

Alternative Dispute Resolution



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Editor's Note

Happy New Year 2021!

Welcome to the Alternative Dispute Resolution Journal Vol.9 No.1 2021, a publication of the Chartered Institute of Arbitrators- Kenya Branch (CIARB-K).

The Journal provides a platform for scholarly discourse on pertinent issues across the whole spectrum of ADR mechanisms including arbitration, mediation, negotiation, construction adjudication and Traditional Dispute Resolution Mechanisms.

ADR is a necessary ingredient in the quest for access to justice. Access to Justice is a key pillar to sustainable development.

The Journal is an invaluable resource for scholars, ADR practitioners and other academics who seek information on conflict management.

This volume is a Souvenir Journal from the CIARB-K Conference themed '*Africa & ADR in an Evolving Landscape*' held in November 2020. It covers topics such as: Making Kenya a Preferred Seat for International Arbitration; COVID-19, Construction Projects, Contracts and Disputes; Dispute Settlement Mechanisms Under the African Continental Free Trade Area Agreement; Regional Courts and Arbitration, Third Party Funding and Investment Arbitration; the Law Governing Capacity of Parties to Enter into an Arbitration Agreement; the Place Human Rights in Environmental and Natural Resources Conflicts Management in Kenya; Arbitration and Technology Related Disputes and Arbitration of Insurance Disputes.

As Africa continues to position itself as a hub for Alternative Dispute Resolution, the Journal offers insight and perspective into some of the key concerns, challenges and opportunities for ADR in Africa.

ADR in Africa is not 'Alternative'. It is the first point of call for managing conflicts. The Journal thus seeks to enhance the use of ADR as a tool of access

to justice to Africa by addressing some of the current concerns and emerging issues.

The ADR Journal is peer reviewed and refereed and adheres to the highest quality of scholarly standards and credibility of information. The editorial team further welcomes feedback from our readers across the globe to enable us continually improve the publication.

CIArb-K takes this opportunity to thank the publisher, contributing authors, editorial team, reviewers, scholars and those who have made it possible to continue publishing such a high impact journal.

Dr. Kariuki Muigua, Ph.D; FCIArb; C.Arb
Editor.
Nairobi, January 2021.

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Looking into the Future: Making Kenya a Preferred Seat for International Arbitration

*By: Kariuki Muigua**

Abstract

With the ever increasing globalisation and international trade and investments, territorial boundaries have increasingly become irrelevant as far as businesses are concerned. However, with the ever present commercial disputes, international arbitration has continued to play a critical role in their management. Developing countries have been working hard to position themselves to tap into the economic benefits that come with the practice of international arbitration. This paper offers an analysis of the prospects and challenges of international arbitration practice in Kenya and what the country can do to sell itself as the preferred seat and venue for international arbitration.

1. Introduction

Some authors have rightly argued that international arbitration has undergone a self-sustaining process of institutional evolution that has steadily enhanced arbitral authority.¹ It has undergone both judicialization and delocalization. Delocalization, that is, detachment from national procedural and substantive law of the place of arbitration, or any other national law, and underlines the principle of party autonomy as the guiding idea pertaining to the process of delocalization,² also recognises the choice of parties for the seat of arbitration,

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¹ Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) <<https://hal-univ-paris10.archives-ouvertes.fr/hal-01647263>> accessed 1 August 2020.

² Dejan Janićijević, 'Delocalization in International Commercial Arbitration' (2005) 3 *Facta Universitatis - Law and Politics* 63.

which defines the law that will govern the arbitration; it is about which courts have supervisory power over your arbitration and the scope of those powers.³ This judicialization process, it has been observed, was sustained by the explosion of trade and investment, which generated a steady stream of high stakes disputes, and the efforts of elite arbitrators and the major centres to construct arbitration as a viable substitute for litigation in domestic courts.⁴ In addition, state officials (as legislators and treaty makers), and national judges (as enforcers of arbitral awards), have not just adapted to the expansion of arbitration; they have heavily invested in it, extending the arbitral order's reach and effectiveness.⁵ It is against this background that many states around the world have been working on the domestic legal and institutional frameworks geared towards enhancing the practice of international arbitration within their jurisdictions. This paper critically discusses Kenya's preparedness for the ever-growing field of international arbitration practice. The author discusses the existing challenges but also offers some recommendations on how the country can position itself to tap into this field of international dispute settlement.

2. The Place of International Arbitration in Global Economy: Prospects and Challenges

Over the past century, international arbitration has grown to become an autonomous legal order.⁶ It has been growing in its importance especially in

³ 'The Seat of Arbitration Is Important. It's That Simple.' (*Kluwer Arbitration Blog*, 10 June 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/06/10/seat-arbitration-important-simple/>> accessed 1 August 2020.

⁴ Ibid; See also Dimitropoulos, Georgios. "Constructing the independence of international investment arbitrators: past, present and future." *Nw. J. Int'l L. & Bus.* 36 (2016): 371; Sweet, Alec Stone, and Florian Grisel. "The Evolution of International Arbitration: Delegation, Judicialization, Governance." *Studies* 31 (1999): 147-184; Stromberg, Winston. "Avoiding the full court press: International commercial arbitration and other global alternative dispute resolution processes." *Loy. LAL Rev.* 40 (2006): 1337.

⁵ Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) <<https://hal-univ-paris10.archives-ouvertes.fr/hal-01647263>> accessed 1 August 2020.

⁶ Ibid; See also Gaillard, Emmanuel. "International Arbitration as a Transnational System of Justice." In *Arbitration – The Next Fifty Years (ICCA Congress Series 16)*. *Kluwer Law International*, pp. 66-73. 2012.

settling international disputes within the international commercial circles. Globalization has led to an influx of international contracts, and the resultant increased complex commercial disputes.⁷

These have been instrumental in the development of international arbitration as the preferred choice of businessmen for the settlement of their disputes.⁸ They have further led to a denationalization of arbitration, both procedurally and substantively, as well as to a convergence of national legislation and institutional rules, based on a consensus on a greater liberalization of the process.⁹ It has also been documented that the forces of globalization have also opened the door to the application by arbitral tribunals of general principles of international commercial law, common to all nations, and have contributed to the development of an international arbitration culture.¹⁰

There is however a group that feels that international arbitration has also come with its fair share of challenges. There is an increased concern over its judicialization, its time and cost efficiency and various ethical issues.¹¹ Some feel that the mechanism of international arbitration has lost a stronghold in the global justice arena despite its continuous growth, and a consensus among

⁷ Bernard Hanotiau, 'International Arbitration in a Global Economy: The Challenges of the Future' [2010] 2010 Herbert Smith Freehills-SMU Arbitration Lecture Series <https://ink.library.smu.edu.sg/hsmith_lect/2> accessed 1 August 2020.

⁸ Ibid; 'The Globalization of International Arbitration' (*Global Arbitration News*, 13 June 2017) <<https://globalarbitrationnews.com/the-globalization-of-international-arbitration/>> accessed 1 August 2020.

⁹ Ibid; Katherine Lynch and Katherine L Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (Kluwer Law International BV 2003).

¹⁰ Bernard Hanotiau, 'International Arbitration in a Global Economy: The Challenges of the Future' [2010] 2010 Herbert Smith Freehills-SMU Arbitration Lecture Series <https://ink.library.smu.edu.sg/hsmith_lect/2> accessed 1 August 2020; 'The Globalization of International Arbitration' (*Global Arbitration News*, 13 June 2017) <<https://globalarbitrationnews.com/the-globalization-of-international-arbitration/>> accessed 1 August 2020.

¹¹ Ibid; See also Gu, Weixia. "Looking at Arbitration through a Comparative Lens: General Principles and Specific Issues." *The Journal of Comparative Law* 13, no. 2 (2018): 164-188.

scholars, businesses, and parties across the world is also mounting that the mechanism has completely lost feasibility.¹² It has been argued that generally argued that international arbitration has lost its complete efficiency and seen to be equating with litigation-based mechanisms, where parties' ultimate goals are no longer realized and justified as the ends of international arbitration.¹³

It has been noted that even as the debate on the pros and cons of international arbitration ranges on, there are those who view it as a developed versus developing world issue. One author has rightly pointed out that the success story has been relatively regionally celebrated given that some regions like Africa, Latin America, as well as Asia, except the Asian Pacific, are still grappling with how to mainstream and take their share of global international arbitration growth.¹⁴

Despite these challenges, it is not in question that both developed and developing countries have actively promoted international arbitration practice as the best option for settling global disputes, and have manifestly substantiated their efforts by massively embracing pro-arbitration laws or statutes, as well as

¹² Nwedu, Cosmos Nike, 'Spotlight on International Arbitration: A Study of Emerging Trends and Challenges to Its Practice' *YB on Int'l Arb.* 6 (2019): 23 <https://www.researchgate.net/publication/332104324_Spotlight_on_international_arbitration_A_study_of_emerging_trends_and_challenges_to_its_practice> accessed 4 August 2020; Seen, Things Not. "Achieving Access to Justice through ADR: Fact or Fiction?."

https://www.fordham.edu/download/downloads/id/13894/law_review_colloquium_2019_cle_materials.pdf accessed 4 August 2020.

¹³ Ibid; ABA Journal, 'International Arbitration Loses Its Grip' (*ABA Journal*) <https://www.abajournal.com/magazine/article/international_arbitration_loses_its_grip> accessed 4 August 2020; Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 *Groningen Journal of International Law* 110; William W Park, 'Arbitrators and Accuracy' (2010) 1 *Journal of International Dispute Settlement* 25.

¹⁴ Ibid; International Bar Association, 'The Current State and Future of International Arbitration: Regional Perspectives,' IBA Arb 40 Subcommittee < www.ibanet.org/Document/Default> accessed 4 August 2020.

ratifying key international and regional arbitration legal instruments.¹⁵ Most African countries, including Kenya, may be said to be at this stage where they are still trying to make their jurisdictions attractive to business community and international arbitration practitioners.

3. Emerging Issues and Trends in International Arbitration

3.1 Costs and time efficiency

Some authors have argued that although individual parties and businesses traditionally believed that one of the advantages of international arbitration is costs and time efficiency, they have begun to realize clearly that this is not certainly true at all times.¹⁶

It is well known within international arbitration practice that practitioners' hourly rates and venue charges are usually high especially for the well-established institutions.¹⁷ Sometimes, parties spend hugely to have their disputes conducted, even paying higher than what they would have ordinarily spent in litigation, due to inordinate delays in the conduct of arbitral

¹⁵ Nwedu, Cosmos Nike, 'Spotlight on International Arbitration: A Study of Emerging Trends and Challenges to Its Practice' *YB on Int'l Arb.* 6 (2019): 26 <https://www.researchgate.net/publication/332104324_Spotlight_on_international_arbitration_A_study_of_emerging_trends_and_challenges_to_its_practice> accessed 4 August 2020; see also 'Commercial Arbitration in Africa: Present and Future | Herbert Smith Freehills | Global Law Firm' <<https://www.herbertsmithfreehills.com/latest-thinking/commercial-arbitration-in-africa-present-and-future>> accessed 4 August 2020.

¹⁶ Nwedu, Cosmos Nike, 'Spotlight on International Arbitration: A Study of Emerging Trends and Challenges to Its Practice' *YB on Int'l Arb.* 6 (2019): 26 <https://www.researchgate.net/publication/332104324_Spotlight_on_international_arbitration_A_study_of_emerging_trends_and_challenges_to_its_practice> accessed 2 August 2020.

¹⁷ Herbert Smith Freehills, 'Inside Arbitration Perspectives on Cross-Border Disputes,' Issue 3 February 2017; White & Case LLP, '2018 International Arbitration Survey: The Evolution of International Arbitration,' <<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>> accessed 2 August 2020.

proceedings.¹⁸ This has therefore raised doubt on the effectiveness of international arbitration as the preferred choice for management of commercial disputes.

3.2 Third party funding

In the last decade, the efficiency of arbitration has become a concern. Some of the arbitration advantages that have always been highlighted include the speed and the reduced costs of this alternative method of dispute resolution.¹⁹

International arbitration, while potentially cost effective, can have its costs growing exponentially expensive. To arrest this situation, major players and practitioners have been coming up with creative means of financing the process. One such means is third party funding which is defined as an arrangement where someone who is not involved in arbitration provides funds to a party to that arbitration in exchange for an agreed return.²⁰ The third party funding or financing usually covers the funded party's legal fees and expenses incurred in the arbitration and the funder may also agree to pay the other side's costs and provide security for the opponent's costs if the funded party is so ordered.²¹

While third party funding is not new, and was originally designed to support companies that did not have the means to pursue claims, its use has become a feature of the litigation landscape in several jurisdictions, including in international arbitration, where it has attracted the funders due to the high-value claims, perceived finality of awards, and the enforcement regime

¹⁸ Nwedu, Cosmos Nike, 'Spotlight on International Arbitration: A Study of Emerging Trends and Challenges to Its Practice' *YB on Int'l Arb.* 6 (2019): 29 <https://www.researchgate.net/publication/332104324_Spotlight_on_international_arbitration_A_study_of_emerging_trends_and_challenges_to_its_practice> accessed 2 August 2020.

¹⁹ Florescu, Cristina Ioana. "Emerging tools to attract and increase the use of international arbitration." *Juridical Tribune/Tribuna Juridica*, Jun2020, Vol. 10, Issue 2, p255-278.

²⁰ 'Third Party Funding in International Arbitration' <<https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>> accessed 1 August 2020.

²¹ *Ibid.*

provided by the New York Convention.²² Initially, the funding focused on investor-state arbitration, but now spreading to commercial international arbitration.²³

While third party funding comes with some risks, it can also enhance access to justice for under-resourced parties (especially in investor-state disputes) enabling them to pursue proceedings which a lack of financing would otherwise have prevented.²⁴ On the other hand, for parties that are adequately resourced, funding can offer a more convenient financing structure, allowing capital which would otherwise be spent on legal fees to be allocated to other areas of their business during the proceedings.²⁵

3.3 Changing Arbitration Rules

It has been reported that most of the major international arbitration institutions have been considering their arbitration rules as a way of embracing the emerging trends and practice in international arbitration. For instance, as at 2020, the rules of the London Court of International Arbitration (LCIA) were updated, with a particular focus on cybersecurity and data protection.²⁶ Also noteworthy is the fact that the International Centre for the Settlement of Investment Disputes (ICSID) has also refined its rules – a code of conduct for tribunal members, the need for transparency in third party funding, and a new advisory centre on investor-state dispute settlement, and addressing common

²² ‘Third Party Funding in International Arbitration’

<<https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>> accessed 1 August 2020.

²³ Ibid.

²⁴ ‘The Third-Party Funding Debate - We Look at the Risks | Global Law Firm | Norton Rose Fulbright’

(<https://www.nortonrosefulbright.com/en/knowledge/publications/imported/2018/07/18/05>)

<<https://www.nortonrosefulbright.com/en/knowledge/publications/6c843d32/the-third-party-funding-debate---we-look-at-the-risks>> accessed 1 August 2020.

²⁵ Ibid.

²⁶ ‘International Arbitration: Current Trends and What to Expect in 2020 And the Years Ahead - Litigation, Mediation & Arbitration - Worldwide’

<<https://www.mondaq.com/uk/arbitration-dispute-resolution/880988/international-arbitration-current-trends-and-what-to-expect-in-2020-and-the-years-ahead>> accessed 1 August 2020.

criticisms of investor-state dispute settlement by addressing costs, the quality and consistency of decisions, and access to justice.²⁷

4. The Practice of International Arbitration in Kenya: Prospects and Challenges

In the last few years, the setting up of legal and institutional frameworks specifically meant to promote the growth and practice of international arbitration in Kenya has picked up. The *Nairobi Centre for International Arbitration Act*²⁸ establishes the Nairobi Centre for International Arbitration (NCIA) whose functions include, inter alia, to promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; to administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; to ensure that arbitration is reserved as the dispute resolution process of choice; and, to develop rules encompassing conciliation and mediation processes.²⁹ NCIA is administered by a Board of Directors as provided for under the Act.³⁰ There is also an Arbitral Court established under the Act, which court has exclusive original and appellate jurisdiction to hear matters that are referred to it under the Act.³¹

Its capacity to handle domestic and international arbitration requires to be constantly improved, and it can only be hoped that this potential will be exploited to its maximum in the years to come so as to prominently place Kenya on the global map of international arbitration.

Despite the efforts by stakeholders in Alternative Dispute Resolution (ADR) and especially arbitration to invest in making Kenya a more receptive destination for international arbitration, the country still faces a number of challenges that have slowed down the progress. These include: real or perceived national courts

²⁷ Ibid.

²⁸ *Nairobi Centre for International Arbitration Act*, No. 26 of 2013, Laws of Kenya (Government Printer, Nairobi, 2013).

²⁹ Ibid, Sec. 5 (a)-(d).

³⁰ Ibid, Sec.6.

³¹ Ibid, Sec.21.

interference; perception of corruption/ government interference; inadequate marketing of the country; inadequate capacity of existing institutions; and endless court proceedings, among others.³²

5. Making Kenya a Preferred Seat for International Arbitration

5.1 Enhanced Capacity

Kenya has qualified and experienced arbitrators who are arbitrating commercial disputes around Africa. Indeed, following the revival of the East African Community and the expansion of regional trade, the possibility of Nairobi becoming a regional centre for arbitration is very high. Therefore, the prospects of international commercial arbitration in Kenya are really promising. However, with the changing trends at the global scene, there is a need for the practitioners and the judges to stay abreast with what is happening. In addition, with the international commercial arbitration taking root in Kenya in recent years and the ever increasing institutional capacity, there is a need to equip students and practitioners with the basic knowledge in their quest for expertise in the area.³³

5.2 Marketing and Arbi-Tourism

The stakeholders in arbitration sector in the country can utilise arbi-tourism to market Kenya as a preferred seat and venue for international arbitration. Arbi-tourism (arbitration tourism) may be defined as the promotion of arbitration alongside tourism.³⁴ Kenya is known globally for its tourism sector and thus, the stakeholders in the arbitration and dispute resolution sector should make use of this fame. While marketing Kenya as a tourist destination, there is a need for the ADR stakeholders to consider working with the ministry of tourism and all other relevant ministries to market Kenya as a friendly seat and venue for

³² Muigua, K., *Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya*, Arbitration workshop for EAC region 24th-25th May 2013. Available at <http://www.kmco.co.ke/index.php/publications>.

³³ See Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi, 2017.

³⁴ See Muigua, K., 'Promoting International Commercial Arbitration in Africa,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 2, (2017), pp. 1-27, p. 13.

international arbitration. This could be done by providing incentives in terms of subsidized hotel and park rates for those who are in the country for international arbitration. The relevant government and private stakeholders should also take advantage of international conferences and seminar forums to market the country as a friendly and viable seat and venue for international arbitration.

5.3 Security

Over the last several years, Kenya has had an unprecedented level of insecurity from both internal and external forces such as the Somali Islamist group, al-Shabaab.³⁵ This has negatively affected the image of Kenya as a safe destination for tourism and business due to this increased insecurity.³⁶ While the government has done much in improving security over the years, the perception that the larger horn of Africa is insecure still affects Kenya's rating. If effort towards marketing Kenya as a preferred seat and venue for international arbitration are to bear fruits, then there is a need for the stakeholders in the security department to work closely with other regional leaders to eradicate the insecurity or the perception for the same since security is paramount for both local practitioners and the foreign ones, together with their clients.

5.4 Adherence to the Rule of law

The Constitution of Kenya, 2010 provides under Article 259(1) that the Constitution should be interpreted in a manner that: promotes its purposes, values and principles; *advances the rule of law*, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.

³⁵ Atta-Asamoah, A. "The nature and drivers of insecurity in Kenya." *East Africa Report* 2 (2015) < <https://www.files.ethz.ch/isn/190658/East-Africa-Report-2-Kenya.pdf> > accessed 1 August 2020.

³⁶ "Tourism Activity, Terrorism and Political Instability within the Commonwealth: The Cases of Fiji and Kenya | Request PDF" <https://www.researchgate.net/publication/227843064_Tourism_activity_terrorism_and_political_instability_within_the_Commonwealth_The_cases_of_Fiji_and_Kenya> accessed 1 August 2020.

While international arbitration has developed over the years to stand as a transnational legal order, its outcomes still heavily rely on national courts and laws in conservatory orders as well as recognition and enforcement of arbitral awards. There is thus a need for continued reforms and fidelity to the rule of law in the country so as to win the confidence of investors as well as practitioners who may wish to designate Kenya as their preferred seat and venue for arbitration but would otherwise be wary of the status of respect for rule of law in the country.

5.5 Supportive Institutional Framework and Informed Judges

International arbitration is an important component of the right of access to justice especially in commercial disputes. There have been efforts over the years to ensure that the legal and institutional framework on access to justice in Kenya achieves that: fulfilment of the right of access to justice. Notably, this right comes with several components as a means to an end.³⁷ In the case of *Dry Associates Limited v Capital Markets Authority & Another; Interested Party Crown Berger (K) Ltd*³⁸, the High Court outlined some of the components of access to justice as follows: [110] “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.”

Further, in *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR, the Court affirmed that “the right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the Courts.

³⁷ See generally, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi, 2015.

³⁸ *Dry Associates Limited v Capital Markets Authority & Another; Interested Party Crown Berger (K) Ltd*, High Court Constitutional Petition No.328 of 2011 [2012] eKLR.

The Supreme Court also elaborated on the confines of access to justice in the case of *Francis Karioko Muruatetu & another v Republic*³⁹, in the following words: [57] *Thus, with regard to access to justice and fair hearing, the State through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair, one cannot be said to have accessed justice. In this respect, when a murder convict's sentence cannot be reviewed by a higher court, he is denied access to justice which cannot be justified in light of Article 48 of the Constitution.*

The effect of court intervention on arbitral proceedings depends on three critical factors, namely the provisions of the law on court intervention, the general policy and attitude of the court towards its role in arbitration and finally, the approach of lawyers and their clients on court intervention.⁴⁰

The legal provisions on court intervention are mainly found in the Arbitration Act, 1995 and the Arbitration Rules thereunder, the Civil Procedure Act⁴¹ and the Civil Procedure Rules 2010⁴². There are chances of conflict of rules and uncertainty in the laws on court intervention especially because of the fact that there is no one-stop source of law on the matter. However, all the instances of court intervention provided for in the legal framework as demonstrated above are justified and necessary. For instance, stay of proceedings applications are meant to give effect to the arbitration agreement where one party has filed a suit in court in breach of the agreement.

