstract

Administrative tribunals in Kenya are established vide Article 169 (1) (d) of the Constitution of Kenya 2010. Administrative tribunals are among the bodies in Kenya, mandated with the onerous responsibility of ensuring that the seminal right of access to justice is realized in accordance with Article 48 of the Constitution of Kenya 2010.¹ It is on this basis then that one can affirmatively assert that their place in enhancing access to justice is seminal and inderogable.

Premised on the foregoing, this paper therefore delimits; the nature of administrative tribunals, the position of administrative tribunals under the constitution of Kenya 2010, preference of administrative tribunals over classic courts, ways of enhancing access to justice through administrative tribunals and finally offers a conclusion.

1.0 Introduction

The starting point of this discourse has to be defining administrative tribunals. To this end, administrative tribunals can succinctly be defined as hybrid adjudicating authorities which render judicial decisions². The Black's Law dictionary on the other hand defining what an administrative tribunal is; provides that it is an administrative agency before which a matter may be heard or tried.³ Lastly, the Committee on Administrative Tribunals and Enquiries (the Franks Committee) in Britain defined tribunals as “...a machinery provided by Parliament for adjudication rather than as part of the machinery of administration”⁴

*LL.B & LL.M-University of Nairobi, PGDL, Patent Agent, Court Accredited Mediator, MCI Arb, Legal Audit & Compliance Officer and Publisher. Email; muriithipitaz@gmail.com

¹Article 48 of the Constitution of Kenya 2010

²Duhaime's Law Dictionary,

<<http://www.duhaime.org/LegalDictionary/A/AdministrativeTribunal.aspx>> lastly accessed on 19/06/21

³Brayn A. Garner, Black's Law Dictionary 9th Edition page 51

⁴Geoffrey Marshall, The Franks Report on Administrative Tribunals and Enquiries

It is to be appreciated that between routine government policy decision-making bodies and the traditional court forums lies a hybrid sometimes called a "tribunal" or "administrative/ specialized tribunal" and not necessarily presided by judges.⁵

The Franks Committee stated that such administrative tribunals must operate independently of Government Departments. In this respect, the Committee observed:

*“...We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned...and the intention of Parliament to provide for the independence of tribunals is clear and unmistakable.”*⁶

Recently, the court has affirmed this position of independence of administrative tribunals and the need for them to operate independently, free from any interference from the government especially the executive branch of government. This was in the case of; *Law Society of Kenya vs. Officer of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR*.⁷ In this case, the Petitioner *Law society of Kenya* sought a declaration that the Executive Order, Number 1 of 2020, issued on 14th January 2020 (Revised) purporting to organize the government and set out the Judiciary and *its tribunals*, Commissions and Independent offices as institutions under the functions of ministries and government departments and other constitutional bodies, to be declared unconstitutional, null and void. The Petitioner successfully argued that the *restructuring of the Judiciary and placing of the various Tribunals and the Judicial Service Commission* under various Ministries and State Department is a threat to the judicial financial independence and hence is contrary to *Articles 160; 161; 169; 171; and 173 of the Constitution*.

⁵Duhaime's Law Dictionary , <<http://www.duhaime.org/LegalDictionary/A/AdministrativeTribunal.aspx>> lastly accessed on 19/06/21

⁶Joash Dache, Reforming Tribunals in Kenya <<http://www.klrc.go.ke/index.php/klrc-blog/522-reforming-tribunals-in-kenya-concept-paper-by-joash-dache?showall=1&limitstart=>> lastly accessed on 27/06/21

⁷eKLR Petition No. 203 of 2020

Justice J.A. Makau in finding, Executive Order, Number 1 of 2020, issued on 14th January 2020 to be unconstitutional; illegal, impediment of the Rule of Law, null and void verbatim stated;

“...I find that the Petitioner has demonstrated that the intended restructures of the Judiciary, an arm of government, by Executive arm of the government, and placing of the various Tribunals and the Judicial Service Commission under various Ministries and State Department is a threat to the judicial financial independence.”

As part of the adjudication machinery, the Franks Committee further recommended that Tribunals must satisfy three fundamental principles of openness, fairness and impartiality:

“.....In the field of tribunals, openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness requires the adoption of a clear procedure that enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from influence, real or apparent, of Departments concerned with the subject-matter of their decisions”⁸

2.0 Nature of Administrative Tribunals in Kenya

Administrative tribunals in Kenya are quasi-judicial in nature meaning that they have a partly judicial character by possession of the right to hold hearings on and conduct investigations into disputed claims and alleged infractions of rules and regulations and to make decisions in the general manner of courts.⁹

Administrative/specialized tribunals are bodies established by Acts of Parliament to exercise judicial or quasi-judicial functions. They supplement ordinary courts in the administration of justice. It is to be appreciated, however, that tribunals do not have penal jurisdiction. This means that tribunals cannot impose a penalty or punishment

⁸Geoffrey Marshall, The Franks Report on Administrative Tribunals and Enquiries

⁹<<https://www.merriam-webster.com/dictionary/quasi-judicial>>lastly accessed on 27/06/21

especially inform of imprisonment on any of the parties that come to resolve disputes before them as ordinary courts do.¹⁰

Tribunals, like the courts, have to respect the Bill of Rights in their decisions and not be repugnant to justice and morality or be inconsistent with the Constitution or other laws of the land. Most tribunals are subject to the supervision of the High Court.¹¹

There are many different types of tribunals in Kenya. As earlier stated they exercise administrative or quasi-judicial powers. Some, such as the Kenya Board of Mental Health are purely regulatory and advisory. Others such as the Rent Tribunals adjudicate disputes between citizens. Yet others like the Income Tax Tribunals hear disputes between citizens and public bodies. Some like the Medical Practitioners and Dentists Board register professional practitioners and exercise disciplinary control over them. Others, such as Liquor Licensing Tribunals have first instance jurisdiction to consider and approve applications for licenses. Others such as the Agriculture Appeal Tribunal have only appellate jurisdiction from decisions of public officials or regulatory bodies.¹²

3.0 The position of Administrative Tribunals in the Constitution of Kenya 2010

The Constitution of Kenya in various instances refers to tribunals in Kenya. From the onset, the Constitution of Kenya under Article 1(3) provides that the sovereign power is donated to the tribunals and judiciary as state organs to exercise it in accordance with the Constitution.

¹⁰Bryan A. Garner, Black's Law Dictionary 9th Edition page 1246 defines the word 'penal' as; "... of, relating to, or being a penalty or punishment, esp. for a crime. See also; William M. Lile et. al., *Brief Making and the Use of Law Books 344* (3rd ed. 1914), which provides that "The general rule is that penal statutes are to be construed strictly. By the word 'penal' in this connection is meant not only such statutes as in terms impose a fine, or corporal punishment, or forfeiture as a consequence of violating laws, but also all acts which impose by way of punishment damages beyond compensation for the benefit of the injured party, or which impose any special burden, or take away or impair any privilege or right." See also; Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 59.01, at 1 (4th ed. 1986) which provides that "The word *penal* connotes some form of punishment imposed on an individual by the authority of the state where the primary purpose of a statute is expressly enforceable by fine, imprisonment, or similar punishment the statute is always construed as penal."

¹¹<<https://www.judiciary.go.ke/courts/tribunals/>> lastly accessed on 27/06/21

¹²Joash Dache, Reforming Tribunals In Kenya <<http://www.klrc.go.ke/index.php/klrc-blog/522-reforming-tribunals-in-kenya-concept-paper-by-joash-dache?showall=1&limitstart=> lastly accessed on 27/06/21

It is informative that various provisions that mention the judiciary also mention tribunals. For example, just to mention but a few; Article 24(4) of the Constitution on the interpretation of the Bill of rights, Article 47(3) (a) of the Constitution on fair administrative actions, Article 50(1) of the Constitution on fair hearing etc. At the very least this is a vindication of the quasi-judicial nature of the administrative tribunals in Kenya. The following seminal provisions of the Constitution illuminate the position of the administrative tribunals in the Constitution of Kenya 2010:

- i)** Article 47 of the Constitution on fair administrative actions- Under Article 47(3) (a) of the Constitution the parliament is required to enact legislation to provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal. This is a clear manifestation of the role that tribunals play and where they derive their authority from (Statutes enacted by parliament)
- ii)** Article 159 of the Constitution on judicial authority- Like courts the tribunals exercise judicial authority derived from the people as the sovereign and ought to exercise it in accordance with the salient principles enumerated under Article 159(2) of the Constitution.
- iii)** Article 169 of the Constitution on subordinate courts- This clearly manifests the position of tribunals in the hierarchy of courts. From this provision, of the Constitution it is clear that administrative tribunals are ranked together with (a) the Magistrates courts; (b) the Kadhis' courts; and (c) the Courts-Martial, and are generally referred to as the subordinate courts. This means in the hierarchy of courts they are below; Supreme Court, Court of Appeal and High Court chronologically.