³⁹ *Francis Karioko Muruatetu & another v Republic*, SC Petition No. 15 of 2015; [2017] eKLR.

⁴⁰ Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi, 2017, Chapter Ten; See also Lew, Julian DM. "Does national court involvement undermine the international arbitration process." *Am. U. Int'l L. Rev.* 24 (2008): 489; Allahhi, Nahal. "The Optimization of Court Involvement in International Commercial Arbitration." PhD diss., University of Manchester, 2016.

⁴¹ See Sec. 59 of the Civil Procedure Act Chapter 21, which provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules.

⁴² *Ibid*, see generally Order 46 of the Civil Procedure Rules 2010.

The interim measures of protection before arbitration, offer an opportunity for a party to an arbitration agreement to take measures to maintain the *status quo* of the subject matter of the intended arbitration. This is clearly an appreciation of the reality that reference to arbitration does not happen overnight.⁴³

The court intervention measures during arbitration as provided for under the law are similarly based on demonstrable logic and rationalization. The provisions on court involvement in the appointment of the arbitral tribunal offer a default measure where the parties' efforts to pursue the agreed modes of appointment have hit a dead end. On its part, the opportunity to challenge arbitrators/the arbitral tribunal, just like the opportunity to challenge the bench in civil proceedings, is meant to ensure that justice is not only done but seen to be done.⁴⁴

It also avoids the likelihood of the disgruntled party opting to later challenge the arbitral award on grounds he could have raised as preliminary matters as that would imply extra expenses and delay in holding fresh arbitration proceedings if the challenge succeeds.⁴⁵ It is universally accepted that jurisdiction is everything⁴⁶ and a party should thus not be compelled to put up with an award of a tribunal whose jurisdiction he would rather challenge,

⁴³ Alison Jean Louis v Rama Homes Limited [2020] eKLR, Miscellaneous Application E235 of 2019; Coast Apparel Epz Limited v Mtwapa Epz Limited & another [2017] eKLR, Commercial Suit 12 of 2017; Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; '10 - Provisional Measures In International Arbitration |' <<https://lawexplores.com/10-provisional-measures-in-international-arbitration/>> accessed 7 August 2020.

⁴⁴ Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi, 2017, Chapter Ten.

⁴⁵ Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010.

⁴⁶ Nyarangi, JA in *Owners' of the Motor Vessel "Lillian S"-v-Caltex Oil Kenya Ltd.* [1989] KLR 1.

whether on the basis of substance or procedure. This is the basis for the provisions on challenging the jurisdiction of the arbitral tribunal.⁴⁷

The court is also afforded an opportunity to facilitate and aid the arbitration especially in matters that, as an emanation of a private arrangement, the arbitral tribunal cannot undertake and or purport to compel. The opportunities for limited court intervention after the award are even more justified and necessary. The need to set aside arbitral awards that visit manifest injustices on a party cannot be admitted to debate.⁴⁸ In the same breath, arbitral awards, being a result of private contractual arrangements, cannot attain immediate force of law until they are adopted by the court. The court, being the custodian of public policy in Kenya, cannot reasonably be expected to perform a mere rubber-stamping role.⁴⁹ The High Court is thus afforded an opportunity to scrutinise the arbitral award. No doubt this also helps secure the party, adversely affected by the arbitral award, a right to be heard in the interest of natural justice.⁵⁰

⁴⁷ Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi, 2017, Chapter Ten; Barraclough, Andrew, and Jeff Waincymmer. "Mandatory rules of law in international commercial arbitration." *Melbourne Journal of International Law* 6, no. 2 (2005): 205-245.

⁴⁸ See the decisions of the Kenyan courts in *Kenyatta International Convention Center v Congress Rental South Africa* [2020] eKLR, Civil Application 231 of 2018; *Manyota Limited v Muranga University College* [2020] eKLR, Miscellaneous Application E132 of 2019; *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR, Petition No. 2 of 2017; *Synergy Industrial Credit Limited v Cape Holdings Limited* [2020] eKLR, Civil Appeal No. 81 Of 2016; *Nyutu Agroviet Limited v Airtel Networks Kenya Limited*; *Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR, Petition No. 12 of 2016.

⁴⁹ Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010.

⁵⁰ Prakash Pillai and Umer Chaudhry, 'The Singapore Approach to Scrutiny of Arbitral Awards' (*Kluwer Arbitration Blog*, 24 December 2014) <<http://arbitrationblog.kluwerarbitration.com/2014/12/24/the-singapore-approach-to-scrutiny-of-arbitral-awards/>> accessed 7 August 2020; Brady, Daniel. "Review of arbitral awards for breach of natural justice: an internationalist approach." (2013) <<https://core.ac.uk/download/pdf/41338459.pdf>> accessed 7 August 2020.

But while the instances of court intervention are rationally justified, the provisions relating to them are far from being perfect and unambiguous. For instance, the provisions on stay of proceedings are beset with unnecessary conditions that even a well-meaning court is disadvantaged in expediting the application especially when the Plaintiff is not receptive.⁵¹ For instance, there is nothing that a judge can do when an application for stay of proceedings is inadvertently lodged a day after entry of appearance except to dismiss it.⁵² In such an instance, there is no room for equity when the law is strict in its stipulations.⁵³ The uncertainty of the arbitration law on the issue of setting aside arbitral awards even within the allowed timelines has given rise to a myriad of constitutional applications in arbitration proceedings.⁵⁴

⁵¹ Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; MITS Electrical Company Limited v Mitsubishi Electric Coporation [2018] eKLR, Civil Suit 132 of 2016; Darius Chan, 'Stay of Proceedings in Favour of Arbitration under the Court's Inherent Jurisdiction' (*Kluwer Arbitration Blog*, 15 August 2012) <<http://arbitrationblog.kluwerarbitration.com/2012/08/15/stay-of-proceedings-in-favour-of-arbitration-under-the-courts-inherent-jurisdiction/>> accessed 7 August 2020.

⁵² Muigua, K., 'Role of the Court Under Arbitration Act 1995: Court intervention before, pending and after Arbitration in Kenya,' *Kenya Law Review Journal*, 2008-2010; Eunice Soko Mlagui versus Suresh Parmar & 4 others [2017] eKLR; Adrec Limited versus Nation Media Group Limited [2017] eKLR; Mt. Kenya University v Step Up Holding (K) Ltd [2018] eKLR, Civil Appeal 186 of 2013.

⁵³ See court's decision in *Manyota Limited v Muranga University College* [2020] eKLR, *Miscellaneous Application E132 of 2019*, where the High Court at Nairobi stated as follows:

*From the authorities it is clear that the Court can only deal with Arbitration matters as encapsulated by the Arbitration Act. The Court's jurisdiction is limited by **Section 10 of Arbitration Act** that prescribes that the Court's intervention is/can only be to the extent provided by the Act. **Section 35(3) Arbitration Act** does not employ an opportunity for the Court to exercise discretion and extend the period to file an application to set aside the Arbitral award beyond the statutory 3 months from the date of receipt of the Award. The cited authority of *Anne Hinga case supra* ousts the application of **Civil Procedure Act & Rules 2010** as the **Arbitration Act** is a complete Code.*

⁵⁴ See *Alison Jean Louis v Rama Homes Limited* [2020] eKLR, *Miscellaneous Application E235 of 2019*; See also *Kenyatta International Convention Center v Congress Rental South Africa* [2020] eKLR, *Civil Application 231 of 2018*; *Manyota Limited v Muranga University College* [2020] eKLR, *Miscellaneous Application E132 of 2019*; *Synergy*

With regard to the court's approach to intervention in arbitration, the same has considerably changed from indifference to a perception of the process as being facilitative of arbitration. The sentiments of the court of appeal in the *EpcO Builders Limited-v-Adam S. Marjan-Arbitrator & Another*,⁵⁵ and *Kenya Shell Limited v Kobil Petroleum Limited*⁵⁶ are indicative of this change of heart. The courts now see arbitration as an opportunity to wrestle the backlog of cases and yield justice on the parties' terms. If such a positive attitude could be coupled with the necessary reforms as proposed herein, much ground would be covered in making court intervention a friend, rather than a foe, of arbitration.

Courts have also continually demonstrated their commitment to upholding arbitration awards and making their recognition and enforcement in the country as easy as possible. This was recently affirmed in the case of *Kenya Bureau of Standards v Geo-Chem Middle East [2017] eKLR*⁵⁷ where Ochieng, J. stated as follows:

39. As regards the finding that the Kenya Bureau of Standards was liable for the payments to Geo-chem, that is a decision on the merits of the case. It is not the function nor the mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside an award.

40. If the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue.

41. In the light of the Public Policy in Kenya, which loudly pronounces the intention of giving finality to Arbitral Awards, it would actually be against the

Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, Petition No. 2 of 2017; Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR, Civil Appeal No. 81 Of 2016; Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, Petition No. 12 of 2016.

⁵⁵ *EpcO Builders Limited-v-Adam S. Marjan-Arbitrator & Another*, Civil Appeal No. 248 of 2005 (unreported).

⁵⁶ *Kenya Shell Limited v Kobil Petroleum Limited*, Civil Appeal (Nairobi) No. 57 of 2006.

⁵⁷ *Kenya Bureau of Standards v Geo-Chem Middle East [2017] eKLR*, Miscellaneous Cause 455 of 2016.

said public policy to have the court sit on an appeal over the decision of the arbitral tribunal.

42. When the court is called upon to decide whether or not to set aside an arbitral award, issues such as the justice, morality and fairness do not come into play, unless they were so perceived within the confines of Section 35 of the Arbitration Act.

43. The court cannot set aside an arbitral award on the grounds that it was unfair, unreasonable or non-feasible.

.....

54. Regrettably, this court does not have authority to make an assessment on the merits of the arbitral award. The jurisdiction of the High Court, when called upon to set aside an award, is limited to what is permissible pursuant to Section 35 of the Arbitration Act.

55. Any other intervention by the Court is expressly prohibited by Section 10 of the Act; and I therefore decline the invitation to ascertain if there were any contradictions in the various aspects of the decision made by the arbitral tribunal.

In the above matter, the Respondent filed an appeal to the Court of Appeal in *Civil Appeal No. 259 of 2018*. The Court of Appeal, in allowing the appeal and setting aside the ruling of the High Court held *inter alia*; that the reference and the subsequent constitution of the arbitral tribunal was done outside the time limits prescribed in the contract. The appellate Court further held that the issues determined by the arbitral tribunal fell outside its scope pursuant to Section 35(2)(iv) of the Arbitration Act and that the award which imposed a liability on the Respondent, a state corporation, to pay from public funds over Kshs.1Billion without proof of liability was against public policy. The decision was appealed to the Supreme Court which pronounced itself as follows:

[48] In the premises, we have no option but to hold that the Judgment of the Court of Appeal, to the extent to which it purported to interrogate the merits of an arbitral award, in the absence of the High Court's pronouncement on the same, was rendered in excess of jurisdiction. This means that even if we had found that we had jurisdiction to decide the appeal on its merits, this jurisdictional conundrum would have stopped us in our tracks.

[49] *In conclusion, having declined to delve into the merits of the Court of Appeal Judgment for the reasons stated, and having also found that the Appellate Court prematurely, and in excess of its jurisdiction, sat on an appeal that was not ripe, instead of remitting the same to the High Court for determination, what course of action is open to us? To answer this question, we must first address the issue as to whether the leave that triggered these proceedings in the first place, ought to have been granted. Or put another way, had the application for leave to appeal been made after the delivery of Nyutu and Synergy, would such leave have been likely granted by the Court of Appeal? It is to this question that we must now turn.*

[50] *Towards this end, we have already made two critical observations, firstly, that in granting leave on 31st May 2018, the Court of Appeal did not interrogate the substance of the intended appeal and whether it fell within the said Section (read, Section 35 of the Arbitration Act). Secondly, that in granting leave, the Court of Appeal appeared to suggest or must be taken to have been suggesting that such appeals were open-ended. At that time there were two divergent schools of thought at Court of Appeal; the one which argued that appeals lay to the Court from decisions of the High Court and the other which was categorical that no such appeals could lie to the Court. And then came our decisions in Nyutu and Synergy of which we shall say no more, save that the window to appeal is severely restricted.*

[51] *The applicable law is now settled regarding the vexed question as to whether an appeal lies or not, under Section 35 of the Arbitration Act and if so, under what circumstances. We appreciate the fact that at the time leave was granted, the Supreme Court was yet to pronounce itself on the issue. However, the law as enunciated must now henceforth be the yardstick for granting or refusing to grant leave to appeal in such matters. After our pronouncements in Nyutu and Synergy, it is not possible that the Court of Appeal can grant leave to appeal from a Section 35 Judgment of the High Court without interrogating the substance of the intended appeal, to determine whether, on the basis of our pronouncement, such an appeal lies. A general grant of leave to appeal would not suffice. Yet this is exactly what happened in the instant case before us.*

[52] *In conclusion, having declined to delve into the merits of the substantive Judgment of the Court of Appeal for the reasons stated, and having further determined that the said Judgment was nonetheless rendered in excess of jurisdiction, and finally having determined that the initial leave to appeal was*

granted without interrogating the substance of the intended appeal, the only course of action open to us is to maintain the Ruling of the High Court.

In the highlighted cases of Synergy⁵⁸ and Nyutu, the Supreme Court had been called upon to decide the fate of parties' right to appeal the decision of the High Court made under section 35 of the Arbitration Act, Kenya, on recognition and enforcement of arbitral awards. In Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR at the Supreme Court, the majority held as follows:

[90] In the circumstances, various questions would necessarily arise; would a Judgment that leaves a party in such a precarious position be said to create confidence in the administration of justice" Would the principle of minimal courts' intervention in arbitration matters supersede the need to correct an injustice" Our position is that where allegations of such manifest unfairness have been made, they should not be left incapable of a higher Court's review. And it is on that basis that, we hold that in this case, the Court of Appeal should have assumed jurisdiction to hear the Petitioner's appeal arising from the decision of the High Court under Section 35 of the Arbitration Act limited to the relevant consideration expressed above.

[91] As we conclude on this issue, we affirm that arbitration should and ought to drastically reduce courts' intervention and in this regard, we find favour in the words of the Court of Appeal in CGU (supra) where it stated that: "the Courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument for subverting statute and undermining the process of arbitration." These words ring true if we are to protect the integrity of the arbitration process. But in this case, as we have shown, justice must be done and that necessitates that the Court of Appeal ought to relook at the decision of the High Court in the manner we have explained above.

The dissenting opinion of Justice D.K. Maraga, CJ & P was as follows:

⁵⁸ Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR, Petition No. 2 of 2017.

[146] Taking all these factors into account and given its wording, *I find no warrant whatsoever to imply that the silence in Section 35 of the Kenyan Arbitration Act should be understood as a tacit right of appeal against a decision made thereunder.*

[147] Following the shift it made with the repeal of Arbitration Act of 1968 and the enactment of the Arbitration Act of 1995, Kenya would backpedal if the appellant's argument that Article 164(3) ipso facto grants both the jurisdiction and right of appeal against all High Court decisions, including those made in arbitral proceedings, is accepted. That would also jettison out of the window the principle of finality in arbitral proceedings.

[149] Because the Kenyan Arbitration Act of 1995 puts emphasis on the concept of finality in arbitration and the above stated public policy to promote arbitration as encapsulated in Article 159(2)(c), save as stated in the Arbitration Act, awards should be impervious to court intervention as a matter of public policy. Unwarranted judicial review of arbitral proceedings will simply defeat the object of the Arbitration Act. The role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration in this country but will also be a clear negation of the legislative intent of the Arbitration Act.

[150] In commercial transactions, disputes are often about money, and more often than not, large sums of money. "[A]nd where money is concerned there are not many good losers...." In an adversarial system as ours, to open unwarranted doors to court intervention in arbitral proceedings, as the Singaporean Court of Appeal observed in the said case of *AKN & Another v. ALC and Others* and other appeals (supra) "*through the ingenuity of counsel, we shall have appeals on literally all issues disguised and presented as ... challenge[s] to process failures during the arbitration.*" And we know what that means: arbitral awards or decisions on them shall be subject to court challenges on every issue. Arbitration will therefore be an extra cog in the gears of access to justice through

litigation or “a precursor to litigation.” By the time the court determines the issue, the matter will have dragged in court for years. Arbitrations will thus prolong dispute resolution and be self-defeating. In such a scenario, it would be more efficacious to abandon arbitration altogether and litigate all disputes in courts of law.

[151] As stated, timelines in the performance of contracts and speed in the disposal of disputes are the hallmarks of the current competitive commercial environment. The importance of arbitration as an ADR mechanism cannot be over-emphasized. “Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court.” The common thread that runs through most arbitration statutes based on the UNCITRAL Model Law is the restriction of court intervention except where necessary and in line with the provisions of the Acts of various jurisdictions.

[152] Kenya’s boasting as the arbitration centre in the East African region cannot hold if Kenyan courts do not reflect on the effect of their decisions in arbitral proceedings. The words of Andrew P. Tuck, in his treatise, *The Finality Question: Appellate Rights and Review of Arbitral Awards in the Americas* are particularly apposite with regard to the appellate jurisdiction in arbitral proceedings. He observes that in the selection of the seat of arbitration, parties often pay regard to, inter alia, the right of appeal and judicial review in that jurisdiction; and also finality of an arbitral award and whether the jurisdiction is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is because, in his view, which I share, the rights of appeal and review;

“can seriously frustrate the advantages of international arbitration ... over the vicissitudes and uncertainties of international business litigation.”

[153] And as Christa Roodt, in her article titled *Reflections on finality in arbitration*, warned, “If a state’s judicial institutions fail to accord respect

for rights established under international law, their judicial decisions cannot demand pluralist respect.” In other words, if decisions of Kenyan courts disregard established principles of international arbitration law, Kenya will be shunned as both an investment destination and a seat of arbitration. In the words of Nyamu J. (as he then was) in *Prof. Lawrence Gumbo & Anor v. Hon. Mwai Kibaki & Others* [37], that will reduce Kenya into “a pariah state” and cause it to “be isolated internationally”.

[154] In the circumstances, allowing appeals where the Arbitration Act states otherwise would in my view, as stated, turn arbitration into “a precursor to litigation.” The Kenyan courts must therefore, “as a matter of public interest” [39], interpret the provisions of the Arbitration Act in a manner that seeks to promote and embellish arbitration, rather than emasculate and thus render it redundant. As the United States’ Second Circuit of the Court of Appeal stated in *Parsons Whittemore Overseas Co Inc. v. Société Générale de l’Industrie du Papier (RAKTA)*,

“By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights ... [including the appellate process] in favor of arbitration with all of its well-known advantages and drawbacks”

[156] The dispute in this matter has been raging for over 10 years. That alone is clear testimony of the danger we will be exposing arbitration to in this country if we allow unwarranted court intervention. Failure to adhere to the prescriptions in the Arbitration Act will hinder investment, as foreign firms and their agents will not be assured of an expeditious clear-cut dispute resolution mechanism in line with international standards.

[157] Given the history of the practice of arbitration in this country and the clear and unambiguous wording of Section 10 of the Kenyan Arbitration Act, we would, in my humble view be amending the Arbitration Act if we allow appeals from High Court decisions on

Section 35 which, as the explanatory notes by the UNCITRAL Secretariat state was intended to be final.

While the dissenting opinion holds valid points regarding the subject at hand, the Synergy matter had to be referred back to the Court of Appeal under *Synergy Industrial Credit Limited v Cape Holdings Limited* [2020] eKLR⁵⁹ where the Court of Appeal held as follows:

Where the terms of the arbitral agreement are clear and unrestricted, it is not open to the court to look for and impose its own strictures and restrictions on the arbitral agreement. If the parties wished to restrict the arbitration to only the written agreements, we would have expected them to state so expressly in the arbitral agreement itself. Furthermore, a look at how the learned judge dealt with the question leaves no doubt in our minds that he did not confine himself to the real question, namely the terms of the arbitral agreement, but instead went into a determination that amounts to saying the arbitral award was erroneous under the law of contract.

This was tantamount to undertaking a merit review of the arbitral award, based on consideration of provisions of the written agreements far removed from the arbitral agreement itself, so as to reach a different finding from the arbitral tribunal, which we think the learned judge was not entitled to do.

As for the Nyutu case⁶⁰, the Supreme Court was called upon to address itself to a Ruling of the Court of Appeal which had dismissed an appeal against the decision of the High Court in *Nyutu Agrovet Ltd v Airtel Network Kenya Ltd* Nairobi H.C.C.C. No.350 of 2009, where the Court of Appeal in its Ruling had found that there is no right of appeal to that Court following a decision made under Section 35 of the Arbitration Act 1995 (the Act), and so struck out the entire appeal to it.

⁵⁹ *Synergy Industrial Credit Limited v Cape Holdings Limited* [2020] eKLR, Civil Appeal No. 81 of 2016.

⁶⁰ *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, Petition No. 12 of 2016.

At the High Court, Airtel had filed an application under Section 35 of the Act seeking to set aside the award in its entirety Kimondo J, in *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd* (supra), had to decide inter alia whether the arbitral award had dealt with a dispute not contemplated by the parties; whether it had dealt with a dispute outside the terms of reference to arbitration and whether the said award was in conflict with public policy. The entire arbitral award was then set aside purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties and for other reasons and deliberations contained in the learned Judge's Ruling.

The Supreme Court had to deal with, inter alia, the following issues for determination: Whether Sections 10 and 35 of the Act contravene a party's right to access justice under Articles 48, 50(1) and 164(3) of the Constitution and are therefore unconstitutional to that extent; and Whether there is a right of appeal to the Court of Appeal following a decision by the High Court under Section 35 of the Arbitration Act.

The Supreme Court pronounced itself as follows:

[69] The above comparative review thus shows circumstances where a decision challenging an award may be appealable. With regard to jurisdictions that grant leave to appeal, Courts have held that leave to appeal may be granted where there is unfairness or misconduct in the decision making process and in order to protect the integrity of the judicial process. In addition, leave would be granted in order to prevent an injustice from occurring and to restore confidence in the process of administration of justice. In other cases, where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue. An appeal may also arise when there is need to bring clarity to the law by settling conflicting decisions. However as cautioned by the Singapore Courts, an intervention by the Courts should not be used as an opportunity to delve into the merits of the arbitral award but rather that the intervention should be limited to the narrowly circumscribed instances for reviewing or setting aside an award.

[71] *We have in that context found that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the Constitution 2010, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. And hence the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.*

[72] *Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in AKN and another (supra) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no Court intervention' principle.*

[74] *Whereas the above proposals are clearly progressive and well thought out, if adopted as they are, they may considerably broaden the scope of the exercise of the limited jurisdiction under consideration. As we have stated above, there has to be exceptional reasons why an appeal should be necessary in a matter arising from arbitration proceedings which by its very nature discourages court intervention. Thus, we do not think as suggested by the Interested Party that*

an issue of general public importance should necessarily deserve an appeal. This is because such an issue cannot be identified with precision because of its many underlying dynamics. To that extent we reject that proposal.

[77] In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.

[81] We have answered the question whether there is a right of appeal from the High Court to the Court of Appeal under Section 35 of the Arbitration Act but have delimited the circumstances under which the right can be exercised....

Thus, the Supreme Court's position in the above matters is that the window to appeal is severely restricted.

The above decisions by the Supreme Court on the implication of appeals under Article 35 had come against the background of conflicting decisions from the Court of Appeal such in *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited Civil Application No. Nai. 302 of 2015*;

[2017] *eKLR*, where the Court of Appeal had rendered itself as follows:

"In our view, the fact that Section 35 of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The Section grants the High Court jurisdiction to intervene in arbitral proceedings wherein it is invoked. It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution."

This confusion was aptly captured by the Supreme Court in Nyutu case as follows:

[51] Thus, it is evident that there is no consensus by the Court of Appeal both before and after 2010 on how Section 35 should be interpreted. There is need therefore to properly interrogate the matter and establish why, unlike other provisions in the Arbitration Act, Section 35 does not specifically state that decisions of the High Court are final, and unlike Section 39, it does not also state that an aggrieved litigant may appeal to the Court of Appeal. We shall also need to understand the import of Section 10 of the Act and its relevance, if at all to the interpretation before us. A proper interpretation would also require a broader understanding of the principles of arbitration vis-a-vis the lingering powers of the Courts to intervene in arbitral proceedings. And finally, any interpretation adopted should not negate the fundamental purpose for which the Arbitration Act was enacted.

There is also a need to curb lawyers and parties bent on abusing court intervention to clog the arbitration process. The problem with the adversarial system is that it often forces the court to stand aside and watch parties obviate each other's cause of action with all imaginable tricks like a lame duck. The few remedies fashioned to prevent abuse of court process do not offer much help, especially when lawyers get into the fray with their bagful of tricks. Soon, what was a simple issue is reduced into complex legal affair.⁶¹ This was aptly captured in *Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR* at the Supreme Court, in the dissenting opinion of Justice D.K. Maraga, CJ & P as follows:

[150] In commercial transactions, disputes are often about money, and more often than not, large sums of money. "[A]nd where money is concerned there are not many good losers...." In an adversarial system as ours, to open unwarranted doors to court intervention in arbitral proceedings, as the Singaporean Court of Appeal observed in the said case of AKN &

⁶¹ Gaillard, Emmanuel. "Abuse of process in international arbitration." *ICSID Review-Foreign Investment Law Journal* 32, no. 1 (2017): 17-37.

Another v. ALC and Others and other appeals (supra) “through the ingenuity of counsel,” we shall have appeals on literally all issues “disguised and presented as ... challenge[s] to process failures during the arbitration.” And we know what that means: arbitral awards or decisions on them shall be subject to court challenges on every issue. Arbitration will therefore be an extra cog in the gears of access to justice through litigation or “a precursor to litigation.” By the time the court determines the issue, the matter will have dragged in court for years. Arbitrations will thus prolong dispute resolution and be self-defeating. In such a scenario, it would be more efficacious to abandon arbitration altogether and litigate all disputes in courts of law.

Arbitration is part of the justice system in Kenya and the fates of each of the two are inseparably tied together and interdependent. The general duty of advocates as officers of the court needs to be addressed. So is counsel’s allegiance and compliance to clients’ whims. The two are matters belonging to the realm of professional ethics. Undoubtedly, they go to the training and orientation of the lawyers. Local law schools will do better to impress upon their students on the role of ADR and arbitration in general and the fact that the two are not ‘mechanisms designed by non-legal professionals to drive legal practitioners out of business.’ Also, professional organizations like Law Society of Kenya and the Chartered Institute of Arbitrators-Kenya branch need to continually and adequately orient their members on ADR and adopt specific policies for the members to follow when involved in litigation affecting arbitration through continuous professional training.

The foregoing discussion renders it clear that court intervention in Kenya cannot be dismissed as detrimental to the ideals of arbitration. No doubt, the role of the court so far exonerates it from being a foe of the arbitral process in Kenya.⁶² As demonstrated by the decisions above, the confusion is slowly but surely being addressed by the courts in Kenya especially in relation to the perceived

⁶² See *Nyutu Agrovat Limited v Airtel Networks Kenya Limited*; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR, Petition 12 of 2016; *Alison Jean Louis v Rama Homes Limited* [2020] eKLR, Miscellaneous Application E235 of 2019.

constrictions that are imposed by the provisions of the Arbitration Act.⁶³ Thus, there is need for continued reforms if the role of the court is to become facilitative of arbitration and to shake off such challenges as we have seen above which unnecessarily render arbitration inexpedient and cumbersome, thus discouraging parties especially those of foreign origin from picking Kenya as their preferred seat for international arbitration.

5.6 International Cooperation

As already pointed out, international arbitration developed over the years to achieve the status of a transnational legal order. As such, its development and continued acceptance heavily relies on cooperation amongst various states in both developing and developed world to recognise and enforce the outcome of international arbitration in their jurisdictions. There is therefore a need for Kenya work closely with other likeminded states in Africa and beyond in order to build its capacity and have a ready market for its institutions.

5.7 Finality

The question of finality of arbitral decisions in Kenya is one that has attracted a heated debate with a recent court case having gone all the way to the Supreme Court of Kenya. In *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR⁶⁴, an appeal to the Supreme Court of Kenya from a Ruling of the Court of Appeal which had dismissed an appeal against the decision of the High Court in *Nyutu Agrovet Ltd v Airtel Network Kenya Ltd* Nairobi H.C.C.C. No. 350 of 2009. The Court of Appeal in its Ruling had found that there is no right of appeal to that Court following a decision made under Section 35 of the Arbitration Act 1995 (the Act), and so struck out the entire appeal to it.

⁶³ See issues raised in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR, Petition 12 of 2016; *Synergy Industrial Credit Limited v Cape Holdings Limited* [2020] eKLR, Civil Appeal No. 81 Of 2016. **Notably, Civil Appeal No.61 of 2012 (Nyutu) was referred back to the Court of Appeal in December, 2019 by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR to be determined on an expeditious basis.**

⁶⁴ *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR, Petition 12 of 2016.

The High Court had set aside the entire arbitral award *purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties and for other reasons and deliberations contained in the learned Judge's Ruling.*⁶⁵ At the Court of Appeal level, the Court of Appeal unanimously held that the decision by the High Court made under Section 35 of the Act was final and no appeal lay to the Court of Appeal; thus striking out the appeal and awarding costs to Airtel.⁶⁶ The question for determination as framed by the Court of Appeal was whether there is any right of appeal to the Court of Appeal upon a determination by the High Court under Section 35 of the Act.⁶⁷

The Supreme Court set out to address the following issues: whether Sections 10 and 35 of the Act contravene a party's right to access justice under Articles 48, 50(1) and 164(3) of the Constitution and are therefore unconstitutional to that extent; whether there is a right of appeal to the Court of Appeal following a decision by the High Court under Section 35 of the Arbitration Act; what are the appropriate reliefs; and who should bear the costs of the Appeal.⁶⁸ While commenting on the finality of arbitral awards, the Supreme Court observed as follows:

[52] We note in the above context that, the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the Arbitration Act indicates that, *"the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial*

⁶⁵ Para. 4.

⁶⁶ Para. 6.

⁶⁷ Para. 7.

⁶⁸ Para. 29.

process.” It was also reiterated that the limitation of the extent of the Courts’ interference was to ensure an, *“expeditious and efficient way of handling commercial disputes.”*

[53] Similarly, the Model Law also advocates for “limiting and clearly defining Court involvement” in arbitration. This reasoning is informed by the fact that *“parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the “finality and expediency of the arbitral process.”* Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in Article 159(2) (c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it. However, the arbitration process is not absolutely immune from the Court process, hence the present conundrum.

[54] The Model Law indeed advises that all instances of courts intervention must be provided for in legislation. That is the explanation that the Model Law accords to Article 5 which is in *pari materia* with Section 10 of the Act. The said Section 10 provides, *“Except as provided in this Act, no Court shall intervene in matters governed by this Act.”* On the other hand, Article 5 provides, *“In matters governed by this Law, no court shall intervene except where so provided in this Law.”*

[55] In illuminating the meaning of Article 5, the explanatory notes of the Model Law provide that, beyond the instances specifically provided for in the law, no Court shall interfere in matters governed by it. That further, the main purpose of Article 5 is to ensure predictability and certainty of the arbitral process. That understanding is also discerned in the Court of Appeal decision of Singapore in the case of *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57 where the Court stated that:

“The effect of art 5 of the Model Law is to confine the power of the Court to intervene in an arbitration to those instances which are provided for in the Model Law and to ‘exclude any general or residual powers’ arising

from sources other than the Model Law.... The raison d'être of art 5 of the Model Law is not to promote hostility towards judicial intervention but to 'satisfy the need for certainty as to when court action is permissible'."

... ..

[57] Thus, it is reasonable to conclude that just like Article 5, Section 10 of the Act was enacted, to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a Court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the Courts may be invoked. According to the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds.

[58] Having stated as above therefore we reject Nyutu's argument that Section 10 is unconstitutional to the extent that it can be interpreted to limit the Court of Appeal's jurisdiction to hear appeals arising from decisions of the High Court determined under Section 35 of the Act. We have shown that Section 10 is meant to ensure that a party will not invoke the jurisdiction of the Court unless the Act specifically provides for such intervention. With regard to Section 35, the kind of intervention contemplated is an application for setting aside an arbitral award only. However, Section 10 cannot be used to explain whether an appeal may lie against a decision of the High Court confirming or setting aside an award. This is because by the time an appeal is preferred, if at all, a Court (in this case the High Court) would have already assumed jurisdiction under Section 35 and made a determination therefore. Thus, by the High Court assuming jurisdiction under Section 35, it would conform to Section 10 by ensuring that the Court's intervention is only on instances that are specified by the Act and therefore predictability and certainty commended by Article 5 of the Model Law is assured. The question whether an appeal may lie against the decision of the High Court made under Section 35 thus still remains unanswered because, just like Section 35, Section 10 does not answer that question.

The Supreme Court went on to affirm the need for limited court intervention by stating as follows:

[69] The above comparative review thus shows circumstances where a decision challenging an award may be appealable. With regard to jurisdictions that grant leave to appeal, Courts have held that leave to appeal may be *granted where there is unfairness or misconduct in the decision making process and in order to protect the integrity of the judicial process*. In addition, leave would be granted *in order to prevent an injustice from occurring and to restore confidence in the process of administration of justice*. In other cases, *where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue*. An appeal may also arise when there is need to bring clarity to the law by settling conflicting decisions. However as cautioned by the Singapore Courts, an intervention by the Courts should not be used as an opportunity to delve into the merits of the arbitral award but rather that the intervention should be limited to the narrowly circumscribed instances for reviewing or setting aside an award.

[77] In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.

[78] In stating as above, we reiterate that Courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious

and efficient way of delivering justice. The High Court and the Court of Appeal particularly have that onerous yet simple task. A leave mechanism as suggested by Kimondo J. and the Interested Party may well be the answer to the process by which frivolous, time wasting and opportunistic appeals may be nipped in the bud and thence bring arbitration proceedings to a swift end. We would expect the Legislature to heed this warning within its mandate.

[79] Having held as above, does the case at hand justify the Court of Appeal's intervention" In answer to that question, it will be noted that the High Court (Kimondo J) set aside the arbitral award on the grounds *inter alia* that the award contained decisions on matters outside the distributorship agreement, the terms of the reference to arbitration or the contemplation of parties. In granting leave to appeal, the learned Judge washed his hands of the matter and left it to the Court of Appeal to determine the question of the right to appeal to that Court. It so determined hence the present Appeal.

[80] The Court of Appeal, it is now clear, never determined the substantive complaint by Nyutu as to whether the learned Judge properly applied his mind to the grounds for setting aside an award under Section 35 of the Act. We have clarified the circumscribed jurisdiction of the Court of Appeal in that regard. Without a firm decision by the Court of Appeal on that issue, we cannot but direct that the matter be remitted back to that Court to determine whether the appeal before it meets the threshold explained in this Judgment or in the words of Kimondo J, the "*journey was a false start*".

In conclusion, the majority held as follows:

[109] Consequent upon our findings above, we make the following orders:

(a) The Petition of Appeal dated 15th July 2016 is hereby allowed as prayed.

(b) The Order of the Court of Appeal made on 6th March 2015 is hereby set aside in its entirety.

(c) The Notice of Motion Application dated 3rd May 2012 in Civil Appeal No. 61 of 2012 Nyutu Agrovet Limited v Airtel Networks Kenya Ltd. is hereby dismissed.

(d) Civil Appeal No. 61 of 2012 aforesaid shall be heard and determined by the Court of Appeal on an expeditious basis.

(e) Each party shall bear its own costs.

However, it worth pointing out that in a dissenting opinion by Justice D.K. Maraga, CJ & P, the Chief Justice held as follows:

[104] Arbitration does not deny access to the Courts. Courts are but one of the means of resolving societal dispute. The other modes of dispute resolution, as stated in Article 159(2)(c) include “*reconciliation, mediation, arbitration and traditional dispute resolution mechanisms....*” Every litigant has the right to choose which mode best serves his or her interests. As AM Gleen posited, “*Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court.*” [6] Once one has made that choice, one cannot be heard to claim that one’s right of access to justice has been denied or limited. As the United States’ Second Circuit of the Court of Appeal also stated in *Parsons Whittemore Overseas Co Inc. v. Société Générale de l’Industrie du Papier (RAKTA)*, “*By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights ... [including the appellate process] in favor of arbitration with all of its well-known advantages and drawbacks.*” [7]

[105] Finally, the appellant argued that the principle of finality in arbitrations applies only to an arbitration award itself and not to any Court proceedings founded on it. I do not think this is correct.

[106] One of the main objectives of preferring arbitration to Court litigation is the principle of finality associated with doctrine of *res*

judicata that is deeply rooted in public international law. Section 32A captures this principle: “*Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it....*” Most parties, especially those engaged in commercial transactions, desire expeditious and absolute determinations of their disputes to enable them go on with their businesses. [8] They require a final and enforceable outcome. That is why the Section goes on to limit recourse “*against the award otherwise than in the manner provided by this Act.*”

[107] In the circumstance, I concur with the respondent that, read together, Sections 10 and 35 of the Arbitration Act restrict judicial intervention in the arbitral process to expedite dispute resolution while maintaining the sanctity of the principle of finality in the entire arbitral process. If the principle of finality is limited to the arbitral awards only and not to any court proceedings founded on them as the appellant contended, then the objectives of arbitration would be defeated and arbitration will be “*a precursor to litigation.*” [9] This is because any Court proceedings that render an award unenforceable affects the principle of finality.

[108] For these reasons, I would myself dismiss this appeal with no order as to costs. However, as the majority holds a contrary opinion, the final orders of the Court shall be as set out in their Judgment.

It is therefore worth noting that the Supreme Court did not decide the question as to whether parties have a right to appeal the decision of the High Court under section 35 of the Arbitration Act but instead it referred the question back to the Court of Appeal for determination. It however provided useful but progressive principles on what factors the Court of Appeal should consider in making such determination.

However, In the *Synergy Industrial appeal*, the Supreme Court of Kenya specifically stated:

“[86] For the avoidance of doubt, we hereby restate the principle that not every decision of the High Court under Section 35 is appealable to the Court of Appeal. It also follows therefore that an intended appeal, which is not anchored upon the four corners of Section 35 of the Arbitration Act, should not be admitted. In this regard, an intended appellant must demonstrate (or must be contending) that in arriving at its decision, the High Court went beyond the grounds set out in Section 35 of the Act for interfering with an Arbitral Award.”

It can therefore be safely concluded that the Supreme Court (and more so Justice Maraga’s dissenting opinion) in the *Nyutu case* and even more clearly in the *Synergy case* and *GEO Chem Middle East v Kenya Bureau of Standards [2020] eKLR* affirmed the finality of arbitral awards. However, it is also noteworthy that we would have to wait for the decision of the Court of Appeal in the *Nyutu case* as the final position of the Kenyan courts on the issue. What is however encouraging is the positive attitude this case demonstrates towards ensuring that the court’s role and intervention is limited for purposes of promoting finality of arbitral processes, thus, promoting the growth and usage of arbitration in the country.

5.8 Easy Access and Travel to Kenya

One of the factors that make any country to lag behind in attracting international arbitration practitioners and parties’ preference for a country as their preferred seat for their arbitration is difficulty in accessing the same physically, should they require traveling there. As recently as June 2020, it was reported that Government officials are in the process of finalising a free trade agreement (FTA) that, if signed, is set to ease the entry of established US companies into the local market.⁶⁹ If concluded, the reciprocal trade deal would grant the US government unfettered entry for its companies into nearly all segments of Kenya’s economy including the heavily guarded ones.⁷⁰ While this may come with intended and unintended repercussions for the job market for Kenyans and

⁶⁹ Wednesday, June 3 and 2020 0:01, ‘America Seeks Easy Access in New Trade Pact with Kenya’ (*Business Daily*) <<https://www.businessdailyafrica.com/economy/America-seeks-easy-access-in-new-trade-pact-with-Kenya/3946234-5569764-yvybkl/index.html>> accessed 4 August 2020.

⁷⁰ *Ibid.*

local companies, the same is also likely to bring some work for the local arbitrators and institutions, if they are ready to grab the opportunity and well prepared for the same.

As for foreign parties that may not have their businesses running local subsidiaries, they can benefit from government to government agreements on either complete waiver of visas or convenient arrangements that might allow business persons entering the country to get their visas on arrival. Kenya is among the very few states in the world that offer visa exemption to quite a number of particular nationalities. Currently, the citizens of 43 states can travel to Kenya without a visa, only a passport is necessary to enter the country, and there's no need to get a Kenyan visa.⁷¹ The only exceptions to this rule involve the citizens of Rwanda and Uganda, part of the East African Agreement, who can travel to Kenya only with their Identity Cards.⁷² As a way of promoting Kenya as a preferred seat for international arbitration, Kenyan stakeholders in arbitration may consider approaching the Government for either visa free entry or specialized processes for visa processing for parties who choose to carry out their arbitration in the country or choose Kenya as their preferred seat and decide to visit the country for business.

5.9 Effective Supporting Institutions

As already mentioned elsewhere, Kenyan courts have shown a positive attitude towards ADR and arbitration and are willing to minimise court intervention as envisaged under the relevant laws. There is a need for ensuring that this continues and also ensuring that lawyers and judicial officers are not used by parties to frustrate the arbitration process. Only then will the practice of international arbitration in the country grow and attract international clientele. The Nairobi Centre for International Arbitration (NCIA) is commendably rising

⁷¹ 'Kenya Visa-Free Countries-Can I Travel Just With My Passport?'

<<https://www.ivisa.com/kenya-blog/kenya-visa-free-countries-can-i-travel-just-with-my-passport>> accessed 4 August 2020; 'Countries Whose Nationals Do Not Require a Visa to Kenya'

<<http://www.kenyaembassy.nl/index.php/consular/country-information>> accessed 4 August 2020.

⁷² Ibid.

and making itself known for international arbitration and ADR.⁷³ There is a need for all stakeholders including the Government of Kenya, arbitration practitioners and learning institutions to support NCIA in its quest to compete competitively with the global international arbitration institutions.

5.10 Modern Arbitration Law

Arbitration matters in Kenya are mainly governed by the *Arbitration Act*⁷⁴ and the Rules therein. However, arbitration is also conducted under the *Civil Procedure Act*⁷⁵, which allows a suit to be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.⁷⁶ The provision also provides that where an award is reached under the section and the same is entered as the court's judgement, no appeal shall lie against it. Further, Order 46 of the Civil Procedure Rules, 2010 provides for arbitration under order of a court and other alternative dispute resolution mechanisms. It provides that parties can apply to court to have a matter referred to arbitration.⁷⁷ It provides for the procedural guidelines therein. Section 59D of the Act further demonstrates the courts' supportive role in arbitration and ADR mechanisms in the pursuit of justice. It provides that *all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court.*⁷⁸

The practice of arbitration in Kenya has also been enhanced through Article 159 of the Constitution of Kenya, 2010⁷⁹ which provides for promotion of alternative forms of dispute resolution as one of the guiding principles of the Kenyan courts

⁷³ admin, 'Permanent Court of Arbitration Signed Cooperation Agreement with NCIA' (*Nairobi Centre for International Arbitration*, 18 March 2019) <<https://www.ncia.or.ke/court-arbitration/>> accessed 28 December 2020; 'CRCICA & NCIA MoU - Nairobi Centre for International Arbitration' <<https://www.ncia.or.ke/crcica-and-ncia-memorandum-of-understanding-mou/>> accessed 28 December 2020.

⁷⁴ Arbitration Act, 1995, No. 4 of 1995(Amended in 2009).

⁷⁵ Cap 21, Laws of Kenya.

⁷⁶ S.59C (1), Cap 21, Laws of Kenya

⁷⁷ R. 46, Civil Procedure Rules, 2010

⁷⁸ Section 59D, Cap 21, Laws of Kenya.