Arising from the fundamental differences in Tribunals, the following have been identified as the general characteristics of Tribunals¹³: -

- a) They are statutory bodies
- b) They are established to deal with particular types of cases or a number of closely related types of cases on a permanent basis as opposed to being set

¹³Joash Dache, Reforming Tribunals In Kenya <<http://www.klrc.go.ke/index.php/klrc-blog/522-reforming-tribunals-in-kenya-concept-paper-by-joash-dache?showall=1&limitstart=> lastly accessed on 27/06/21

- up for a one-off inquiry and do not have jurisdictions covering a much wider range of subject matters like courts do.
- c) They are independent of the administration and decide cases before them impartially
 - d) They reach binding decisions in the cases they hear
 - e) Their decisions are usually made by a panel or bench of members rather than by a single adjudicator
 - f) Members often do not serve full-time and are not professional judges or even lawyers
 - g) They adopt a procedure similar to, but more flexible and simpler than a court of law

4.0 The basis of preference of Administrative Tribunals over classic Courts

The resilience of tribunals is primarily attributable to their advantages over ordinary courts of law. The quasi-judicial nature of administrative tribunals has over time proved to be advantageous and a basis for preference over classic courts.

Over time, various justifications have been adduced as the basis of litigants preferring to pursue their grievances in tribunals rather than courts of law.

Prof S A de Smith has enumerated the reasons why parties prefer *administrative tribunals over classic courts* in the following terms¹⁴:-

“A tribunal may be preferred to an ordinary court because its members will have (or soon will acquire) administrative knowledge of the subject-matter because it will be more informal in its trappings and procedure, because it may be better at finding facts, applying flexible standards and exercising discretionary powers, and because it may be cheaper, more accessible and more expeditious than the High Court. Occasionally dissatisfaction with the over-technical and allegedly unsympathetic approach of the Courts towards social welfare legislation has led to a transfer of their functions to special tribunals...”

¹⁴S. A. de Smith, *Judicial Review of Administrative Action*

The Franks Committee expressed itself in similar terms why parties prefer Administrative tribunals over courts. It noted as follows¹⁵:-

“Tribunals have certain characteristics which often give them advantages over the courts. These are cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject. It is no doubt because of these advantages that Parliament once it has decided that certain decisions ought not to be made by the normal executive or departmental process, often entrusts them to tribunals rather than ordinary Courts”.

Buttressing this position is the Court of Appeal in the case of; *Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 others [2012] eKLR* where it held as follows:

“.....The Review Board is an administrative statutory tribunal established to deal with all complaints of breach of duty by the procuring entity.From its nature, the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by the procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.....”

This is buttressed by the *Halsbury’s Laws of England 4th Edition Vol. (1) (1) at paragraph 60* which gives a **caution** that;

“... it must always be remembered that in every case the purpose of Judicial Review is to ensure that an individual is given a fair treatment by the authority in which he has been subjected to and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question and unless the restriction on the power of the Court is observed, the Court, will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.”

Over and above the reasons enumerated above, administrative tribunals have additional advantages. Frequently the issues at stake may have adverse effects on a citizen, and yet

¹⁵Geoffrey Marshall, The Franks Report on Administrative Tribunals and Enquiries

be not justiciable in the strict legal sense. The aggrieved citizen may not have *locus standi* in the matter in the strict legal sense. The conduct that has aggrieved a citizen may not strictly speaking amount to a violation of the law, or no judicial remedies may be available. In all these instances where an aggrieved citizen may not obtain assistance from the regular courts, the administrative tribunals offer an appealing alternative.¹⁶ Summarily stated the preference of administrative tribunals over classic courts is based on the following reasons; lower costs, accessibility, administrative knowledge of the subject matter, procedural informality, flexibility, better at fact-finding, freedom from technicality, better equipped and expeditious disposal of disputes.