⁷⁹ Government Printer, Nairobi, 2010.

while exercising judicial authority. These forms include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

The current law on Arbitration, *Arbitration Act*⁸⁰, repealed the colonial *Arbitration Ordinance of 1914* which was a replica of the English Arbitration Act of 1889. The Ordinance was later replaced by the now repealed *Arbitration Act*, Cap 49. These two Acts gave immense powers to courts with little or no regard to the parties' autonomy. *Arbitration Act*, Cap 49 was drafted along the English *Arbitration Act* of 1950. This was later repealed by the current *Arbitration Act*, Act No. 4 of 1995. This Act was substantially amended in 2009 in order to reflect the main principles of the UNCITRAL Model law to which Kenya is a signatory⁸¹, amongst others, minimal court intervention in matters of arbitration.⁸² Regarding the scope of the Act, section 2 thereof provides that except as otherwise provided in a particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration. 'Arbitration' is defined under section 2 to mean any arbitration whether or not administered by a permanent arbitral institution.

As observed above, various jurisdictions and global arbitral institutions have been amending their rules and laws periodically in order to capture the new trends in the area of arbitration. There is thus a need for Kenya and the local institutions such as the Nairobi Centre for International Arbitration to ensure that their laws and rules are always up to date and reflect the global trends in the sector.⁸³ This is one of the ways of ensuring that they improve their marketability globally and attract not only investments but also practitioners and parties wishing to pick Kenya as their seat for international arbitration.

⁸¹ Kenya acceded to the law in 1989 but with reservation on reciprocity.

⁸² Section 10, Arbitration Act, No. 4 of 1995

⁸³ Norton Rose Fulbright, *International arbitration report*, Issue 11, October 2018 <<https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-review---issue-11.pdf?la=en-be&revision=>> accessed 7 August 2020; '6 Trends Will Shape Future International Commercial Disputes | Insights | DLA Piper Global Law Firm' (DLA Piper) <<https://www.dlapiper.com/en/us/insights/publications/2018/08/6-trends-will-shape-future-international-commercial-disputes/>> accessed 7 August 2020.

5.11 Enhanced Access to Internet and Cybersecurity

With the world becoming global village due to the advancement in technology, it is possible for parties to carry out their international arbitration proceedings from different parts of the world. Technology has also become a valued part of arbitration proceedings and has been embraced by all the major arbitral institutions across the world.⁸⁴ The corona virus pandemic has forced many professions to resort to the use of virtual forums to conduct meetings.⁸⁵ While Kenya has made considerable steps in enhancing access and the use of internet in the country, the same cannot be said to be satisfactory.⁸⁶ The country has also made some progress in putting in place cybersecurity law, a step towards enhancing trust for dispute resolvers and their clients.⁸⁷ There is however a need

⁸⁴ See Muigua, K. & Ombati, J., 'Achieving expeditious Justice: Harnessing Technology for Cost Effective International Commercial Arbitral Proceedings,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, 7(1):1-32, (April, 2019).

⁸⁵ Martha C White, 'For Conference Planners, Virus Means a "Huge Learning Curve"' *The New York Times* (18 May 2020)

<<https://www.nytimes.com/2020/05/18/business/coronavirus-business-travel-conferences.html>> accessed 5 August 2020; 'COVID-19: How Companies Are Responding' (*World Economic Forum*)

<<https://www.weforum.org/agenda/2020/03/how-are-companies-responding-to-the-coronavirus-crisis-d15bed6137/>> accessed 5 August 2020; 'Will the Coronavirus Make Online Education Go Viral?' (*Times Higher Education (THE)*, 12 March 2020)

<<https://www.timeshighereducation.com/features/will-coronavirus-make-online-education-go-viral>> accessed 5 August 2020; Michael Price Apr. 28, 2020 and 4:20 Pm, 'As COVID-19 Forces Conferences Online, Scientists Discover Upsides of Virtual Format' (*Science | AAAS*, 28 April 2020)

<<https://www.sciencemag.org/careers/2020/04/covid-19-forces-conferences-online-scientists-discover-upsides-virtual-format>> accessed 5 August 2020.

⁸⁶ Muigua, K., 'Virtual Arbitration Amidst Covid-19 : Efficacy and Checklist for Best Practices,' *A Discussion Paper for the Chartered Institute of Arbitrators Kenya Branch (CIArb-K) Webinar ADR Talk Series 8 held on 28th May 2020* < <http://kmco.co.ke/wp-content/uploads/2020/05/Virtual-Arbitration-Proceedings-Amidst-COVID-19-Efficacy-and-Checklist-for-Best-Practices69523-Revised.pdf> > accessed 5 August 2020; Muigua, K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice,'

<<http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf> > accessed 5 August 2020.

⁸⁷ Muigua, K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice,'

for the local arbitration practitioners and institutions to borrow a leaf from their international counterparts and invest in the appropriate software and hardware necessary for virtual arbitration.⁸⁸ Technology can save parties valuable time and resources and still achieve justice.

5.12 Perception of Corruption

Kenya's justice sector and its key players have consistently been rated poorly as far as corruption index is concerned.⁸⁹

Section 35 confers the High court powers to set aside an arbitral award under the circumstances provided under that provision. Notably, Section 35(2) sets out the grounds upon which the High Court will set aside an arbitral award upon the applicant furnishing proof. These grounds include, inter alia: where fraud, undue influence or corruption affected the making of the award. The High Court may also decline recognition and/enforcement of an award if its making was affected by fraud, corruption or undue influence.⁹⁰ There is a need to fight corruption in order to create conducive environment for international arbitration and eliminate any notion or perception that the government is likely to interfere with private commercial arbitration matters.⁹¹

<<http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf> > accessed 5 August 2020.

⁸⁸ Muigua, K., 'Virtual Arbitration Amidst Covid-19 : Efficacy and Checklist for Best Practices,' *A Discussion Paper for the Chartered Institute of Arbitrators Kenya Branch (CIArb-K) Webinar ADR Talk Series 8 held on 28th May 2020* < <http://kmco.co.ke/wp-content/uploads/2020/05/Virtual-Arbitration-Proceedings-Amidst-COVID-19-Efficacy-and-Checklist-for-Best-Practices69523-Revised.pdf> > accessed 5 August 2020.

⁸⁹ Hope Sr, Kempe Ronald, 'Kenya's Corruption Problem: Causes and Consequences: Commonwealth & Comparative Politics: Vol 52, No 4' <<https://www.tandfonline.com/doi/abs/10.1080/14662043.2014.955981?scroll=top&needAccess=true&journalCode=fccp20>> accessed 5 August 2020; Mbate, Michael. "Who bears the burden of bribery? Evidence from public service delivery in Kenya." *Development Policy Review* 36 (2018): O321-O340.

⁹⁰ S. 37(1), No. 4 of 1995.

⁹¹ 'Advantages of International Commercial Arbitration - International Law - Worldwide'

6. Conclusion

Kenya has a promising future as the preferred seat and venue for international arbitration. All that is required is for the stakeholders to work closely in order to eliminate the challenges identified in this paper as well as ensuring that the law and institutional practice stays up to date as far as international trends in international arbitration are concerned. Making Kenya a preferred seat for international arbitration is a valid dream that can be realized in the very near future.

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COVID-19: Construction Projects, Contracts and Disputes

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1.0 Introduction

The COVID-19 (C-19) pandemic has unleashed a plethora of effects across the construction industry. While the immediate attention of the pandemic has focused on the dire health consequences, more and more countries are becoming aware of its impact on the economy – both at a macro and micro level. Many of the measures taken by governments, including imposing a lockdown, social distancing amongst others, have had a direct impact on the welfare of sectors across the country. The construction sector has not been spared from the ensuing impact of various responses to C-19 by government. Travel restrictions have impacted its global supply chains and markets. More specifically at a domestic level, government directives outlining strict health measures such as requirements for PPE (Personal Protective Equipment) and restraining the movement of persons have directly impacted the operational costs of projects, potentially threatening their closure. Amidst this uncertainty and turmoil, the stage has been set for the rise of many disputes within the industry.

The first part of this article discusses the different scenarios in which disputes may be prompted by events linked to the C-19 pandemic. In particular, discussions explore the effects of C-19 in three particular contexts upon which disputes may arise – delays, suspensions, termination. In discussing these contexts, it may be necessary to pay attention to questions of whether events arising from C-19, whose outcome lead to such delays, suspensions or termination, are force majeure or supervening events that frustrate the contract. The second part of the article is an attempt to rethink dispute resolution in the current context. It starts with the underlying assumption that the C-19 presents a platform for the proliferation of disputes. The impact of this proliferation on the operations and the commercial viability of the industry can be massive. The

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article therefore highlights the importance of dispute avoidance from the onset. Even when it is not possible to avoid disputes, it will be important to explore how they can be handled in a manner that is both effective and efficient. One part of this entails looking at employing alternative dispute resolution mechanisms, and thereby avoiding the less efficient pathway of litigation. Thus, the article looks at how parties can employ common ADR mechanisms such as mediation and arbitration. The other side of this discussion takes into account various government measures such as curfews and the lockdown, and how they are likely to impact existing ADR platforms. It is the author's view that the pandemic presents a useful opportunity to discuss innovation of these platforms, such as the prospects for adopting different procedures, virtual mechanisms etc. in order to respond to the constraints imposed by the crisis.

2.0 Understanding The Nature of The C-19 Event

Disputes are likely to be as numerous as the dilemmas imposed upon parties by the crisis. For example, many disputes will emanate from decisions to lockdown sites and the impact that this might have on the contract, workforce and supply chain. In such situations, a party will have to prepare for claims that may arise thereafter. Claims are likely to emerge in view of the increased attention on health and safety measures, and the need for contractors to pay paramount attention by reorganising how sites are managed and adequate equipment provided. This in itself is likely to become a ground for disputes among parties, and between local regulatory authorities and contractors. Furthermore, we are likely to see disputes in connection with insurance contracts, and whether or not payment of claims can be made. A common feature that may arise across the range of disputes will lie in how C-19 associated events are qualified for the purposes of the contract. Would such events amount to force majeure (FM), do they frustrate the contract? Many disputes will revolve around determining the nature of the C-19 related events on the contract. In turn this will depend upon how the C-19 pandemic, in terms of its foreseeability and impact, is perceived. Debates are already raging on whether C-19 is a 'black swan event' – a phrase was adopted to describe the 2008 financial crisis.

¹ The term was extracted in the 17th when the Dutch explorer Willem de Vlamingh discovered black swans in Australia, an unexpected event (as only white swans had been encountered) but widely considered probable with hindsight (since it is likely that swans like other species would exist in alternative colours).² It is unlikely that C-19 is a black swan event since it was not sufficiently unexpected. The past decades have witnessed a number of global pandemics such as SARS, Ebola, swine flu etc. upon which several governments have surmised the prospects of similar global pandemics.

What is more debatable is whether a C-19 related event amounts to FM or an event frustrating a contract. Most construction contracts include FM and frustration provisions. Depending upon the circumstances, the cumulative impact of C-19 related events could potentially amount to a 'force majeure'.³ It is worth noting that countries such as China,⁴ Singapore⁵ and France⁶ have declared C-19 as a FM event. No such declaration has been made in this region and the wording of the contract will be crucial as there is no established meaning for the term under the law. Many contracts however go on to list a number of

¹ P Parameswaram, 'COVID-19 and Risk Analysis: Look beyond the Black Swan Talk' (*The Diplomat*, 30 April 2020) <https://thedi diplomat.com/2020/04/covid-19-and-risk-analysis-look-beyond-the-black-swan-talk/> accessed 25 June 2020.

² T Aven, *Risks, Surprises and Black Swans: Fundamental ideas and concepts in risk assessment and risk management* (1st edn, Routledge 2014) 11.

³ W J Shaughnessy and W Underwood, 'COVID-19's impact on construction: Is there a remedy? -Time extension, force majeure or more?' (*National Law Review*, 3 April 2020) <https://www.natlawreview.com/article/covid-19-s-impact-construction-there-remedy-time-extension-force-majeure-or-more> accessed 25 June 2020.

⁴ H Tan 'China invokes 'force majeure' to protect businesses but the companies may be in for a rude awakening' (*CNBC*, 6 March 2020) <https://www.cnbc.com/2020/03/06/coronavirus-impact-china-invokes-force-majeure-to-protect-businesses.html> accessed 24 June 2020.

⁵ Lexology, 'Singapore-COVID-19 Temporary Measures Act and its Impact on the Construction Industry' (*Lexology*, 17 April 2020) <https://www.lexology.com/library/detail.aspx?g=8e2d9e3c-2352-43f3-b63d-5c3263bb03b9> accessed 24 June 2020.

⁶ 'French court qualifies COVID-19 crisis as force majeure event resulting in alternative electricity suppliers' financial losses' (*Reed Smith*, 9 June 2020) <https://www.reedsmith.com/en/perspectives/2020/06/french-court-qualifies-covid19-crisis-as-force-majeure-event> accessed 24 June 2020.

events that would fall within these parameters such as riots, earthquakes, epidemic etc.⁷ The closest to a pandemic in this common list would be an 'epidemic'. However, there is a distinct difference between an epidemic and a pandemic; the latter spanning across countries, while the former being limited to distinct regions or populations.⁸ It is questionable whether one can apply an elastic interpretation enough to bring a pandemic within the scope of an epidemic. The approach of listing several illustrative events contrasts with one in which the broad parameters for the occurrence of a FM are laid out to include an event that is an unforeseeable event – one beyond the control of a party – that makes it impossible for that party to perform its obligation.⁹ This could include a number of events that paralyse the performance of a contract in a given duration such as government action, supply of goods.¹⁰ Each of the elements within the broad parameter is the subject of interpretation, and may thus be a fertile ground for disputes.

As noted above, a claim based upon FM arises only where there is explicit reference to the term in the contract. There is no provision for the same under common law. In this context, and assuming the contract does not contain a FM clause, a possible alternative may be to bring a claim under the common law doctrine of frustration.¹¹ The threshold for frustration is quite high and

⁷ See FIDIC Red Book clause 19.1.

⁸ C D Paolo, *Epidemic Disease and Human Understanding* (McFarland 2006) 1.

⁹ The definition under FIDIC Red Book clause 19.1 is an event beyond a party's control, parties could not reasonably provide against; no party could reasonably avoid and not attributable to the other party. The definition under the JBC Kenya Agreement and Conditions of Contract for Building Works 1999 Edition clause 1.11 is an event beyond a party's control, which such party could not reasonably have foreseen before entering into the contract, having arisen, such party could not reasonably have avoided or overcome, and is not substantially attributable to either party.

¹⁰ For instance, the JBCC South Africa Principal Building Agreement 2000 in clause 39.1 anticipates cessation of works for a continuous period of 90 days or an intermittent period of 120 days due to circumstances beyond parties' control.

¹¹ Squire Patton Boggs, 'COVID-19: A Force Majeure Event?' (*Lexology*, 28 April 2020) <https://www.lexology.com/library/detail.aspx?g=eec35c96-4505-4b9d-89c8-37c849d5e167> accessed 25 June 2020.

primarily the reason why FM clauses are included in contracts.¹² Under the doctrine, one must be able to show the occurrence of a supervening event after the formation of a contract that neither party is responsible or could have foreseen, and whose effect is to substantially change the nature of the contract.¹³ A substantial change could arise where performance become impossible or the contract is now totally different from what the parties intended.¹⁴ The threshold for frustration is particularly high because the supervening event is not transient unlike what may occur in the case of a FM.¹⁵ For this reason, frustration will discharge all parties from further performance unlike a FM event where certain aspects of the contract may still be performed. In the context of C-19, this sense of permanency of the supervening event may be difficult to surmount given that many of the measures taken in response to the pandemic appear to be temporary e.g. movement restrictions, lockdowns etc. It is also unlikely for a party to be able to demonstrate that these measures have fundamentally altered the nature of the contract.

It may be worthwhile to talk about C-19 events from the perspective of provisions within the contract that recognise the impact that changes in the law may have on the contract. The response to C-19 has been through legislative and policy directives, which have affected business operations as they have had to conduct additional health and safety concerns, contend with movement restrictions and in certain instances closed projects in compliance with the lockdown imposed by governments. Such directives could satisfy clauses within the contract that cushion a party in the event of changes in law allowing the party to claim time and money from unforeseen changes in law.¹⁶ In relation

¹² A Stewart, W Swain and K Fairweather, *Contract Law: Principles and Context* (Cambridge University Press 2014) 292.

¹³ J Yong, F F Griffith and D Wang, 'Force Majeure vs. Frustration of Contracts in the time of Covid-19' (*Lawson Lundell*, 1 April 2020) <https://www.lawsonlundell.com/china-blog/force-majeure-vs-frustration-of-contracts> accessed 24 June 2020.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Squire Patton Boggs, 'Change in law clauses and force majeure in COVID-19' (*Lexology*, 24 April 2020) <https://www.lexology.com/library/detail.aspx?g=9c623705-6495-454d-81cd-3916c22c62ca> accessed 26 June 2020.

to C-19, debates have arisen as to whether changes in law have a geographical limitation. Are such changes restricted to the country the project is undertaken or may they emanate from legal and policy occurring in other jurisdictions which impact the performance by parties of their obligations? The construction sector is globally connected with supply chains cut across national borders. It is not far-fetched for a local government directive in a province in China or Europe to impact productivity or efficiency of a local project. How all of this would be interpreted would depend upon how the phrase “change in law” is defined in the contract, the causal link with the outcome on the local project and the degree of foreseeability by the parties in the context taking into account their state of knowledge of measures being taken in response to C-19 at the time of contracting.

2.1 Rights of Parties and Options

C-19 has imposed challenging times. It has affected the cash flow of many construction projects which as Denning LJ noted, ‘is the lifeblood of the construction industry’; and with that impacted the rights of parties.¹⁷ One only needs to consider its direct and indirect impact on the certain rights of a contractor such as access to site from employer,¹⁸ right to payment,¹⁹ right to suspend work²⁰ and dispute adjudication.²¹ Similarly, its effect may give rise to various rights that accrue to the employer such as their right to liquidated damages for late completion,²² right to enforced safety with the additional measures demanded by the pandemic, delays in the right to take over on completion, and possible right to termination for default the contract.²³ The nature of claims that arise will depend on the impact of C-19 on these rights and how parties to the contract choose to assert them. Projects may be delayed or

¹⁷ *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* (1973) 71 LGR 162.

¹⁸ See the FIDIC Red Book clause 2.1 and JBC Kenya Agreement and Conditions of Contract for Building Works 1999 Edition clause 3.1.

¹⁹ See the FIDIC Red Book clause 14.7 and JBC Kenya Agreement and Conditions of Contract for Building Works 1999 Edition clause 3.4.

²⁰ See the FIDIC Red Book clause 16.1 and JBC Kenya Agreement and Conditions of Contract for Building Works 1999 Edition clause 29.0.

²¹ FIDIC Red Book clause 20.

²² *Ibid*, clause 8.7.

²³ *Ibid*, clause 15.3.

accelerated, varied, suspended or even terminated. Parties will need to understand where they stand in each of these individual situations.

2.2 Delayed Completion

The multiple effects of the C-19 related events may impact upon the ability of parties to perform their obligations ultimately leading to delay in the conclusion of projects. Examples of such events include closure of ports, factories, unavailability of labour etc. Contracts often take cognisance of the fact of delay indicating when it can be pleaded and its effects. A plea on this account may depend on what prompted the delay. During this period, one should anticipate links between present circumstances and delayed projects, where for example, a party pleads that C-19 constitutes a force majeure (FM) and delayed the project. For reasons observed earlier, the question of delay will however not arise where a party relies on frustration. In contrast to FMs, the general parameters of frustration under the common law arise when a contract becomes impossible to perform.²⁴ Frustration is not relevant to the question of delay in the current context of the C-19 pandemic since at the heart of the principle is the impossibility to perform the contract. The event behind frustration of the contract does not simply delay, disrupt or inconvenience the contract (e.g. making it more costly) but instead prevents its performance entirely.²⁵

Once a claim arising from delay is established, the next question will be to examine whether a party can recover and what they can recover. Both of these elements will be informed by the contract. The contract will indicate whether the party claiming is entitled to time (an extension of time for the delay). Alternatively, it may specify financial compensation for the delay that has been occasioned. Many industry-based standard contracts provide for a right to time²⁶ and in certain instances – time and money. It should be pointed out that were the cause of delay is attributed to a FM; financial compensation will not be available. It is rare for FM clause to give entitlement to a party so claiming

²⁴ Yong, *supra* note 13.

²⁵ E McKendrick, *Force Majeure and Frustration of Contract* (2nd Edition, CRC Press 2013) 37.

²⁶ See FIDIC Red Book clause 8.4 and JBC Kenya Agreement and Conditions of Contract for Building Works 1999 Edition clause 36.0 on extension of time for completion.

compensation through the delay, although it may entitle the party to terminate the contract particularly if the FM continues for a specified number of days.²⁷

2.3 Project Acceleration

In the fear of being affected by C-19 related directives many contractors have opted to accelerate the performance of their obligations with the aim of completing all or certain aspects of the project works. The employer may also demand the works are hastened for similar apprehensions. The employer may also need to accelerate to meet other extra contractual obligations for which it could be penalised e.g. obligations owed to a financier. Acceleration can be achieved in various ways such as: adding source inputs (labour and material), postponing part of the work, outsourcing certain capacity, bringing in overtime labour services, re-arranging the critical path by introducing parallel activities, reducing the scope of project (which may save time/money but also reduce the value of the project or compromise quality e.g. finishes) etc.²⁸ All of this could be part a way to mitigate against additional costs that may be imposed on the project. However, this may have other financial implications on the project and could ultimately give rise to claims.

The validity of claims in connection with acceleration will turn on whether the contractual provisions allow for acceleration and the grounds upon which this can be done. One will especially be careful to examine that the acceleration is related to delays stemming from the impact of C-19 and not merely for the contractor to finish the project and free up resources for another. Even then, clear written instructions must be issued by the employer directing the contractor to accelerate. In the absence of formal written instructions, there is the risk of the employer claiming that contractor elected to accelerate for their own reasons or as part of an effort to recover from its own delays. All of this will assume the existence of an agreed programme with clear time bars that has preferably been given a formal status under the contract. In this case a contractor

²⁷ For example, in the case of a standard FIDIC contract, if the FM event persists for a continuous period of 140 days either party can opt to terminate under FIDIC Red Book clause 19.6.