Despite the foregoing, these administrative tribunals face challenges which can be enumerated as follows:¹⁷

- a) Lack of infrastructural, financial and human resources
- b) Lack of a unified legal framework governing eligibility requirements for chairpersons and members of tribunals
- c) Lack of accountability mechanisms
- d) Terms and conditions of service are not harmonized
- e) Relationship with the courts and other tribunals is not defined
- f) No spatial distribution
- g) Lack of uniform operational systems
- h) Lack of appellate processes within the tribunals' system
- i) Lack of standard operating procedures
- j) Lack of public awareness
- k) Vague or unclear jurisdictions
- l) Lack of independence
- m) Enforcement difficulties
- n) Lack of a unified framework
- o) Lack of effective systems for reporting of tribunal decisions
- p) Lack of clarity on the extent to which evidence law governs adjudication by tribunals
- q) Lack of clarity on whether litigants should pay filing fees

¹⁶Joash Dache, Reforming Tribunals in Kenya <<http://www.klrc.go.ke/index.php/klrc-blog/522-reforming-tribunals-in-kenya-concept-paper-by-joash-dache?showall=1&limitstart=> lastly accessed on 27/06/21

¹⁷Report of the committee on the review of the rationale for the establishment of Tribunals in Kenya, page 8 to 12

- r) Lack of research facilities and training opportunities
- s) Ineffectiveness of the tribunals to deliver quality administrative justice to Kenyans due to the wanting nature of the qualifications of the members of the tribunals

It is to be noted that there is an established principle of statutory interpretation of the law that where a statute confers a mandate to a specific body, that specific body has an overriding mandate in the execution of such specific mandate. This principle in essence discourages courts from interfering with decisions made by tribunals except where there are good reasons to do the same. This was so established in the High court case of; **Republic vs. The Council of Legal Education Ex-Parte James Njuguna & 14 others [2007] eKLR**, where the court held:

“... It would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body such as the Council of Legal Education and for the court to substitute its own view from that of the Council of Legal Education to which discretion was given except where the discretion has been improperly exercised...”

5.0 Access to justice through Administrative Tribunals in Kenya

A. Delimiting the Concept of Access to Justice as an Inviolable Human Right

The right to *access to justice* is internationally recognized and is considered to be a basic and inviolable right. It is codified under various international instruments which Kenya has ratified. For example; Article 8 of the Universal Declaration of Human Rights to a great extent enumerates access to justice.¹⁸

Access to justice as a concept is not easy to define as it is very wide. It may refer to a situation where people in need of help, find effective solutions available from justice systems that are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution. It could also refer to judicial and

¹⁸Article 8 of UDHR provides verbatim that; “...Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue.¹⁹

Further, *access to justice* refers to a fair and equitable legal framework that protects human rights and ensures the delivery of justice.²⁰ It also refers to the opening up of formal systems and structures of the law to disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.²¹

In the case of; *Dry Associates Limited v Capital Markets Authority & another*²², the court in its decision at paragraph 110 was of the view that;

“..Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”

Expounding further on what constitutes access to justice, *Justice D.S Majanja* had this to say in the case of; *Kenya Bus Service Ltd & another vs. Minister For Transport & 2 others [2012] eKLR*²³

¹⁹M.T. Ladan, Access to justice as a human right under the ECOWAS community law ‘A paper presented at: The Commonwealth Regional Conference on the theme: - The 21st Century Lawyer: Present Challenges and Future Skills, Abuja, Nigeria, 8 to 11 April, 2010.

Available at ;

<<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAF OAO&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07->lastly accessed on 27/06/21>

²⁰ Ibid No.19

²¹Global Alliance Against Traffic in women(GAATW) < <https://www.gaatw.org/157-what-we-do/what-we-do/446-access-to-justice>> lastly accessed on 27/06/21

²²eKLR, Petition No. 358 of 2011

²³eKLR, Civil Suit 504 of 200

“...By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and protection against legal formalism and dogmatism. (See “Law and Practical Programme for Reforms” (1992) 109 SALJ 22) Article 48 must be located within the Constitutional imperative that recognizes the Bill of Rights as the framework for social, economic and cultural policies.

Without access to justice, the object of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. Article 48, therefore, invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law.”