²⁸ S Mubarak, *Construction Project Scheduling and Control* (John Wiley & Sons, 2015) 213.

needs to ensure that they have not ignored these time bars. Lastly, a contractor seeking to claim for costs arising from accelerating the project, it must be evident how the additional costs claimed result from the acceleration and would not have been incurred notwithstanding.²⁹

2.4 Mitigation of Costs

A breach due to C-19 will impose the requirement to take steps to reduce or minimise the loss brought about by the event. Mitigation is about resisting additional costs. The demands for such mitigation may be in contract or applicable law. Many standard industry-based contracts carry provisions obligating parties to mitigate. For example, clause 36(4) of the Joint Builders Council Standard Form Contract (1999) obligates contractors to undertake their best endeavours to prevent delay, which in its very essence could lead to rising costs.³⁰ Under the common law the requirements for mitigation entail taking reasonable steps to minimise damages. Such damages ought to be reduced proportionally to reduce the degree of causation in the party's failure to perform its obligations and the ensuing losses.

It is important to emphasise that the duty to mitigate obligates a party to take reasonable steps and not take unreasonable steps to mitigate. Reasonable steps will depend on circumstances. A party is not required to take risks with its money, reputation or even to sacrifice its proprietary or other rights. Reasonable steps will also depend on the resources at the disposal of a party. A well-resourced claimant may be required to do more than one who has limited resources. In the context of civil law jurisdictions, although there is express duty to mitigate, the equivalent of the same can be found within the code of many

²⁹ This particular aspect must be able to withstand scrutiny in order to demonstrate that the costs claimed by acceleration would not have been incurred in any event e.g. if efficiency decreased as a result of the acceleration and not due to contractor's domestic issues.

³⁰ JBC Kenya Agreement and Conditions of Contract for Building Works 1999 Edition. Also see FIDIC Red Book clause 19.3 which places a duty upon each party to minimise delay that may be caused by a force majeure event.

such countries, which outline a duty to act in good faith so as to mitigate losses³¹ or restrict liability to damage arising from events that could not be avoided.

2.5 Variations of the Scope

C-19 may impact projects in a manner that necessitates the need to vary the work. Government directives may impact upon the supply of materials, requiring parties to consider suitable alternatives, ultimately varying the contract. Such directives may give rise to financial issues where for example a supplier is unable to honour the agreement and lead to design changes by consultants where there may have been insufficient details in the original design. Variation implies there is a change in scope of project obligating party to do work that was not planned.³² During the present times, it is critical that one explores ways of achieving the variations in a manner that mitigating the project costs.

The starting point in considering whether such variations are permissible. This will entail looking at the agreed scope of work that the parties agreed upon (assuming that this is clearly indicated), and whether the contract permits variations. The variation order ought also to be presented at the time of discussing variation. One will also have to examine whether the variation order has been validly given and is in line with the procedure indicated in the contract. Often this procedure requires written instructions to this effect as it is not uncommon for an employer to try to implement a variation by issuing revised drawings, sidestepping the need for formal written instructions.³³ Similarly, verbal instructions, particularly where there is ambiguity in the scope of works, have been used by the employer to vary works in a way that fails to take into account the costs and time associated with the variation. For contractor seeking

³¹ For instance UAE Civil Code, Article 246.

³² JBC Kenya Agreement and Conditions of Contract for Building Works 1999 Edition clause 30.0 contemplates variation to entail alteration or modification of the design, quality or quantity of the Works as shown in the contract drawings. The FIDIC Red Book clause 13.1 contemplates variations to include changes in quantity, quality, dimensions, omissions, additional work or changes to the sequence or timing of the execution of works.

³³ See FIDIC Red Book clause 13.3 on the variation procedure.

to successfully bring a claim in response to variations arising out of the C-19 pandemic, they will have to demonstrate that the variations are beyond the scope of work provided in the contract, and the work done has been subsequent to precise contractual correspondence that indicates a clear cost and time impact by the variation.

2.6 Suspension and Termination

As observed, one of the outcomes of C-19 has been government directives requiring compliance with health and safety safeguards, movement restrictions amongst other things. These directives may demand that work is paused until the impacts of C-19 are under control since they affect the contractor's ability to perform its obligations. Similarly, an employer may have concerns over a contractor's non-compliance with these health and safety directives, and demand the contractor suspend the works. In many contracts, the procedures and notice requirements for suspension will be laid out.³⁴ Such requirements may entitle one party to suspend for a given period before the contract can be breached, even though under the present circumstances, this approach should be exercised with caution as the other party may use it to justify termination of the contract. A suspension order should also be issued at the earliest in light of the impact various ongoing factors may have upon costs.

Where suspension is occasioned by the employer consequential to a cause that the contractor is not responsible, the contractor may be in a position to claim for an extension of time and/or reimbursement of costs due to suspension.³⁵ To do so, the contractor should be able to demonstrate that it has incurred costs for complying with suspension such as storage costs, security, deterioration, resumption of work after the suspension amongst other things. A contractor negatively impacted during suspension in this manner should promptly notify the employer while at the same time endeavouring to defer procurement until the suspension is lifted. The knock-on effects of the suspension will also require the main contractor to make appropriate notification to subcontractors to the extent that they will incur additional costs and require compensation. A valid

³⁴ See FIDIC Red Book clause 8.8.

³⁵ Even if this claim is made at a later date - see FIDIC Red Book clause 8.9.

claim for suspension should indicate that the grounds giving rise to the same are valid. In addition, a claim will demand that the party seeking relief gave requisite notice and complied with a duty to mitigate.

Beyond suspension, C-19 related events may lead to scenarios that threaten to re-write commercial underpinnings of the parties. In such circumstances, the parties may desire to bring the contract to an end. The contract will provide the process under which termination can be done. Contracts will also determine whether termination can arise simply out of convenience or whether it can only be done upon very specific grounds. In the latter case, one possible ground may arise when a FM event impedes the advancement of the project for an extended period of time necessitating the termination of the project.³⁶ The time period before one can contemplate suspension is entirely an issue of drafting within the contract. Furthermore, this time period could be fixed so that it relates to a single FM event or it could be the product of a cumulative period from multiple events of FM. Similarly, the monetary consequences of terminating the contract will depend on how the related provisions are drafted. In this regard, it is common for most provisions to provide payment for work done and supplies delivered.³⁷ During this time of the pandemic, a delicate commercial balance exists between suspension and termination. Whether or not to proceed with termination will require a delicate balancing act between obtaining the short term relief one is entitled to at the point of termination, versus the long term gains that accrue upon the fulfilment of the contract upon resumption of work in the future. C-19 has taught us that the future will require:

- More dedicated consultants to manage risk.
- Greater use of IT software to track and manage projects and risk.
- More time on risk mapping.

³⁶ FIDIC Red Book clause 19.6.

³⁷ For instance see JBC Kenya Agreement and Conditions of Contract for Building Works 1999 Edition clause 39.5 and 40.2.1.

2.7 Common Strands - Notices and Records

At the heart of any claim purporting to suspend, terminate, vary a project – is the need to comply with the notice provisions, indicating the circumstances and that the requisite notice procedure under the contract or law has been satisfied. The latter introduces some debate over whether a government directive in the present times of the pandemic, may satisfy the requirements of notice, and exempt a party from giving notice.³⁸ In addition to the contract and law, it is also possible under the present circumstances, for parties to agree on a simplified notice procedure that affords them sufficient time to assess the impact of C-19 related event. That said, a general notice that a C-19 related event has simply occurred, leading to delay or termination etc., may not be sufficient.³⁹ The notice must go further to show that the contractor is prevented from performing its obligations⁴⁰ citing the contractual provisions relied upon as well as the circumstances preventing due performance.⁴¹ For example, a notice related to a FM event, must explain how the event satisfies the requirement for an FM - why it is exceptional and not obvious and prevents performance within the time stipulated in the contract. Similarly, notices for delay or variations must comply with prescribed time limits, articulate the legal and contractual basis, and specify amounts claimed. It is important to pay close attention to the details of the notice as a necessary component of the evidence required to substantiate any claims.⁴² This is because notices may be rejected if issues are raised such as the fact that they are time-barred; suffer from procedural defect such as failure to

³⁸ For instance an industry circular issued in line with the presidential directive of 29th March 2020 in Nigeria declaring the COVID-19 situation a force majeure. Can a contractor then fail to give notice arguing that the industry circular was sufficient? See Department of Petroleum Resources (Nigeria), 'Industry Circular: Management of COVID-19 outbreak-update 2' (*Department of Petroleum Resources (Nigeria)*, 30 March 2020) <https://www.dpr.gov.ng/industry-circular/> accessed 1 July 2020.

³⁹ Such generality will still require the contractor to continue to perform contract and take the necessary steps to mitigate.

⁴⁰ See JBC Kenya Agreement and Conditions of Contract for Building Works 1999 Edition clause 36.1 which requires the contractor to give a written notice of cause of delay and supporting details of extent of delay.

⁴¹ There should be clear identifying of the activities affected and how this is due to contractual grounds relied upon.

⁴² The employer is certain to check if the contractor has complied with notice requirements under the contract.

label the notice appropriately etc. A well drafted notice may also assist contractors in their internal administration, and possibly help the parties reach an agreement in the future since the matters therein are clearly stipulated.

Notices will form a part of the assortment of documents that form a record of event occurrences. The keeping of good records relating to events cannot be overstated. Documentation is key in resolution of disputes. In order to advance a claim for delay or variation, requesting for an EOT or monetary compensation, a party must have kept records to illustrate the starting point, the programme of works, the details of the agreed scope, instructions of variations requested etc. More specific to C-19 related events, parties should have been careful to keep records that document the precise impacts caused by the pandemic, mitigation taken and what an unmitigated project would look like as well as measures introduced.⁴³ Good records will enable parties to separate issues related to C-19 and those that are not.

3.0 Rethinking Dispute Resolution

3.1 Collaboration and Dispute Avoidance

C-19 was unexpected. It is important for parties to remember this as they seek solutions around the problems that arise from the impact of the pandemic on their rights and obligations. The focus should be on completing the work to the best extent and with the same cost. This will entail a shift from an approach to disputes based upon contractual rights to one that is undergirded by collaboration. The idea behind such collaboration being to find a way to re-distribute the risks among the parties so that they can eventually complete the project. In some cases, parties may find innovative ways to pass on existing risk to third parties such as insurance agents and suppliers and avoid a situation where their relations turn acrimonious because each insists on their legal rights. Collaboration underscores voluntary engagements on a without prejudice basis by the parties since the contract is already in place.⁴⁴ It will also mean turning

⁴³ For instance through use of in site reports, diaries etc.

⁴⁴ A Bates and Z Torres-Fowler, 'ADR for construction disputes during COVID-19: How to manage disputes before and after the dust settles' (*JD Supra*, 4 May 2020)

for expert advice to consultants whose approach is confidential and embedded in cooperation, such as collaborative lawyers and not litigants, who try to keep matters from spilling over to disputes.⁴⁵

Mediation has become quite popular in recent times. The court backlogs as well as other impediments associated with litigation have increased the appetite for this ADR platform as evidenced by the Court Annexed Mediation initiative.⁴⁶ On a global level, contemporary developments such as the Singapore Convention have hastened the legitimacy of mediation worldwide as a solid dispute resolution where one can anchor and foster their professional skills.⁴⁷ With this mind, what does the present crisis imply for mediation? As observed, many of the restrictions of the moment are likely to hamper the traditional perspective of mediation where parties engage within physical environs. The idea of the virtual space, as a platform for mediation, is quickly picking up currency. Parties unable to meet because of the present restrictions can now become a part of a mediation run virtually. These developments have the potential to accentuate many of the advantages associated with mediation such as its relatively reduced cost and speedier resolution.⁴⁸ Indeed, virtual platforms mean dispensing with many of the logistical costs inherent in a physical setting

<https://www.jdsupra.com/legalnews/adr-for-construction-disputes-during-69737/>
accessed 25 June 2020.

⁴⁵ R E Wagner, 'Collaborative Construction Claims Process: Another ADR tool and perhaps the lawyer advocate's best tactic?' (*JAMS Global Construction Solutions*, 2017) <https://www.lexology.com/library/detail.aspx> accessed 29 June 2020.

⁴⁶ Judiciary (Republic of Kenya), 'Judiciary rolls out Court Annexed Mediation to other regions' (*Judiciary*, 23 October 2018) <https://www.judiciary.go.ke/judiciary-rolls-out-court-annexed-mediation-to-other-regions/> accessed 1 July 2020.

⁴⁷ UNCITRAL, 'United Nations Convention on International Settlement Agreements Resulting from Mediation (New York 2018) (the "Singapore Convention")' (*UNCITRAL*, 2018)

https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements accessed 1 July 2020.

⁴⁸ L Dzyuba, N Fedorenko and J Fedorenko, 'Mediation as an Alternative Method of Dispute Resolution in Business' (2017) 5(3) *International Journal of Economics and Business Administration* 21, 28.

such as hiring of rooms, transport etc.⁴⁹ The convenience afforded to the parties, who are able to join the virtual space from any geographical location, may enable greater participation. Often mediations are stalled because one or two important parties are unable to join proceedings due to competing demands. A virtual platform may provide the convenience to get everyone on board and hasten the arrival at a settlement.

The move to a virtual mediation space raises legitimate concerns on whether the unique advantages of mediation can be transposed into this space. At the core of mediation is the ability to create a safe space for the parties. There are many elements to the idea of a safe space. One is confidentiality, where parties feel free to engage in a process and outcome that they know will not be disclosed without their express consent.⁵⁰ Two, the process of mediation is structured to rules of engagement where parties interact on an equal footing and power relations are mitigated, if not eliminated.⁵¹ Three, the person of the mediator is central given their facilitative role and the skills they employ to guide the process towards a win-win outcome.⁵² To successfully function, the mediator needs to read the behaviour in the room, as well as communicate aptly through appropriate body language. Can all of these aspects be transposed into the virtual platform? There is no reason that they cannot, even though admittedly it may require greater effort. Virtual mediations can be run on platforms that are secure from intrusion by hackers and allow for the necessary confidentiality. Of course, this means that such mediations are not recorded in the same way that transcription is not permitted in the physical space. One could also argue that the absence of physical proximity through virtual engagements reduces previously existing power relations since a party is far removed from their

⁴⁹ A Balakrishnan, 'With courts on pause, ADR offers ways to solve disputes online' (*Law Times*, 14 April 2020) <https://www.lawtimesnews.com/practice-areas/adr/with-courts-on-pause-adr-offers-ways-to-resolve-disputes-online/328640> accessed 1 July 2020.

⁵⁰ W Barry, *Appropriate Dispute Resolution* (Wolters Kluwer 2018) 83.

⁵¹ O Shapira, 'Exploring the Concept of Power in Mediation: Mediator's Sources of Power and Influence Tactics' (2009) 24 *Ohio State Journal on Dispute Resolution* 535,551.

⁵² C J Brown, 'Facilitative mediation: The classical approach retains its appeal' (*Mediate*, December 2002) <https://www.mediate.com/articles/brownc.cfm> accessed 1 July 2020.

counterpart. However, the introduction of technology may give rise to other forms of inequality in situations where parties do not have access to similar infrastructure and equipment.⁵³ This remains a complex issue in remote areas and could place the parties in unequal position. The present crisis may present an opportunity for the industry to make the necessary investment in this regard bearing in mind the considerable savings referred to above (such as logistical costs associated with mediation), which could offset costs associated with such investment.

On the question on whether a mediator is hampered by a virtual platform, debate is rife. It has been suggested that something is lost where the mediator cannot read the body language of those present in a room.⁵⁴ It is also suggested that the mediator is unable to project their physical presence in a way that facilitates the engagement of the parties.⁵⁵ While there is some validity to these perspectives, one should also be mindful that a virtual space may introduce elements that counter some of these concerns. For example, virtual engagements allow for close ups where one can better read facial expressions – to discern the parties’ mood and response to ongoing conversations. It is not lost that this may require more efforts by the mediator if the supporting environment for party interaction is to be maintained. S/He may have to be more deliberate and active in engaging parties so that they feel heard. The mediator may also need to work harder in building the confidence of parties in the platform as one through which meaningful conversations can be held. The task is not insurmountable. With the growing use of the virtual space, parties will acclimatise as they have to the other forms of innovation. Impediments associated with infrastructure such as poor network and audibility, are likely to be addressed with subsequent

⁵³ M T Adekilekun, ‘Legal and Infrastructural Challenges to Remote Court Proceedings in Africa’ (*Institute of African Women in Law*, 2020)

<https://www.africanwomeninlaw.com/post/legal-and-infrastructural-challenges-to-remote-court-proceedings-in-africa-during-covid-19> accessed 1 July 2020.

⁵⁴ D Garrie, ‘Confronting the challenges of virtual mediation’ (*Law360*, 1 April 2020)

<https://www.law360.com/articles/1258457/confronting-the-challenges-of-virtual-mediation> accessed 1 July 2020.

⁵⁵ *Ibid.*

technological developments. In this sense, the constraints brought about by C-19 may have opened a new horizon for mediation.

3.2 Arbitration

Arbitration remains the best next alternative where mediation may not result in a settlement. It offers parties the added advantage of an enforceable binding award without the encumbrances of the judicial system such as long delays amidst mounting legal costs.⁵⁶ These advantages of arbitration continue to be discussed by scholars and practitioners alike. What is unique in the context of the pandemic, and similar to the foregoing discussions on mediation, is the impact that the current restrictions may have on arbitral proceedings. How can arbitral proceedings retain their unique advantages in this present context without being hampered by the current restrictions? One possibility is to employ existing arbitral processes that do not require physical meetings such as documents-only procedure and waive the need for a hearing.⁵⁷ While this may not be appropriate for complex arbitrations where the inherent need for cross-examination is key, a documents-only procedure will go a long way towards resolving many claims that are industry specific and relate to issues such as specification of products, intellectual property and small claims in general. A cursory observation of the construction industry will show that a large number of construction adjudications are concluded by documents only.

Disputes that do not lend themselves to a documents-only procedure can still be handled feasibly by employing the same innovation discussed in connection with mediation. In the context of these developments, it is worth noting that the notion of utilizing technology is not new to arbitration. Equally, technology has been acknowledged as a critical add on to the world of dispute resolution from the earliest days of globalisation that saw Online Dispute Resolution (ODR) systems gain currency amidst the new paradigm of a borderless world of

⁵⁶ K Muigua, *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers 2017).

⁵⁷ CMS 'Doing arbitration differently: Documents only arbitration during COVID-19 pandemic and beyond' (CMS, 26 March 2020) https://www.cms-lawnow.com/ealerts/2020/03/doing-arbitration-differently-documents-only-arbitration-during-the-covid-19-pandemic-and-beyond?cc_lang=en accessed 1 July 2020.

finance and capital coupled with advancement in the ICT industry and their bearing upon how business is done.⁵⁸ The restrictions of the present times should be seen as accelerating the reliance on technologically aided dispute resolution platforms. In this regard, the season has been characterised by a strong push for virtual arbitral hearings. It is worth clarifying that virtual hearings are not the same as online dispute resolution (ODR).⁵⁹ The use of technology to hold virtual hearings remotely is meant to connect people, affording an opportunity to replace the real world, offline space, which may not be available to them for some reason (such as difficulty to travel, illness), by an online space.⁶⁰ However, other aspects of the arbitration procedure may not be conducted using online platforms. On the other hand, ODR consists in using information and communication technology to negotiate, mediate, arbitrate, conduct proceedings, and settle disputes exclusively or primarily online.⁶¹ When such ICT platforms used make a significant contribution to resolving disputes, such online resolution equates to ODR.

Using a platform for virtual hearings carries with it many benefits. Parties need not be constrained any longer by physical proximity; they can proceed to initiate, hear and conclude a dispute with greater flexibility – and as some may argue – at a faster and cheaper than previously.⁶² Cost, speed and flexibility are all pegged on the eased logistical burden afforded by the platform.⁶³ Logistic conveniences also mean that one does not have to leave the privacy of their

⁵⁸ E Katsh, *ODR: a look at history. Online dispute resolution: theory and practice. A treatise on technology and dispute resolution* (The Hague: Eleven International 2012).

⁵⁹ M Philippe, 'Offline or Online? Virtual Hearing or ODR?' (*Kluwer Arbitration Blog*, 26 April 2020) [http://arbitrationblog.kluwerarbitration.com/2020/04/26/offline-or-online-virtual-hearings-or-odr/?doing_wp_cron=1594039552.4933888912200927734375#:~:text=It%20is%20worth%20clarifying%20that,resolution%20\(%E2%80%9CODR%E2%80%9D\).&text=ODR%20consists%20in%20using%20information,disputes%20exclusively%20or%20primarily%20online.](http://arbitrationblog.kluwerarbitration.com/2020/04/26/offline-or-online-virtual-hearings-or-odr/?doing_wp_cron=1594039552.4933888912200927734375#:~:text=It%20is%20worth%20clarifying%20that,resolution%20(%E2%80%9CODR%E2%80%9D).&text=ODR%20consists%20in%20using%20information,disputes%20exclusively%20or%20primarily%20online.) accessed 1 July 2020.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ BLG, 'Virtual disputes: Best practices and benefits' (*BLG*, 4 May 2020) <https://www.blg.com/en/insights/2020/05/virtual-disputes-best-practices-and-benefits> accessed 2 July 2020.

home and incur travel costs.⁶⁴ All of this makes things simpler and attends to the questions of access to justice and participation. As noted earlier in the discussions relating to virtual mediation, the close up in a virtual setting may provide greater intensity to the process and more focus. This may foster the cross examination as witnesses can be read better through camera and zoom; the technology of which is likely to improve in the future. One could also argue that this close up attention increases the focus of those involved and translate to more efficiency in concluding proceedings.

While the benefits are numerous, one cannot shrug away real challenges associated with moving arbitration hearings to a virtual platform. Two in particular are worth mentioning: technical challenges associated with the infrastructure, and the procedural challenges that may arise from a party unwilling to adopt the same.⁶⁵ Understanding these challenges presents an opportunity to develop best practices around these areas going into the future. On the first of these – the technical challenges – It is clear that the success of virtual arbitral proceedings depends on IT infrastructure. Considerations arise around whether the technology and infrastructure available. Do parties have the equipment, hardware, software, connection speeds etc. These questions are particularly relevant to the context of developing countries where remote rural areas may experience challenges in these aspects. Even where the technology is available, the video and sound quality is a factor upon which parties remain dependant. Furthermore, persons that are not techno-savvy will experience more challenges in navigating the platform than counterparts who are conversant with basic technology.⁶⁶ This could compromise the equality of parties and impact upon due process issues, undermining the fundamental

⁶⁴ R Byrne. 'The Virtues of Virtual ADR' (*National Arbitration and Mediation*, 20 March 2020)<https://www.jdsupra.com/legalnews/the-virtues-of-virtual-adr-57981/> accessed 1 July 2020.

⁶⁵ Lexis Nexis 'Advocacy in virtual arbitration hearings-a practical guide' (*LexisNexis*, 22 June 2020)
<https://www.lexisnexis.co.uk/blog/covid-19/advocacy-in-virtual-arbitration-hearings-a-practical-guide> accessed 1 July 2020.

⁶⁶ U J Orji, 'Technology Mediated Dispute Resolution: Challenges and Opportunities for Dispute Resolution' (2012) 18 *Computer and Telecommunications Law Review* 124, 128

arbitral principle of affording both parties a fair and reasonable opportunity to present their case.⁶⁷ Equally important is the question of the security of the platform.⁶⁸ Certain platforms are capable of and have been hacked in the past e.g. Zoom. This could undermine the privacy and confidentiality of the process – a unique advantage that arbitration enjoys over the public court process.⁶⁹

These ICT challenges may be compounded by knee jerk reactions by legal practitioners comfortable with the status quo and sceptical about the new platforms. The legal profession has been faulted for being conservative, sometimes to the detriment of their client. Some legal practitioners could use the technological challenges as part of their grounds for opposing virtual proceedings, and in particular the conduct of a virtual hearing.⁷⁰ They could point at the unreliable features of such technology e.g. connectivity, speed etc. as a hindrance to due process. As noted earlier, such parties may argue that under this platform the arbitrator and counsel for the parties do not have demeanour to judge witnesses. In certain cases, they could also point at the lack of provision for virtual proceedings in statutory instruments or rules of arbitral institutions, arguing that these contemplate physical hearings and not virtual hearings. When faced with this reluctance one has to reflect upon the question of the parties autonomy in choosing the manner they would like to proceed with their dispute, particularly as many parties may not have contemplated the possibility of virtual proceedings prior to the emergence of the C-19 pandemic and its impact on dispute resolution platforms.

Best practice is emerging in response to the challenges cited above. As far as the ICT related challenges are concerned, it is generally now becoming clear that the disruptions of the moment present an opportunity to invest in ICT infrastructure. The potential to divert considerably savings associated with the logistics of physical interactive platforms (such as meeting rooms, travel, accommodation etc.) could be ploughed back into developing the necessary

⁶⁷ Arbitration Act, section 19.

⁶⁸ *Supra* note 65.

⁶⁹ Orji, *supra* note 66 at 128 and 132.

⁷⁰ *Supra* note 65.

infrastructure to accommodate virtual platforms. Where parties have access to the necessary ICT infrastructure, preparatory activities may mitigate the ICT related challenges and allow the smooth running of proceedings. Such preparatory activities include dry run tutorial sessions to test the technology. The participants must plan for the possibility that someone will be disconnected at some point during the hearing and exchange contacts while agreeing on how to respond in the event of such occurrences. Also important is the building the capacity for all to participate effectively to the extent required. These include training for arbitrator, parties to the dispute, witnesses, arbitral assistants, stenographers etc. In this regard, parties should be encouraged to access support ICT personnel to guide them on technical matters. Likewise, identifying the appropriate venue with hearing rooms that are audible friendly (with no distracting noises etc.) and visually perceptible (not dark with good lighting) will be crucial to the success of proceedings. A number of arbitral institutions have prepared checklist on the above to assist in the preparation of activities.⁷¹

Given that such processes are grounded upon party autonomy, an agreement amongst disputants will greatly assist in providing the necessary consent to the use of virtual platforms has been granted. The dilemma of course arises where one parties is unwilling to proceed in this manner. Even in the absence of such consent by a party, there may be grounds upon which a tribunal directs in favour of virtual platforms. In so doing it may reach to the cornerstone upon which the tribunal's powers are hinged across a wide number of jurisdictions – the need to adopt proceedings that expeditiously resolve the disputes while affording the parties a fair and reasonable opportunity to present their case.⁷² One could argue with the uncertainties imposed by the pandemic, that holding proceedings in abeyance until normalcy would be an infringement of the tribunal's duty to adopt the most expeditious mode of proceedings. Tribunals could point at the precedent being created by recent developments among the courts to adopt virtual proceedings in order to unlock the backlog building up because of the present disruptions. The willingness of courts, which are

⁷¹See the Chartered Institute of Arbitrator's Guidance Note on Remote Dispute Resolution Proceedings 2020 Checklist (Appendix 1).

⁷² Arbitration Act, section 19 and 20(2).

conservative by nature, to incorporate technology, in their procedures in the face of this new reality, strengthens the case for similar incorporation in the circles of arbitration. As noted earlier, even before the pandemic arbitral practice had already employed such innovation to expedite proceedings and reduce costs. Many institutions have developed platforms enabling arbitration proceedings that can be fully remote—i.e., where submissions are filed exclusively by electronic means and no in person hearings are required. Alongside arbitral institutions, specialized service providers have developed virtual platforms that enable remote hearings and other sessions. More recently, key arbitral institutions have used the current crisis to accelerate the development of rules relating to each of these aspects of virtual arbitration.⁷³ All the above, together with the prospects available to mitigate the impact of technology on due process, presents formidable reasons upon which the tribunal could rely when directing in favour of virtual proceedings.

In moving forward with virtual arbitration, there will be need for upfront consideration of preliminary requirements specific to these proceedings such as when to log on, online etiquette, ability to multi-task, potential disruptions, ensuring confidentiality amidst electronic recording, ensuring parties have all the documents they need, suitable notice is given to witnesses etc.⁷⁴ For purposes of the future, parties may also need to decide whether to add clauses in contract with specific reference to virtual proceedings. This could be done at the pre or post dispute stage and be tailored to the specific requirements of the parties and the dispute. Local arbitral institutions will also need to develop rules to support the process and allow for hearings to be conducted remotely or virtually. Such rules should provide for the exchange of documents and witness examination detailing best practice on how depositions may be taken virtually, direct testimony received, expert evidence and the cross examination in general. The tribunal and the parties will also need to be conscious about the unique context of virtual hearings when allocating time. A virtual hearing may require

⁷³ For example see the Chartered Institute of Arbitrator’s Guidance Note on Remote Dispute Resolution Proceedings 2020. Also see the AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties Utilizing ZOOM by the American Arbitration Association in collaboration with the International Centre for Dispute Resolution.

⁷⁴ *Supra* note 65.

more time than an in-person hearing, so having a schedule (and adhering to it) is important.⁷⁵ Counsel should prepare a detailed schedule and submit it to the arbitrator a few days in advance of the hearing to encourage efficiency. All in all, in order to help parties obtain prompt resolution of their disputes and move forward with business during this time of the pandemic, virtual arbitration may be an attractive option. This may be so when one contemplates the potential backlog expected once the courts resume full operations.

4.0 Conclusion

It is evident that events flowing from the C-19 pandemic are sure to set off numerous disputes between parties in construction related contracts. Delays in completion, project acceleration, suspensions and termination of works due to the pandemic will bring about unforeseen cost and time implications which will trigger contractual disputes. Parties will need to rethink dispute resolution methods, moving from an emphasis on their contractual rights to collaborative means of project completion and risk redistribution. Mediation and arbitration remain some of the most popular mechanisms for dispute resolution because of their cost and time efficiency as well as emphasis on confidentiality and party equality. There is need for innovation in ADR to ensure that resolution of disputes is not put on hold on account of the C-19 situation. The present restrictions occasioned by the pandemic have increased the use of virtual platforms in ADR which brings with it numerous benefits including removal of logistical costs, expedition of dispute resolution and enhanced participation. Nonetheless, the introduction of technology creates unique challenges for ADR such as limitations in access to technological infrastructure, connectivity issues, limited knowledge on use of technology and unwillingness by parties or their representatives to make use of virtual platforms. Undoubtedly, as long as the pandemic persists, ADR will continue to rely on technology. As such, more needs to be done to ensure success of virtual ADR processes. Investing in ICT infrastructure, conducting preparatory activities before virtual sessions and training of participants are some of the ways of overcoming these ICT related challenges. Local arbitral institutions will also be very instrumental in the

⁷⁵ *Supra* note 63.

process by formulating rules that support use of technology in ADR. All in all, ADR could benefit from the use of technology and innovation.

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Reform of the African Continental Free Trade Area Agreement (AfCFTA) Dispute Settlement Mechanism: The Trinity of Decolonisation, Decentralisation and Devolution

*By: Wilfred Mutubwa**

Introduction

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

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

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

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

Conceptual Basis

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

² See, for example Vanni A and Gathii J “Did Decolonisation Stall in the Global South? A Conversation with Ian Taylor: Symposium Introduction”

<https://www.afronomicslaw.org/2020/10/18/did-decolonisation-stall-in-the-global-south-a-conversation-with-ian-taylor-symposium-introduction/> accessed on 28th

December 2020; see also, Fagbayibo B “Of Integracidares and the Contemporary Publics of Continental Integration in Africa”

<https://www.afronomicslaw.org/2020/10/28/of-integracidares-and-the-contemporary-publics-of-continental-integration-in-africa/> accessed on 28th December

2020. In the practice of international arbitration, the equal representation pledge is an affirmative action plan that seeks to advance the participation of arbitrators and lawyers from Africa and the developing world, hitherto marginalised, in that sphere. See, <http://www.arbitrationpledge.com/about-the-pledge> accessed on 28th December 2020.

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

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

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

Weaknesses of the Current System

The integration of markets and trade policies is a cumbersome process. It has to be undertaken with the acknowledgement of the diversity in socio-politico-legal and cultural backgrounds of member states. In reference to building strong supranational institutions, Fagbayibo notes that "it demands cautious and calculated steps, tactful negotiations, constant assurances and compromises, and the skilful management of national egoisms."³

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

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

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

Most African integration efforts are mostly intergovernmental and state-centric. Although Africa's economic integration also exhibits functionalist and neo-functionalist approaches to integration, it is intergovernmentalism that finds favour among African states. This is partly because intergovernmentalism seems to assure states of retention of their sovereign authority with little, if any, of its authority ceded to the integration organs. It is also partly embraced because of the intergovernmental origins of Africa's continental integration under the now defunct Organisation of African Unity (OAU). The OAU was essentially an intergovernmentalist approach to continental integration. Its successor, the AU, has followed the same approach, albeit with attempts at establishing supranational organs such as the ACJ&HR.

Overall, trade and investment dispute settlement in Africa take two forms, the judicial (adjudicative) and the diplomatic (non-judicial). Adjudicative methods

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

offer legally binding outcomes, while diplomatic ones rely on the goodwill of parties for their observance.

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

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

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

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

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

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

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

The AU has set 2030 as the year in which it will decide the readiness of the continent for the creation of a single government and the form it should take. This date coincides with that set for the complete and successful implementation

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

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

of the AEC Treaty. If successfully implemented, the integrated continental court should offer a useful tool for evaluating the readiness of the continent, in the creation of the single government and the appropriate form it should take.

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

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

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

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

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

(i) Supremacy

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

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

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

To give effect to this recommendation, there is a need to amend the treaties establishing regional courts in Africa so as to expressly provide for the hierarchical structure of the African Court system, with the ACJ&HR at the apex

⁸ Article 28 of the ACJ&HR Statute.

while the regional courts serve as the courts of first instance. This recommendation is also in furtherance of the step-wise integration approach articulated in Article 6 of the AEC Treaty. Furthermore, this recommendation is in line with Article 3(l) of the AU Constitutive Act, which enjoins the AU to harmonise the policies and norms of the RECs under a continental umbrella.

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

(ii) Direct effect

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

(iii) The Use of the Preliminary Ruling Procedure

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

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

It is further recommended that this procedure be available to national and regional courts before they pronounce their final judgment on a matter relating to African community law. It is proposed that this procedure be modelled along the lines of Article 234 of the Treaty establishing the European Community, in terms of scope of matters to be referred.⁹ The EAC and COMESA models can also be adopted.¹⁰

(iv) Advisory Opinions

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

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

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

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- a) the interpretation of this Treaty;*
- b) the validity and interpretation of acts of institutions of the community and the ECB;*
- c) the interpretation of Statutes of bodies established by an act of the council, where those statutes so provide.*

Where such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law, the court or tribunal shall bring the matter before the Court of Justice.

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

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

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

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

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

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

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

This recommendation is also aimed at enhancing the independence of the Court in general and insulate it from the control of state parties besides ensuring that only persons who possess the highest competence and qualifications are appointed to these positions. Through this move, it is also anticipated that the court's independence will be underwritten and the jurisprudence emanating from the court will be of the highest quality.

(vi) Financing the Expanded ACJ&HR

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

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

The third proposal is attributed to reforms initiated by the immediate former AU Chairman, President Paul Kagame of Rwanda.¹² The model, aimed at a sustainable financing of the AU and reducing its dependency on the EU and Asian support, involved the collection of a 0.2% levy on all imports into all AU member states from non-member states to fund the AU operations, projects and its activities.¹³ Since most African states are net importers of goods, mainly from Europe and Asia, the intention is to indirectly pass the cost of funding the AU to the countries exporting into Africa. This model is yet to find traction with

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

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

most members yet to implement it.¹⁴ However recent statistics indicate that more African countries are willing and have started implementing the levy.¹⁵

There is a fourth model that is connected to the third. It involves regional economic hegemony that stand to benefit most from the free trade arrangements entered into at both the continental and sub-regional levels. Countries such as South Africa in the south, Nigeria in the west, Kenya in the east, and Egypt in the north form the regional economic hegemony in Africa.¹⁶ This is primarily because these regional economic powerhouses exert influence in their respective economic blocs through investments, macro-economic stability and general economic strength. These regional hegemony can play a critical role in ensuring the success of continental integration as a whole.¹⁷ Indeed, countries such as Egypt and South Africa have already indicated their willingness to collect, through other means, the levy necessary to finance the operations of the AU organs.¹⁸ Countries that are willing to pay beyond the prescribed 0.2 % levy should by all means be encouraged to do so.

A combination of the four models for financing the court will suffice. Each approach addresses different aspects and unique circumstances. Reasonable court fees paid by users of the court will serve two primary purposes; to deter frivolous claimants, and to ensure that cost is not a deterrent to accessing justice.

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

¹⁵ Ibid.

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

¹⁷ Ibid, 55-56.

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

It will also mitigate the financial hardships which may occur due to the chronic delays and defaults by African states in meeting their subscription obligations to regional organs.

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

(vii) Access by Individuals

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

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

The ACJ&HR and AfCFTA dispute resolution systems only attends to (public law) inter-state disputes without addressing the private party disputes at the micro level. Interestingly, the current regime also seems oblivious to the fact that

states can also be private legal persons while acting in a commercial capacity through state entities and corporations.

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

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

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

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

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

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

(viii) Enforcement of Decisions

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

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

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

A hybrid of the foregoing three approaches will suffice. A unit established in every member state for monitoring implementation of the court's decisions, similar to the one used by ECOWAS is proposed. The direct effect of decisions of a supranational court/arbitral tribunal without domestic recognition procedures has been largely successful in the Organisation for the Harmonisation of Business Law in Africa (OHADA) region. It has therefore been a testament to the ability by Africans to embrace supranational regulation and dispute resolution, particularly in commercial matters.

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

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

However, for it to be effective, the PAIC dispute settlement system should allow not only for state-state but also investor – state dispute resolution. This should

be for both African and foreign investors. To give access to its dispute settlement system, the PAIC should merge and harmonise the sub-regional codes and devolve its tenets to RECs and national levels.

A commercial and investments disputes section of the ACJ&HR Trade and Investment Chamber specifically entrusted with the role of intra-Africa investment arbitration will ameliorate the problems arising out of the proliferation of commercial and investment arbitration in Africa. Firstly, it will lead to the harmonisation and development of an African community investment law. Secondly, it will also develop the capacity and experience of African Arbitrators in international arbitration, as well as in readiness for international assignments. Thirdly, it will also offer, through the ACJ&HR, a recognition and enforcement mechanism for arbitral awards and therefore, avoid or limit interaction with domestic courts which are perceived to be state influenced. This will give comfort to the intra-African and foreign investors, of the transparency and integrity of the dispute settlement system. To this end, it will be imperative that the arbitrators on the ACJ&HR roster be recruited competitively, on merit, without the option of states nominating members to the panel.

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

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Regional Courts and Arbitration: The Jurisdiction of the Comesa Court of Justice (CCJ)

By: Honourable Lady Justice Mary Kasango

*

Introduction

1. This paper aims to discuss the arbitral jurisdiction of the **COMESA Court of Justice (CCJ)** as provided under **Article 28** of the **COMESA Treaty** (the Treaty)¹. The paper will address the advantages as well as the limitations of the legal framework for arbitration under the Treaty. It will also highlight the salient features of the Court's Arbitration Rules (2018) and how they incorporate key attributes of international arbitration.

Common Market for East and Southern Africa (COMESA)

2. **Common Market for East and Southern Africa (COMESA)** is a free trade area and was established in 1994 to replace the **Preferential Trade Area for East and Southern Africa (PTA)**. It is stated in the Treaty that it was established as an organisation of free independent sovereign states. It is one of the eight **Regional Economic Communities (RECs)** which are the building blocks of the **African Economic Community** established under the 1991 Abuja Treaty². These RECs provide the overarching framework for continental economic integration.

* Judge - First Instance Division Comesa Court of Justice Presented at The CIArb Kenya Branch 4th Arbitration Conference

¹<<https://www.comesa.int/wp-content/uploads/2020/07/Comesa-Treaty.pdf>> accessed on 27 October 2020.

² The Treaty Establishing the African Economic Community.

Presently, COMESA is comprised of 21 states that is **Burundi, Comoros, Djibouti, Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Eswatini, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia and Zimbabwe**. Most recently, **Somalia and Tunisia** have also joined COMESA.

The COMESA Court of Justice (CCJ)

3. The **COMESA Court of Justice (CCJ)** is one of eight organs of COMESA created under **Article 7** of the Treaty as the judicial arm of the Common Market. The Court replaced previous judicial organs, which existed within the PTA, that is the PTA Tribunal and the PTA Administrative Appeals Board.³

The primary function of the Court is to uphold the rule of law in the application and interpretation of the Treaty, and to adjudicate upon all matters referred to it under the Treaty.⁴ In that way it supports regional integration by ensuring certainty in the Common Market Law.

The court sits as **First Instance Division (FID)** (with 7 judges) and as an **Appellant Division (AD)** (with 5 judges.)

To ensure the independence of the Court, the Treaty provides that the Council shall give directions to all other subordinate organs of COMESA other than the Court in the exercise of its jurisdiction.⁵

The CCJ is unique because it has a hybrid jurisdiction for adjudication as well as undertaking arbitral process.

Adjudication

Legal or natural persons who are resident in a COMESA Member State may file a reference before the Court under Article 26 of the Treaty. The reference may be to challenge an act, decision, regulation, or directive of the Council or of a Member State which is considered unlawful or an infringement of the Treaty.

³ Article 176.

⁴ Article 19 – 36.

⁵ Article 9 (2) (c).

Article 26 provides:

Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the council or of a Member State on the grounds that such an act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty:

Provided that where the matter for determination relates to any act, regulation, directive by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national court or tribunal of the Member state.

Article 26, as seen above, imposes a requirement for exhaustion of local remedies in line with the International Law rule on exhaustion of local remedies. The rule is intended to give the Member State where the alleged unlawful act or infringement occurred, an opportunity to resolve the dispute using its domestic dispute resolution mechanisms before referring the matter to regional or international tribunals. This requirement is not unique to the CCJ as other international and regional courts have declared suits filed in their courts before exhaustion of local remedies as inadmissible. In the *Case Concerning Elettronica Sicala SpA (United States of America v. Italy)* ('ELSI')⁶, International Court of Justice affirmed the need for the exhaustion of local remedies. The African Court on Human and People's Rights held in *Peter Joseph Chacha v. Tanzania*⁷ that exhaustion of local remedies was not a matter of choice but was a legal requirement in international law.

The COMESA Court of Justice First Instance Division, in *Intelsoimac versus Rwanda Civil Aviation Authority*⁸, dismissed the claim because it was 'inadmissible by reason of the failure by the Applicant to exhaust local remedies before filing the Reference in terms of Article 26 of the Treaty'. In *The Republic of Mauritius*

⁶ (1989) I.C.J. Rep. 15 (Judgment of 20 July 1989).

⁷ App. No. 003/2012, Judgment of 28 March 2014, para. 142.

⁸ Reference No. 1 of 2009.

v Polytol Paints & Adhesives Manufacturers Co. Ltd)⁹, in a Ruling on a Preliminary Objection, the Court, while holding that the Respondent (Polytol), had exhausted local remedies, clarified that for purposes of Article 26, a party could approach the Court directly where it was clear that the available domestic remedies were neither effective nor sufficient.

Therein lies a window that could enable parties to file cases directly to the CCJ provided they are able to convince the Court that exhaustion of local remedies was not a viable option.

Arbitral Jurisdiction of the CCJ

4. The rule on exhaustion of local remedies has not been enforced when it involves arbitral matters brought pursuant to Article 28 of the Treaty. That Article grants the CCJ jurisdiction to hear and determine a matter arising from an arbitration clause contained in a contract which confers such jurisdiction to which the Common Market or any of its institutions is a party or from a dispute between Member States regarding the Treaty if the dispute is submitted to it under a special agreement between the Member States concerned.

Article 28 of the Treaty is in the following terms:

The court shall have jurisdiction to hear and determine any matter:

- (a) Arising from an arbitration clause contained in a contract which confers such jurisdiction to which the Common Market or any of its institutions is a party; and*
- (b) arising from a dispute between the Member States regarding this Treaty if the dispute is submitted to it under a special agreement between the Member states concerned.*

From the above provision, it is clear that the arbitral jurisdiction of the CCJ is two-pronged, that is-

⁹ Preliminary Application No. 1 of 2012 (Arising from Reference No. 1 of 2012).