The access to justice framework in Kenya is hinged on the citizen’s knowledge of the existence of rights as enshrined in the Constitution’s Bills of Rights and their capacity and empowerment and to seek redress from the available justice systems. Article 22(1) of the Constitution of Kenya provides that every person has a right to institute a claim that a right or fundamental freedom has been infringed, violated or denied.²⁴

Further, the Chief Justice is to make rules for the court proceedings in the actualization of this provision.²⁵ These rules must meet certain fundamental criteria that include that the formalities relating to the proceedings as well as the formalities of instituting such claim shall be kept at a minimum, observe the rules of natural justice and shall not be unreasonably restricted by procedural technicalities.²⁶

In addition, Article 48 of the Constitution requires the State to ensure access to justice to all persons and the fees required, if any, should be reasonable and should not impede justice. The right to access to justice is further echoed under Article 159(2) of the Constitution that the courts and tribunals are to ensure that justice is not delayed, that it is done to all and administered without undue regard to procedure and technicalities.²⁷

²⁴Under Chapter 4 on Bill of Rights in the Constitution of Kenya 2010

²⁵Article 22(2) of the Constitution of Kenya 2010

²⁶Article 22(3) of the Constitution of Kenya 2010

²⁷Article 159(2) of the Constitution of Kenya 2010

Access to justice, especially by the marginalized, poor, uneducated and underprivileged in the society, has been hindered by several factors. These factors include, but are not limited to, lack of infrastructure, high advocacy fees, illiteracy, lack of information, long distance to the courts and the long duration of time it takes to resolve disputes.

In the past, the use of legal aid services has been utilized to promote access to justice through the courts. The legal aid services are inadequate and cannot cater for the needs of the larger population that cannot meet the legal cost. This notwithstanding, the recent enactment of the Legal Aid Act²⁸ is laudable as it will enhance access to justice for a section of the populace.

B. Ways of enhancing Access to Justice through Administrative Tribunals

There are a number of ways that administrative tribunals can enhance access to justice these include;

i) Adopting/incorporating Alternative Dispute Resolution Mechanisms (ADR) in the resolution of disputes.

There is no universally accepted definition of Alternative Dispute Resolution Mechanisms (ADR).²⁹

ADR simply put denotes all forms of dispute resolution other than litigation or adjudication through the courts.³⁰ This definition of ADR, however, makes no mention of vital consideration. This is that ADR provides an opportunity to resolve disputes and conflicts through the utilization of a process that is best suited to the particular dispute or conflict³¹.

A more elaborate definition of Alternative Dispute Resolution Mechanisms is offered by *Kariuki Muigua* in his article,³² who opines: it refers to all those decision-making

²⁸The Legal Aid Act, No. 6 of 2016 was enacted to give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution to facilitate access to justice and social justice

²⁹Henry J. Brown, Arthur Marriott Q.C, *ADR Principles and Practice*, 3rd Edition, Page 2

³⁰Bryan A. Garner, *Black's Law Dictionary* 9th Edition page 91

³¹Chief Bayo Ojo, *Achieving Access to Justice Through Alternative Dispute Resolution*, (Vol.1 Issue 1 2013, Chartered Institute of arbitrators in Kenya.

³²Kariuki Muigua, *Alternative Dispute Resolution mechanisms and Article 159 of the Constitution*, page 2< lastly accessed on 27/06/21

processes other than litigation including but not limited to, enquiry, mediation, conciliation, expert determination, arbitration and others.³³

In other words, Alternative Dispute Resolution mechanisms refer to the set of mechanisms that are utilized to manage disputes without resort to the often costly adversarial litigation.³⁴ ADR mechanisms mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures. The most explicit provision forming the basis of application of ADR by tribunals is Article 159 2(c) of the Constitution of Kenya 2010.³⁵

Under Article 159 2(c) of the Constitution of Kenya 2010 ADR mechanisms are portrayed as one of the principles that will guide the court and *tribunals* in their exercise of Judicial Authority.³⁶

It is provided that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted.

The caveat to the use of traditional dispute resolution mechanisms is under Article 159(3) of the Constitution which provides that so long as the mechanisms do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.

Considering the quasi-judicial nature of administrative tribunals, they are best placed in promoting the use of ADR mechanisms. Administrative tribunals are not bogged with the legalities associated with courts and are quite flexible in procedures they adopt in adjudicating disputes. This trait of administrative tribunals makes them suitable and best placed to adopt ADR mechanisms and promote access to justice.