- a. Reference to the Court by virtue of an arbitration clause contained in a contract which confers such jurisdiction to the CCJ where the Common Market or its institutions is a party - Article 28(a); and
 - b. Reference to the Court by virtue of a Special Agreement between Member States- Article 28(b).
5. The Jurisdiction is therefore conferred by Article 28 (a) of the Treaty and comes with a qualification that at least one party should be either the Common Market or any of its institutions. Therefore, commercial disputes between private parties cannot be brought to the Court for arbitration. The jurisdiction granted to the COMESA Court by Article 28(b) of the Treaty is restricted to Member States. Therefore, Article 28 has its inherent limitations of access to the Court.
6. The CCJ has not demanded the exhaustion of local remedies for arbitral matters brought to it under Article 28, opting instead, to respect the principle of party autonomy as espoused in arbitration. Furthermore, unlike under Article 26, Article 28 makes no mention of exhaustion of domestic remedies as a prerequisite to filing an arbitral claim. Therefore, unless it is expressly provided that parties shall only have recourse to arbitration on exhaustion of local remedies, the Court assumes that the parties intended to exclude any other remedy.

Jurisdiction conferred by other COMESA legislation

7. Besides the Treaty establishing the Common Market, the most prominent secondary sources of COMESA law consist of **regulations, directives, and decisions** passed by the Council. It should be emphasised that regulations are binding on all the Member States in their entirety.

COMESA Regulations on Trade Remedies and safeguards

8. In 2002 the Council approved the COMESA Regulations on Trade Remedies and Safeguards¹⁰ to operationalise Treaty provisions on trade remedies and safeguards¹¹ and to regulate the application for and conduct of trade remedy investigations within the Common Market.

9. The Regulations provide for a hierarchical dispute resolution mechanism in case of conflict. The Regulations provide that in respect of trade disputes amongst Member states it shall in the first instance be settled amicably and in the absence of settlement of the dispute the Secretary General shall establish a panel of trade experts to resolve the issue. Under Regulation 45, a party aggrieved by the finding of the panel of trade experts has a right to appeal against the findings and recommendations of the panel to the CCJ for Arbitration under Article 28 of the Treaty. Regulation 45 is in the following terms:

If any party to the dispute is dissatisfied with the findings and recommendation (s) of the Panel, the party shall, within 45 days of the submission of the findings and recommendations to the Parties and the Secretary General refer the matter to the COMESA court of Justice for arbitration under Article 28 of the Treaty.

COMESA Regulations on the application of Sanitary and Phytosanitary measures (SPS)

10. Driven by the desire to promote regional and international trade in food and agricultural commodities, the council passed the COMESA Sanitary and Phytosanitary standards (SPS) in 2010¹².

¹⁰<<https://comesacourt.org/wp-content/uploads/2020/01/COMESA-Regulations-on-Trade-Remedy-Measures-October-2002.pdf>> accessed on 27 October 2020.

¹¹ Article 51, 52 and 61.

¹²<<https://comesacourt.org/wp-content/uploads/2020/01/COMESA-SPS-Regulations-2010.pdf>> accessed on 27 October 2020.

Under Regulation 23, matters relating to SPS standards may be referred to the CCJ in accordance with Article 28 of the Treaty if the dispute between Member States fails to be resolved by the Committee on Agriculture as established under Article 15 (b) of the Treaty.

Analysis of the Arbitration Rules of the COMESA Court of Justice 2018

11. In 2018, the CCJ amended its Arbitration Rules (2003) to capture modern best practices and trends in international Arbitration. The amendment was further triggered by the division of the Court into two tiers, the **FID** and the **AD** in 2005, coupled with the need for an effective, time saving, reliable and cost-effective dispute resolution mechanism.

In analysing of the rules, we will consider features that make the CCJ unique as an arbitral Court, and some of salient provisions in the rules that can be a benchmark to improve arbitration as a form of dispute resolution in regional courts.

RULE 3 - MODE OF SERVICE

12. Under the Rules, the accepted modes of service are personal service or registered post, by courier or similar system of delivery, facsimile or electronic communication with proof of delivery, or by any other means as may be directed by the Registrar.

In regard to service through electronic communication with proof of delivery, the court in 2019 adopted the COMESA Digital case system through which parties are enabled to file and serve documents simultaneously and remotely from their respective locations online by uploading them onto the system. The opposite party and Court are notified by a notification email generated by the system in real time. This has resulted into increased accessibility and lowered costs of arbitration.

RULE 7 - APPOINTMENT OF ARBITRATORS

13. Under the Rules the Assigning Authority, that is the Judge President of CCJ, is empowered to appoint an arbitral Tribunal from among the sitting judges of the Court. The parties under the Rules may agree on the number of Arbitrators and in the absence of agreement the Assigning Authority shall decide on the number of arbitrators. The arbitral Tribunal can be of one, three, or five judges, as the case may be. It is of interest to note that the Assigning authority can, and has done so in the past, appointed arbitral Tribunals of judges from the First Division and the Appellant Division sitting together.

RULE 8 - PRELIMINARY MEETING.

14. Under this rule, the arbitral tribunal shall within 30 days of being appointed hold a preliminary meeting to establish a schedule of conduct of proceedings and procedures to be adopted.

According to Dr. Kariuki Muigua¹³ the utility of preliminary meeting is mainly to help clarify and make certain matters arising under the arbitration so as to avoid misunderstandings and delays in future. The preliminary meeting provides a setting for each party to assess each other's case and an opportunity for them to narrow the dispute to specific issues amenable to a decision by the arbitrator. This meeting gives each party a chance to hear the other's side of the story and, therefore, be able to appraise the strengths and weaknesses of its case in comparison with that of the opposing party.

Since adoption of the 2018 Arbitration Rules, preliminary meetings have reduced time within which arbitrations are concluded significantly.

¹³ Preliminary Proceedings and Interlocutories: The Birth, Teething, Immunization and Weaning of Arbitration Proceedings, <http://kmco.co.ke/wp-content/uploads/2018/08/079_prel_proceedings_2010.pdf> accessed on 21 October 2020.

RULE 9 - CHALLENGE OF ARBITRATORS

15. A party can challenge the appointment of an arbitrator for alleged lack of impartiality or independence. A party who intends to challenge the appointment of an arbitrator has to do so within fifteen days after the constitution of Arbitral Tribunal. On such challenge being presented unless the other party agrees to the challenge the Tribunal shall decide on the merit of the challenge on affording the parties opportunity to comment on the same.

The Rule does also provide that a judge has a duty to disclose any circumstances which raise doubt of impartiality

RULE 12 JUDICIAL SEAT OF ARBITRATION

16. Judicial seat shall be designated by the parties or the Tribunal if so authorised by the parties. In the absence of such authorisation the seat is determined by having regard to the parties' agreement and other relevant factors.

RULE 14 - LANGUAGE

17. The language of arbitration proceedings shall be any the official language of the Common Market. The COMESA official languages are English, French, and Arabic

RULE 24 - EMERGENCY ARBITRATION

18. In the Court's repealed Arbitration Rules 2003, a party had no recourse to arbitration to preserve the status quo, conserve assets or evidence; or seek other interim relief until a tribunal had been duly constituted. To obtain such relief parties resorted only to national courts.

However, with the amendment of the rules, a party in need of prompt interim relief may apply for and receive a decision from an emergency arbitrator where no tribunal has yet been constituted.

Schedule 1 to the rules lays down in detail the procedure for application of emergency measures, appointment, and challenge of an emergency arbitrator place of arbitration, jurisdiction and arbitrability of issues, emergency orders and awards.

RULE 30 - FORM AND EFFECT OF THE AWARD

19. Under this rule, the tribunal has jurisdiction to make a final award, interim, interlocutory and or partial awards. The final award made by the arbitral tribunal is final and binding on the parties.

This provision carries the core principle of finality in arbitration because unlike most arbitral regimes where decisions are can be reviewed by national courts or appealed against, final awards under the CCJ arbitral regime are insulated against appeals under Rule 30 (4), which states that by adopting these Rules, the Parties waive their right to any form of appeal or recourse to a court or other judicial authority in so far as such waiver is valid under the applicable law. This therefore prevents over adjudication of a dispute.

POST AWARD- REMEDIES

20. Since awards are final and binding, the award is not subject to any remedy except those provided for in the Rules as post the award which include -

- i. Rule 33 - Interpretation of Award,
- ii. Rule 34 - Correction of Award, and
- iii. Rule 35 - Additional Award.

These remedies afford the court an opportunity to correct any mistake or clerical error that could have been inadvertently missed by the arbitral tribunal when making the award or to grant claims presented in the arbitral proceedings but omitted from the award.

RULE 29 (2) - ENFORCEMENT OF THE AWARD.

21. This rule provides that the award or other decision shall be enforceable in terms of Article 40 of the Treaty which states that:

‘The execution of a judgment of the Court which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Member State in which execution is to take place.....’

It is important to note that since awards made by the Court are final and binding on the parties and are not subject to review by national courts in Member States, by submitting to the jurisdiction of the Court in terms of Article 28 of the Treaty, parties are deemed to have undertaken to implement the resulting awards without delay.

In Conclusion, the CCJ plays an important role in the adjudication of matters brought before it in relation to interpretation and application of the Treaty, and its role as a court of arbitration under Article 28. The Court is alive to the shifting trends in arbitration, and by revising its Rules it is propping itself to play a pivotal role in dispute resolution within the COMESA Community.

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The Arbitration Act, Zambia: Peculiarities and Implications*

By: *Bwalya Lumbwe***

Abstract

The Zambian Arbitration Act No. 19 of 2000 is based on the model law prepared and promoted by the United Nations Commission on International Trade Law, specifically on International Commercial Arbitration of 1985. The arbitration Act contains both modified and the original model law provisions and additional provisions over and above those of the model law. Among the additions is the provision that a body, other than a court, that appoints arbitrators, must be recognised as an arbitral institution under the provision of the arbitration Act in order to perform such a function. However, under its own legislation, the Engineering Institution of Zambia, a professional body, is required to serve as an arbitral institution and regularly appoints arbitrators. The article examines the relationship of this provision vis-à-vis the arbitration Act and concludes that the Engineering Institution of Zambia is not an arbitral institution within the terms of the arbitration Act. The article further concludes that the resultant awards from arbitral appointments made by the Engineering Institution of Zambia acting as an arbitral institution are likely to be set aside by a court of law on account of illegality. The arbitration Act also introduced a code of conduct backed by statutory regulations binding all arbitrators conducting arbitral proceedings in Zambia, a peculiarity. On this issue the article deduces that, the code of conduct is of no effect in terms of professional negligence regulations as it offends the provisions in the arbitration Act. Lastly, the article examines waiver provisions in the arbitration Act, concluding that these are subjected to further limitations imposed by case law resulting in a fundamental effect on the finality of the arbitral process and may result in an abuse of the arbitral process by a party.

* The article is based on an 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 by the author. However, significant changes have been made to the body of the paper and new conclusions have been reached.

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1.0 Introduction

The Arbitration Act No.19 of 2000¹ (AA2000) is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration as adopted by UNCITRAL on 21st June 1985('Model Law').² The AA2000 comprises of three distinct segments.³ The first segment consists of modifications to the Model Law and additional or new provisions.⁴ The second segment of the AA2000 is the First Schedule,⁵ which contains, in its entirety, the 1985 Model Law. The provisions under the Model Law that are modified are clearly identified and form part of the first segment of the AA2000. The additions, as are the modification to the Model Law, are also contained in the first segment of the AA2000 whose provisions are referred to as sections. On the other hand, the provisions under the Model Law, contained in the First Schedule, are referred to as articles. Users must, thus, note that some articles in the model law are not applicable as they have been modified⁶ then added as sections in the first segment of the AA2000.⁷

The Second Schedule, forms the last segment comprising the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as adopted by the

¹ Found at <<https://zambialii.org/zm/legislation/act/2000/19/aa2000137.pdf>> accessed 10th October 2020.

² For confirmation refer to the introductory section of the AA2000. The Model law is found at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf> accessed 10th October 2020.

³ For a detailed structure of AA2000 refer to Bwalya Lumbwe, 'Issues in Arbitration in Zambia: Challenges Pertaining to the Arbitration Act, Related and Subsidiary Legislation' (LLM/MSc Dissertation, The Robert Gordon University, Aberdeen 2017) chap 2.

⁴ For a full description of modified and additional provisions See, Bwalya Lumbwe, 'Issues in Arbitration in Zambia: Challenges Pertaining to the Arbitration Act, Related and Subsidiary Legislation' (LLM/MSc Dissertation, The Robert Gordon University, Aberdeen 2017) chap 2.

⁵ See AA2000, 161.

⁶ Some modified in terms of title and content or both.

⁷ The following sections replace articles in the model law: s 3/ art 1; s 9 / art 7; s10 / art 8; s11 / art 9; s12 / art 11; s 13 / art 15; s 14/ art 17; s15 / art 25; s16 / art 31; s 17 / art 34; s18 / art35; s 19/ art 36.

United Nations Conference on International Commercial Arbitration at New York on the 10th of June 1958.⁸

Amongst the additions or new provisions in the first segment of the AA2000 is the introduction of the concept of an arbitral institution,⁹ which is a body, other than a court, that is charged with authority to appoint arbitrators under certain circumstances.¹⁰ An arbitral institution is required to be certified as such under the provision of the AA2000.¹¹

Additionally, on its enactment into law on the 29th December 2000, the AA2000 provided for the enactment of statutory code of conduct to regulate arbitrators and provide for standards of arbitration.¹² In the interim period before these regulations came into effect, arbitrators were subjected to regulation under the modified Judicial (Code of Conduct) Act, 1999.¹³

The Arbitration (Code of Conduct and Standards) Regulation 2007¹⁴ came into effect on the 19th January 2007 binding all arbitrators conducting arbitral proceedings in Zambia. Such regulations are not typical in arbitration laws around the world and are peculiar.

Furthermore, the AA2000 provides for a waiver of the right to object where there is non-compliance to any provisions under the AA2000 that parties may derogate or any requirement under the arbitration agreement which has not been complied with.¹⁵ Thus, a party who has not raised an objection timely or withing a specified time will lose the right to object to any non-compliance. However, there is a further limitation under case law, which prohibits the

⁸ See AA2000, 174.

⁹ see AA2000 Interpretation, s 2(1).

¹⁰ AA2000, ss 12(2)-12(4).

¹¹ ss 23,25.

¹² AA2000, s 29(1).

¹³ AA200, s 29(2).

¹⁴ Statutory Instrument (SI) No. 12 of 2007.

¹⁵ AA2000, art 4.

application of waiver in cases where the objection has to do with a duty imposed by statute. The effects of the issues introduced above are examined in full below.

2.0 Arbitral Institutions

Section 23 of the first segment, the AA2000, provides for the recognition of arbitral institutions. An arbitral institution is a professional body or organizations in Zambia or elsewhere which regulates the practice of a profession.¹⁶ The minister responsible for legal affairs, at the time of the application (The Minister),¹⁷ has the authority to grant a recognition order, declaring the professional body or organisation as an arbitral institution.¹⁸

The grant of a recognition order is depended on an applicant satisfying the criteria under s 25 of the AA2000 relating to:

- a. The qualification of persons for membership of the arbitral institution;
- b. The certification of arbitrators;
- c. The effective monitoring and enforcement of compliance with prescribed standards of arbitration;
- d. The integrity, conduct, discipline and control of arbitrators;
- e. The investigation of complaints by parties against arbitrators; and
- f. Any other requirements for the maintenance of proper standards of arbitration.¹⁹

An applicant is further required to furnish a copy of its constitution establishing the body or organisation or present similar evidence.²⁰

The grant of a recognition order is further depended on an applicant complying with further criteria under the prescribed regulations as provided for under s 23(2)(a) of the AA2000. These regulations came into effect on the 27th July 2001

¹⁶ AA2000, s 23(1) read in conjunction with s 23(4)

¹⁷ AA2000, s 23(1).

¹⁸ AA2000, s 23(1).

¹⁹ AA2000, s 25.

²⁰ AA2000, s 23(3).

and are referred to as the Arbitration (Recognition of Arbitral Institutions) Regulations, 2001²¹ ('The Regulations') and are examined later.

The Minister may grant or refuse to grant a recognition order²² and may also revoke a recognition order, if an arbitral institution has failed to comply with any obligations under AA2000²³ which by implication includes the Regulations.²⁴

The granting of a recognition order licenses the professional body or organisation to be an arbitral institution and takes on the authority to appoint arbitrators under the provisions of s 12(3), AA 2000.²⁵ It should be noted that this only under circumstances where there is no agreement by the parties on a procedure for the appointment of an arbitrator or arbitrators. Where parties have agreed an appointment procedure, the provisions of s12(4) apply under which any third party can act to appoint an arbitrator or arbitrators.²⁶

Appointments are made by the arbitral institution only in the event of a party or parties' failure to make an appointment or appointments under an agreed procedure or otherwise.²⁷

If the number of arbitrators is not agreed under the procedure, the default position is three arbitrators. This provision is not under s 12 of the first segment, but under art 10 of the of the Model Law. The appointment of the default number of arbitrators must then follow the appointment procedure provided for under s 12(3)(a).

²¹ Issued as Statutory Instrument No. 73. A copy can be found at < <http://extwprlegs1.fao.org/docs/pdf/zam42364.pdf> > accessed 10th October 2020.

²² AA2000, s 24.

²³ AA2000, s 26(1).

²⁴ The Arbitration (Recognition of Arbitral Institutions) Regulations, 2001.

²⁵ AA2000 specifically ss12(3), 12(4).

²⁶ This implied under s12(4)(c).

²⁷ See ss12(3), 12(4) for details. The rules of appointment are also applicable in cases where a substitute arbitrator is required, see s 13(1).

Where an arbitral institution fails to perform or to act, the court will perform that function upon the request of any party.²⁸ Of note, is that an appointment made by an arbitral institution or court, is not subject to an appeal.²⁹

2.1 The Arbitration (Recognition of Arbitral Institutions) Regulations, 2001

The Regulations largely cover administrative functions while the applicant criteria is as listed under the AA2000.³⁰ They also provide for such administrative functions as the manner of making the application,³¹ submission of annual returns,³² and additional information or documents that may be required by the Minister to access the applicants eligibility to qualify as an arbitral institution.³³ Section 10 of the Regulations provide for offences and penalties in the event of non-compliance³⁴ and states that:

Every office bearer and every person managing or assisting in the management in Zambia of a body or organization for the settlement of disputes in respect of which **a recognition order has not been granted**³⁵ commits an offence and is liable to a fine not exceeding two thousand five hundred penalty units³⁶ or imprisonment for a period not exceeding six months or both; and, for a continuing offence, to a fine not exceeding twenty-five penalty units in respect of each day on which the offence continues.

²⁸ AA2000, s 12(4).

²⁹ AA2000, s 12(5). See the case of Metalco Industries Ltd v Nubian Resources Ltd, SCZ/08/069/2013, at J4 in which the Supreme Court of Zambia confirmed the no appeal provision.

³⁰ AA2000, s 23(1).

³¹ The Regulations, reg 3.

³² The Regulations, reg 9.

³³ The Regulations, reg 4.

³⁴ The Regulations, reg 10.

³⁵ Emphasis added.

³⁶ The Fees and Fines Act (The Laws of Zambia, Vol 3, Cap 45), Statutory Instrument 41, 2015; The Fees and Fines (Fee and Penalty Unit Value) Amendment Regulations 2015. Currently at 30 Ngwee or ZMK 0.3 per Penalty Unit or around \$.016 per Penalty Unit as at 10 March 2020.

It is curious that there are no offences and penalties provided for under the Regulations for institution that fall foul of these regulations targeting only officials and not the institution under which the officials fall.

2.2 Recognised Arbitral Institutions

There are three organizations that are recognized as arbitral institutions and these are:

- a. Zambia Centre for Dispute Resolution limited ('ZCDR');³⁷
- b. Zambia Association of Arbitrators ('ZAA'); and
- c. The Chartered Institute of Arbitrators, Zambia Branch ('CIArb-Zambia')³⁸

ZCDR and ZAA both only exist on paper and have been dormant for years, while CIArb - Zambia Branch is the only active body on matters of arbitration in Zambia. It should be noted that s 26 of the AA2000 provides discretionary power to the Minister to revoke a recognition order under set conditions,³⁹ as alluded to above.

It is a notorious fact in the Zambian arbitration community that both ZAA and ZCDR have not met their statutory obligations for several years.⁴⁰ The two bodies have more specifically, not met their obligations for a number of years in filing annual returns as provided for under the Regulations.⁴¹ As such this is a good ground for the revocation of the recognition. At the time of writing this article, the two bodies have not had their recognition withdrawn which is indicative of administrative oversight failure by the Minister. The two bodies

³⁷ The Zambia Centre for Dispute Resolution Limited Booklet.

³⁸ See the web site < <https://www.ciarb.org/our-network/africa/zambia/> > accessed 13 April 2020

³⁹ AA 2000, s 26(1) - (4); The Regulations, reg 7.

⁴⁰ Checks carried out by the author prior to the submission of the article with the Companies Registrar (for ZCDR) and Registrar of Societies (for ZAA) show that both organisation have been in default for many years. Additionally, both have also not submitted annual returns as require under s 9 of the Regulations for many years.

⁴¹ reg 9.

were making appointments up to a few years ago while they were in default and continue to be, though this appears to have stopped.

In *Bormar Mining Company (Z) Ltd v Mopani Copper Mines Plc*, the high court took judicial notice of the non-existence of ZCDR⁴² and substituted the body with CIArb-Zambia as the arbitrator appointing authority.⁴³

2.3 The Engineering Institution of Zambia as an ‘Arbitral Institution’

The Engineering Institution of Zambia (EIZ) is a professional body set up under statute, the EIZ Act.⁴⁴ One of its functions is to ‘promote alternative dispute resolution mechanisms and to **serve**⁴⁵ as an arbitral institution for disputes of an engineering nature’.⁴⁶

To ‘... to **serve** as an arbitral institution for disputes of an engineering nature’, does not give EIZ the authority to act as an arbitral institution. The function merely provides for EIZ to serve as one. The term arbitral institution is not defined under the EIZ Act as such it makes sense to refer to the parent legislation that regulates arbitration in Zambia, that is Arbitration Act 2000 for the meaning.