³³Ibid No.32

³⁴ Kariuki Muigua, Alternative Dispute Resolution and Access to Justice in Kenya page 19

³⁵ Kariuki Muigua, "Alternative Dispute resolution and Article 159 of the Constitution

³⁶ Article 159 2(c) of the Constitution: Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

ii) Promoting/Advocating for substantive justice rather than procedural justice.

Substantive justice maintains that the law to be used as a measure of justice must be just and fair. Substantive is a product of the word ‘substance’, which denotes ‘of the essence or essential of a thing’. So, Substantive justice is therefore the liberal and purposive interpretation of laws, to do justice. Especially, where a formal, strict, and narrow application of the law will lead to hardship, absurdity, or injustice.³⁷

On the other hand *procedural justice*, as the name indicates, is a means of achieving justice through following strict procedures of fairness. It is the idea of fairness in the process that resolves disputes and allocate resources. It is primarily concerned with the fairness and the transparency of the process by which decisions are made.³⁸

Procedural Justice holds that fair procedure leads to an equitable outcome. Hence, seeking justice in accordance with the details or procedures of the law is procedural justice.³⁹In essence then, while Procedural Justice focuses on carrying out decisions according to the statement of the law, Substantive Justice is interested in probing whether or not the laws are just themselves.

Succinctly stated, Procedural Justice follows the process of fairness. Substantive Justice, on the other hand, checks if the fairness of laws that led to the process.⁴⁰

Article 159 2(d) of the Constitution of Kenya 2010 is considered to be the seminal provision advocating for substantive justice rather than procedural justice.⁴¹ The essence of Article 159(2) (d) of the Constitution is that a Court or Tribunal should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties.⁴²

³⁷<<https://www.lawhub.com.ng/the-difference-between-procedural-justice-and-substantive-justice/>>lastly accessed on 27/06/21

³⁸Ibid No.37

³⁹<<https://www.lawhub.com.ng/the-difference-between-procedural-justice-and-substantive-justice/>>lastly accessed on 27/06/21

⁴⁰Ibid No.39

⁴¹Article 159 2(d) of the Constitution provides that justice shall be administered without undue regard to procedural technicalities.

⁴² Zacharia Okoth Obado vs. Edward Akong’o Oyugi & 2 others [2014] eKLR at paragraph 55

To enhance access to justice, administrative tribunals should prioritize substantive justice rather than procedural justice in adjudicating disputes. The nature of administrative tribunals and the role they play in the adjudication of disputes demands that they prioritize substantive justice over procedural justice.

Unlike classic courts which are considered to be a slave of procedural justice, administrative tribunals have a considerable leeway to seek to promote substantive justice. To enhance access to justice administrative tribunals should promote substantive justice.

iii) Customizing their decisions to suit the emerging issues in society.

To enhance access to justice, administrative tribunals should make decisions that are in line with the emerging issues in society. This means that administrative tribunals especially those that adjudicate disputes between citizens should always factor in emerging issues in their decisions.

For example; The Business Premises Rent Tribunal is established under Section 11 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya. This tribunal adjudicates disputes between tenants in a controlled tenancy⁴³ and landlords/owners of shops, Hotels and Catering Establishments. Rent Tribunal is established under Section 4 of the Rent Restriction Act Cap 296 Laws of Kenya. This tribunal adjudicates disputes between tenants and landlords of dwelling houses.

Currently, Kenya is facing the Covid-19 pandemic like all the other countries worldwide. The Covid-19 pandemic negatively impacted the country especially economically. As such, tribunals like Business Premises Rent Tribunal and Rent Tribunal as enumerated above, tasked with adjudicating disputes between tenants and landlords should factor in the impact of the Covid-19 Pandemic on the economy in

⁴³Section 2 of Cap 301 Laws of Kenya defines a “*controlled tenancy*” as a tenancy of a shop, hotel or catering establishment;

- (a) which has not been reduced into writing; or
- (b) which has been reduced into writing and which (i) is for a period not exceeding five years; or (ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or (iii) relates to premises of a class specified under subsection (2) of this section:

adjudicating disputes presented before them. This will enhance access to justice through tribunals. These administrative tribunals should not make decisions in a vacuum and total disregard for such emerging issues. While delicately balancing the interests of parties appearing before them, administrative tribunals should manifest a realization of the emerging issues beyond the control of the parties in their decisions.

iv) Enhancing Emergency Procedures

Administrative tribunals in Kenya should enhance emergency procedures that are currently available. This will ensure that parties who seek injunction or conservatory orders urgently before the administrative tribunals, to prevent them from suffering irreparable harm or their cases are rendered otiose can be heard. This will greatly enhance access to justice.

There are two mechanisms available in respect of emergency procedures that the administrative tribunals can adopt. The first one relates to the expedited formation of the tribunal to hear urgent applications and the second is the accelerated hearing and determination of the urgent application submitted before the tribunal.

- a) *Expedited formation of the tribunals*- To enhance access to justice there is a need for administrative tribunals to have rules that allow them to be constituted expeditiously to hear urgent applications submitted before them.
- b) *Accelerated hearing and determination of the urgent application submitted before the tribunals* - Administrative tribunals should hear and determine urgent applications submitted before them and issue interim/temporary orders where the applications are meritorious. This will enhance access to justice as it will ensure parties do not suffer irreparable harm or their cases rendered otiose.

v) Enhancing accessibility and visibility of administrative tribunals

Accessibility of administrative tribunals is vital in enhancing access to justice. Accessibility in this regard can be in terms of⁷; physical accessibility, language accessibility and procedural/administrative accessibility. It is without a doubt that parties who require the assistance of administrative tribunals might be in the interior parts of Kenya.

This being the case there is a need for the tribunals to be accessible to such parties. Administrative tribunals can hold Adhoc hearings in various parts of the country to promote access to justice. In regards to procedural/administrative accessibility, administrative tribunals should focus on the substance of parties pleadings before them rather than the form adopted by parties in presenting their case.

Administrative tribunals should be flexible in considering how parties have approached them provided the parties articulate their case efficiently. Lastly, administrative tribunals should invent ways of eliminating language barriers to ensure all parties can be heard. There is a need for administrative tribunals to actively seek to be visible to the citizenry that they serve. This can include involvement in various local community activities which ensures that the citizenry is well aware of the role the administrative tribunals play. This will greatly enhance access to justice through administrative tribunals.

6.0 Conclusion

Administrative tribunals have an onerous role to play in enhancing access to justice in Kenya. It is the author's view that the nature of administrative tribunals should be exploited to enhance access to justice in Kenya. The role of administrative tribunals in enhancing access to justice in Kenya is without a doubt vital and ought to be promoted.

References

Bryan, A. Garner Editor in Chief, Black's Law Dictionary 9th Edition

Chief Bayo Ojo, Achieving Access to Justice through Alternative Dispute Resolution (Vol.1 Issue 1 2013, Chartered Institute of arbitrators in Kenya)

Duhaime's Law Dictionary

Geoffrey Marshall, The Franks Report on Administrative Tribunals and Enquiries

Global Alliance Against Traffic in women(GAATW)

Henry J. Brown, Arthur Marriott Q.C, ADR Principles and Practice, 3rd Edition

Joash Dache, Reforming Tribunals In Kenya

Kariuki Muigua, Alternative Dispute Resolution and Access to Justice in Kenya

Kariuki Muigua, Alternative Dispute Resolution mechanisms and Article 159 of the Constitution

M.T. Ladan, Access to justice as a human right under the ECOWAS community law 'A paper presented at the Commonwealth Regional Conference on the theme: - The 21st Century Lawyer: Present Challenges and Future Skills, Abuja, Nigeria, 8 to 11 April 2010.

Report of the committee on the review of the rationale for the establishment of Tribunals in Kenya;S. A. de Smith, Judicial Review of Administrative Action

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 Wednesday 9th February 2022. Articles received after this date may not be considered for the next issue.

Other guidelines for contributors are listed at the end of each publication. The Editor Board receives and considers each article but does not guarantee publication.

Guidelines for Submissions

The Editorial Board welcomes and encourages submission of articles within the following acceptable framework.

Each submission: -

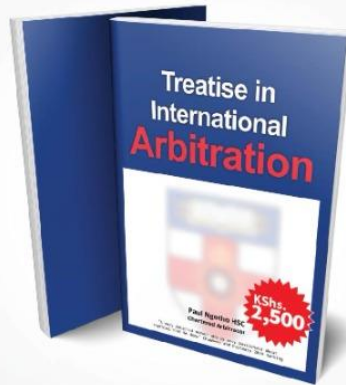
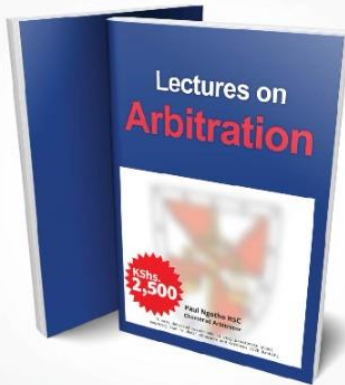
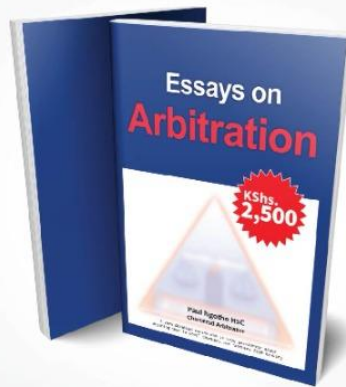
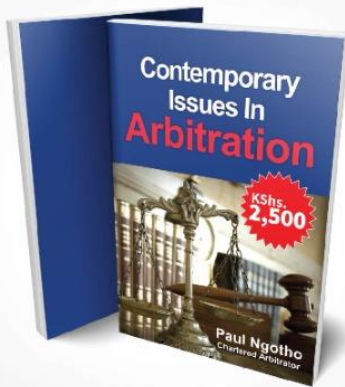
- should be written in English
- should conform to international standards and must be one's original Writing
- should ideally be between 3,500 and 5,000 words although in special cases certain articles with not more than 7,500 words could be considered
- should include the author'(s) name and contacts details
- should include footnotes numbered
- must be relevant and accurate
- should be on current issues and developments.

Recent Arbitration Books by Kenyan Authors



AVAILABLE

Call: +254 728 130 925



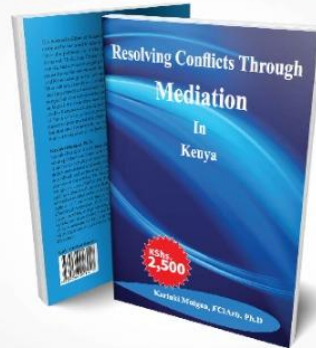
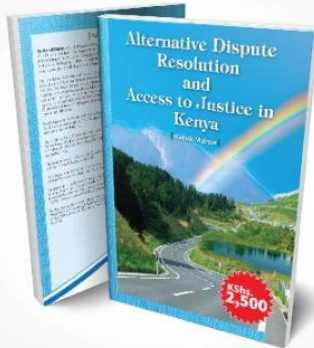
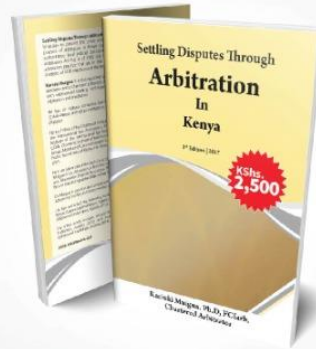
Recent Arbitration Books by Kenyan Authors



**KARIUKI
MUIGUA**

AVAILABLE

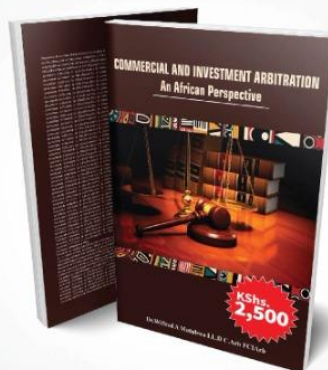
Call: +254 722 818 932



**WILFRED
MUTUBWA**

AVAILABLE

Call: +254 723 469 931



ISBN 978-9966-046-14-7



9 789966 046147

For Marketing opportunities,
contact
marketing@ciarbkenya.org

Chartered Institute of Arbitrators, Kenya
Nicholson Drive, off Ngong Road
between Bemuda Plaza and
Central Church of Nazarene
P.O. Box 50163-00200, Nairobi
Tel: 2712481, 2722724 Fax: 2720912
Mobile: 0734 652205 or 0722 200496
Email: info@ciarbkenya.org
Website: www.ciarbkenya.org