It is a usual practice to include a statement at the beginning of a parent Act, statute or legislation to the effect that the Act shall prevail in case of any inconsistency between it and any other legislation, in matters relating to that particular purpose except were expressly stated that the Act will not apply. It is also a sensible proposition that, were such a statement is not included, it is implied into any Act. In this case, in as far as matters of arbitration are concerned, the parent Act is the AA2000 and the EIZ Act is, thus, subservient with respect to the definition of an arbitral institution. More so that there is no

⁴² 2017/HKC/0002, unpublished, R17.

⁴³ 2017/HKC/0002, unpublished, R20.

⁴⁴ No. 17 of 2010.

⁴⁵ Emphasis added.

⁴⁶ No. 17 of 2010, s 4(1)(l). See also The Engineering Institution of Zambia Constitution 2018, 8 para 17.

conflict between the EIZ Act and the parent the AA2000 as to the meaning of the term 'arbitral institution'.

Hence, following the same logic applicable to parent statute and other statute, the meaning of the term 'arbitral institution' must, therefore, be taken from the definition provided under the AA2000. It will be illogical to proceed otherwise, as the framers of statute always strive to have the same meanings of words and terms across all statutes and the constitution.

Hence, where there is a meaning under a parent statute, the term or word is cross referenced in the subservient statute or some other statute related to the subject at hand. For example, the meaning of term 'public funds' under the Public Procurement Act No. 12 of 2008 has the meaning assigned to it in the Public Finance Act, 2004.⁴⁷

To further support the contention that EIZ does not have authority to act as an arbitral institution, s 23 of the AA2000 provides that:

A professional body or organisation in Zambia or elsewhere may apply to the Minister for an order (in this Act referred to as a "recognition order") declaring the body or organisation to be an arbitral institution for the purposes of this Act.

EIZ is a professional body which under the above provision is required to make an application in order to be recognised as arbitral institution. The application, in itself, is not mandatory as this is a choice left to a professional body. However, without a recognition order issued by the Minister, declaring the body an arbitral institution, such a body, as EIZ in this case, cannot carry out functions that are specifically designated to be performed by an arbitral institution as regulated under the AA2000.

The issuance of a recognition order is meant to uphold proper standards of arbitration and is granted to those professional bodies or organisations that have

⁴⁷ Now overtaken by the Public Finance Management Act, No. 1, 2018.

rules pertaining to qualification and certification of arbitrators. In addition, the body must have in place an effective monitoring and compliance system of standards of practice, among other requirements under s 25 of the AA2000.

The EIZ function to serve as an arbitral institution for disputes of an engineering nature is, therefore, contingent upon EIZ being granted a recognition order by the Minister in accordance with the rules under the AA2000.

Since the inception of the EIZ Act of 2010, EIZ's role has been limited to the regulation of the primary profession of engineering and not the secondary profession of arbitration. EIZ, under the present circumstances, is purely a regulator of the engineering profession which does not meet the s 25 criteria under the AA2000 to qualify as an arbitral institution.

EIZ, therefore, is not an arbitral institution as envisaged under the AA2000 and as such has no authority to make arbitral appointments. To clarify this is only applicable in cases where parties have not agreed their own appointment procedure an EIZ is then requested to make an appointment for arbitrator or arbitrators. Where parties have an agreed procedure any third party can make such an appointment, including EIZ.

2.3.1 Implications of EIZ Appointing Arbitrators

As EIZ is not an arbitral institution, EIZ officers are committing an offence under s 10 of the Regulations by making arbitral appointments without the organisation being conferred as an arbitral institution by way of the issuance of a ministerial recognition order. Consequently, the officers are liable to a fine or an imprisonment term or to both. Under the provisions, EIZ itself faces no sanctions at all.

EIZ is repeatedly asked to make appointments for arbitrators and is regularly named as an appointing authority in public procurement contracts such as those under the Roads Development Agency and other public bodies.⁴⁸ As stated above where EIZ is the stated as the arbitrator appointing body under the arbitration agreement, it is not acting as an arbitral institution but as third party

⁴⁸ e.g. the Ministries of Local Government, Health and Infrastructure.

which the parties have agreed to make appointment or an appointment. EIZ is frequently asked to make appointments where there is no such provision under an arbitration agreement. Under such circumstances EIZ should decline as they are not an arbitral institution.

EIZ can learn from similar bodies such as the Institution of Civil Engineers in the UK, one of the oldest professional bodies in the world.⁴⁹ In contrast to EIZ, the Institution of Civil Engineers acts as an appointing authority but regulates those who are listed by training and qualifying candidates to act as dispute resolvers.⁵⁰

It, therefore, follows that an arbitrator appointment made by EIZ under an agreement which it is not named as an appointing institution, is not valid under the AA2000 as it is not an arbitral institution. This means that any award issued by a Tribunal fully or partly appointed by EIZ is likely be set aside. Hence, any resultant award under those circumstances is likely to be set aside under s 17(2)(a)(i) which states that:

An arbitral award may be set aside by the court only if –

(a) the party making the application furnishes proof that –

(i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Zambia.

The setting aside, therefore, is on the grounds that the arbitration agreement under which EIZ is the appointing authority is not valid under the provision of the AA2000 which is the underlying substantive law which the parties subject the agreement to. In other words, EIZ's appointments of arbitrators is illegal under the AA2000 and therefore invalid.

⁴⁹ ICE is a 200-year-old body at the time of writing this article. See <<https://www.ice.org.uk/about-ice/our-history>> accessed 13 April 2020.

⁵⁰<<https://www.ice.org.uk/knowledge-and-resources/professional-practice/ice-dispute-services/dispute-resolution>> accessed 13 April 2020

The result of the above is that a party can take part in the arbitration process and wait till an award is made and then seek to set it aside if such an award is not favorable to that party.⁵¹ The provisions of art 4-Waiver of the Right to Object and art 16- Competence of Arbitral Tribunal to Rule on its Jurisdiction in as far as time limits are concerned, are not likely to be a bar to setting aside such an award.

This is because a party can willingly and knowingly take part in an arbitration under which EIZ without contractual or legal authority made an arbitrator appointment or appointments. Such a party is not likely to suffer consequences because the law as it currently stands appears to be on such a party's side. In an arbitration case, before the high court for an award setting aside proceedings, *Mpulungu Harbour Management Limited v The Attorney General and Mpulungu Harbour Corporation Limited*,⁵² it was a ruling of the High Court, following other similar earlier decisions that, there can be no reliance on the doctrine of estoppels to negate a duty imposed by statute.⁵³

The implication of this is that even though a party willingly takes part in an invalid process, such as EIZ illegally acting as arbitral institution, there can be no waiver on account of that. This is so because a waiver cannot be invoked to defeat a duty imposed by statute. It is argued that the appointment of arbitrators is a duty imposed on arbitral institutions by the AA2000 under the conditions in s 12(3). The case law on waiver does not differentiate between the statutory duties imposed by the AA2000 or those that are implied into the AA2000. Neither is there an implication in the case law to limit its application to those statutory duties affecting parties to a dispute directly. Hence it is submitted that the case law on waiver is equally applicable to third parties

⁵¹ See Howard M Holtzmann, Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Wolters Kluwer 2015).

⁵²2010/HPC/ARB/0589 [J47-J48] unreported decided 10th October 2014.

⁵³*Arthur Nelson Ndhlovu and Dr. Jacob Mumbi Mwanza v Al Shams Building Materials Company Limited and Jayesh Shah* [2002] ZR 48; *Embassy Supermarket v Union Bank Zambia Limited (In Liquidation)* ZR 226.

carrying out statutory duties under the AA2000 more so in the absence of express words to the contrary.

A party with deep pockets and a poor case may choose to go through an illegal process for the purpose of using an adverse resultant award to settle by, for example, offering a lower amount than decided or awarded while using the illegality stick as a bargaining chip with the threat of instituting setting aside proceedings. Should an award be set aside the same tactic can be employed to pressurise the other party into negotiating. The effect of an award being set aside is that the arbitral process starts all over again. With parties having wasted costs and time in the first award it may be prudent in certain circumstances to agree a settlement and avoid further costs though this may be forced.

It is of course better for an aggrieved party to subject the appointment to a jurisdiction challenge early, under art 16 resulting from an appointment made by a body such as EIZ that is not recognized as an arbitral institution under AA2000.

It seems as well that the same principles will apply in cases where both parties are oblivious to fact that EIZ had no authority to make arbitrator appointments. Upon discovery of the true legal position after an award has been rendered, a party can still apply for setting aside proceedings under s 17(2)(a)(i).

3.0 The Arbitration Code of Conduct

Section 29(1) of the AA2000 provides for the Minister, in consultation with the Chief Justice and by statutory instrument to make regulations providing for a code of conduct for arbitrators and standards of arbitration. By the operation of s 29(2) of AA 2000, these regulations came into force in 2007 and are known as 'The Arbitration (Code of Conduct and Standards) Regulation 2007'⁵⁴ (The Code of Conduct).

⁵⁴ Statutory Instrument (SI) No. 12 of 2007.

The regulations set out the regulatory rules and standards that all arbitrators ought to follow. The code applies and binds every arbitrator conducting arbitral proceedings in Zambia.⁵⁵ It is thus mandatory in this respect.

The peculiarity of the Code of conduct is ‘supported’ by Emilia Onyema⁵⁶ in her book, *International Commercial Arbitration and the Arbitrators Contract*, which gives Argentina and China as the only other Countries with laws providing for an arbitrator’s statutory liability for professional negligence⁵⁷ as is the case in Zambia.

3.1 The Provisions

The Code of Conduct sets out much of the practice and professional conduct that is expected of an arbitrator and generally practiced worldwide. Some of the provisions are similar in nature to those in the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (October 2009).⁵⁸

A substantial number of the provisions in the regulations are expressed in mandatory terms.⁵⁹

A major provision are the circumstances under which an arbitrator shall be guilty of professional misconduct.⁶⁰ These are:

- a. Contravention of any of the provisions of the AA2000 and the Regulations;⁶¹

⁵⁵ Code of Conduct, reg 3.

⁵⁶ Emilia Onyema, *International Commercial Arbitration and the Arbitrators Contract* (Routledge 2010) 229, note 15

⁵⁷ Emilia Onyema, *International Commercial Arbitration and the Arbitrators Contract* (Routledge 2010) 171, 229, note 15; Art 743 Arbitration Law Argentina; Art 38 Arbitration Law China.

⁵⁸ The Chartered Institute of Arbitrators is a world leader in the practice of ADR, see <<http://www.ciarb.org/>> accessed 4 April 2020.

⁵⁹ Code of Conduct, reg 3; Code of Conduct Schedule (Regulation 3), regs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22.

⁶⁰ Code of Conduct, Schedule (Regulation 3), reg 23.

⁶¹ Statutory Instrument (SI) No. 12 of 2007.

- b. Unlawfully disclose or use to their own advantage any information acquired in the course of professional work on behalf of a client;
- c. Engagement in conduct that is dishonest, fraudulent, or deceitful;
- d. Committing a criminal offence;
- e. Engagement in conduct that is prejudicial to the proper administration of the arbitration process;
- f. Charging fees for professional work on scales other than the scales prescribed by an arbitral institution or determined by a court;
- g. Breaching principals of the Code of Conduct and bringing the profession in disrepute;
- h. Encouraging another person to breach or disregard the principles of the code;
- i. Attempting to influence unfairly, whether directly or indirectly the award in arbitration;
- j. Obtaining or attempting to obtain an appointment as an arbitrator by offering or paying monetary or other consideration or inducement to any person or by any other improper means;
- k. Touting for, or in any way soliciting for, appointment as an arbitrator;
- l. Attempting to supplant or discredit another arbitrator with a view to unfairly influencing an appointment; or
- m. Conducting oneself dishonourably in connection with the work performance.

3.2 Implications of the Code of Conduct

The Regulations contain a number of anomalies and challenges but only two main ones are dealt with below.

3.2.1 Professional Misconduct Under the Code of Conduct

Clearly the intent of the imposition of the Code of Conduct was to transform the practice of arbitration to that of a profession by statute,⁶² requiring that a practitioner 'exercise due skill and care in the performance of their duties failing

⁶² Code of Conduct, reg 20(2) as confirmation; reg 23(g).

which they may be liable in professional negligence or misconduct being the term actually used.’⁶³

However, a number of challenges arise under the Code of Conduct, with the first being that, any action against an arbitrator with regard to misconduct can only be decided upon by the Zambia Association of Arbitrators, which is required to determine the complaint in accordance with its rules.⁶⁴ This duty is exclusively given to ZAA and no other arbitral institution. As stated above, ZAA exists only on paper and has been dormant for years. This, therefore, leaves a vacuum in the conduct of misconduct proceedings. However, given the analysis below the above observations and sentiments are of no significance but are only of an academic nature.

The second anomaly or challenge is that s 29 of the AA2000 provides for a blanket immunity against prosecution and presumably against misconduct unless the conduct is done in bad faith. It is a well-known legal principle under common law jurisdiction that statutes enacted by Parliament are superior over other laws and take precedence over other laws such as those made by a court.⁶⁵ At the same time subordinate legislation such as regulations are inferior to statutes and as such in any conflict between a statute and its subordinate legislation, the statute will prevail.⁶⁶ For information, Zambia is common law country.⁶⁷

Hence, under these circumstances, it is a sensible conclusion to make that the misconduct provisions under the Code of Conduct are not applicable as they are not legal. This is so because the AA2000 which is a statute does not recognize offences of professional misconduct. Another way of putting this, is that

⁶³ Emilia Onyema, *International Commercial Arbitration and the Arbitrators Contract* (Routledge 2010) 69.

⁶⁴ Code of Conduct, Schedule (Regulation 3), reg 24. No rules are available and its thought that no rules ever existed.

⁶⁵ Julian Bailey, *Construction Law*, vol 1 (2nd edn, Informa, 2016) par 1.12.

⁶⁶ Dennis Keenan, *Smith and Keenan’s English Law* (Pearson Longman, 14th edn) 14.

⁶⁷ John Miles, Tunde Fagbohunlu, Kamal Rasiklal Shah, *Arbitration in Africa: A Review of Key Jurisdictions* (Sweet and Maxwell, 1st edn, 2016) Appendix 1.

regulations cannot add to provisions, duties or liabilities that are beyond what the parent act intended.⁶⁸ The AA2000 words the immunity provision as follows:

An arbitrator, an arbitral or other institution or a person authorised by or under this Act to perform any function in connection with arbitral proceedings is not liable for anything done or omitted in good faith in the discharge or purported discharge of that function.

The meaning of this clause is that only offences that hinge on bad faith attract liability. In support of this is an example under the England, Wales, and Northern Ireland Arbitration Act 1996 (1996 Act), s 29(1) which states that:

An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

In terms of content, the two provisions are similar and say the same thing and both rule out professional negligence or misconduct suites against arbitrators. In England, it is said that the arbitrator performs a judicial function, hence, not subject to rules affecting professionals or the applicable standard of skill and care expected of a professional.⁶⁹

Under the 1996 Act, 'a party losing an arbitration will not be able effectively to re-open the issues by alleging negligence on the part of the arbitrator and bringing proceedings against him.'⁷⁰ It is argued that the basic reasons as to why this is so, is because, if arbitrators were not immune from such actions, they would be exposed to open ended party liability causing considerable harm to the finality of the arbitral procedure.⁷¹ In addition, it will be hard to find

⁶⁸Denis Keenan, *Smith and Keenan's English Law* (14th edn, Pearson Longman 2004) 14.

⁶⁹Emilia Onyema, *International Commercial Arbitration and the Arbitrators Contract* (Routledge 2010) 68-69

⁷⁰ Bruce Harris, Rowan Planterose, Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (5th edn, Wiley Blackwell 2014) 158.

⁷¹ *Ibid.*

arbitrators willing to serve⁷² while professional negligence insurance will become essential and is most likely to be exorbitant.⁷³

Bad faith charges against an arbitrator cannot be proffered under the Code of Conduct as there is no express or implied provision for such a charge.

3.2.2 Status of the Zambia Association of Arbitrators (ZAA)

Another anomaly is that ZAA is not a statutory body⁷⁴ but a voluntary membership organization which was registered under the Societies Act.⁷⁵ The regulations in the Code of Conduct though, are mandatory and applicable to every arbitrator. Yet, power to administer misconduct proceedings lies with a voluntary membership organization with no legislative powers. In circumstances where a non-member is charged with misconduct, they will be subjected to rules of procedure under reg 24 that they have never signed up for.⁷⁶ It is, hence, quite feasible to make an argument that, an arbitrator charged with misconduct may contest the jurisdiction of ZAA to hear any complaints. At the same time a body that is not statutorily compliant cannot be said to have jurisdiction. To repeat what has been indicated before ZAA exists only on paper.

Despite this, it is possible that a court may substitute ZAA for another arbitral institution which is recognised. This is so because the dominant purpose of the Regulations was to have a body to deal with misconduct charges and such a body must be one that is recognised under the AA2000.⁷⁷ Under these circumstances a court may well substitute the CIArb, Zambia Branch as such body.⁷⁸

⁷² Ibid.

⁷³ Ibid.

⁷⁴ A body set up under legislation or an Act of Parliament e.g. the Engineering Institution of Zambia and derives power from the legislation.

⁷⁵ Cap 119 of the Laws of Zambia.

⁷⁶ Attempts to obtain the rules and constitution of ZAA from known officers were unsuccessful. It is thought that the rules have never existed.

⁷⁷ See *Bormar Mining Company (Z) Ltd v Mopani Copper Mines Plc*, 2017/HKC/0002 under which a similar principle was applied in substituting ZCDR for the CIArb, Zambia Branch, R20.

⁷⁸ *Bormar Mining Company (Z) Ltd v Mopani Copper Mines Plc*, 2017/HKC/0002, R20.

As before these arguments are, however, academic given the conclusion reached under paragraph 3.2.1 above to the effect that the misconduct provisions under the Code of Conduct are not applicable. Other than the misconduct provisions all other provisions are still applicable.

3.3 Case Law on the Provisions of the Code of Conduct

The only case law that was found at the time of article submission and which directly deals with a provision under the Code of Conduct is *Mpulungu Harbour Management v Attorney General & another*,⁷⁹ referred to earlier. In this case the Judge, set aside an award on the premise that the Code of Conduct was violated by the presiding arbitrator. The facts are that, a presiding arbitrator who at the time of appointment was a sitting High Court Judge, failed to disclose to the parties his election to the position of Speaker of the National Assembly.⁸⁰ This was despite the fact that the appointment was a matter of public knowledge and the other party made no objections under AA 2000, Model Law art 12.

The Code of Conduct (Schedule, Part I) at reg 3, mandates an arbitrator to disclose, at the earliest opportunity, any prior interest or relationship that may affect impartiality and /or independence, or which might reasonably raise doubts as to tribunal proceedings. The rule or regulation also makes it clear that, this is a continuing duty which does not cease till the conclusion of the arbitration. The regulations also state that, the onus is on the arbitrator to make the disclosure⁸¹ and this is stated in mandatory terms.

The court found that there should have been a disclosure made as soon as the presiding arbitrator was elected Speaker of the National Assembly, which was perceived as related to a wing of Government and in the courts view, a party to the arbitration.⁸² The court found, as a result, that there was perceived bias in

⁷⁹ 2010/HPC/ARB/0589, unreported.

⁸⁰ The National Assembly is also known as the Parliament of Zambia.

⁸¹ Code of Conduct, Schedule (Regulation 3), reg 24.

⁸² Technically this is incorrect as there is no direct relationship between the Executive which was a party and Parliament or the National Assembly. These are independent wings of Government, at least in theory. The third wing of Government is the Judiciary under which the court decided the matter.

the award and set it aside under s 17(2)(b)(ii) as conflicting with public policy as one ground.⁸³

The Court went on, even though it was not asked to state a position, to comment, that it was misconduct on the part of the presiding arbitrator, under the Code of Conduct not to have disclosed his election as Speaker of the National Assembly.⁸⁴ This finding is misconceived due to the fact that the conduct did not rise to the level of bad faith and in any case as stated earlier professional negligence charges could not have been proffered against the arbitrator as the AA2000 does not provide for such misconduct neither does it imply it. In other words, the provisions under the professional negligence regulation cannot override the blanket bad faith provision under the AA2000.⁸⁵

Another aspect that was reconfirmed in the judgment, was that a party cannot rely on the doctrine of estoppel as alluded to earlier, if the other party fails to object timeously when it has full knowledge of the irregularity, where the duty objected to is a statutory provision. In this case, the provision in the Code of Conduct obligates an arbitrator to declare interest. The Respondent, in defense, had relied on the argument that the Applicant had made no objection at all throughout the proceedings to the continuation of the presiding arbitrator after his appointment as Speaker. Meaning that this operated as waiver under art 4 of the Model Law. The Judge outrightly rejected this and stated, as earlier indicted, that there can no waiver where the affected duty is statutory. That duty being the mandatory requirement to declare interest.

The judgment means that even if a matter is known publicly, a party does not have to object and can wait till the award is made and have it set aside. This also means that the provisions of art 13 of the Model Law on the challenge procedure and timing are on no consequence at all, as setting aside can still be a way out, even where a party has not complied with the provisions thereunder.

⁸³2010/HPC/ARB/0589 J54, unreported.

⁸⁴ 2010/HPC/ARB/0589 J49, unreported.

⁸⁵ AA2000, s 28.

Hence a party can adopt a wait and see strategy knowing that they can institute setting aside proceedings if the award does not meet their expectations, ultimately prolonging the dispute resolution. Meaning that the arbitral process can restart afresh after the parties have spent time and money in the first arbitration. Basically, the party adopting such a strategy gets a second chance to present their case or can use the threat to restart fresh arbitral proceedings, as earlier indicated, to negotiate settlement.

4. Conclusion

The peculiarities pointed out in the article have serious consequences in terms of the overall applications, conduct and finality of the arbitration and other peripheral processes in Zambia.

Awards that result from EIZ acting as an arbitral institution are in danger of being subjected to the setting aside provisions⁸⁶ and refusal of recognition or enforcement.⁸⁷

Where awards have been satisfied and the statute of limitation⁸⁸ period has not expired, it raises a secondary question as to whether or not a party can attempt to recover any monetary awards on account of illegality of the process and also attempt to recovery from legal counsel or other representation⁸⁹ on account of professional negligence.

This question is important given the Supreme Court of Zambia (SCZ) decision in *Metalco Industries Ltd v Nubian Resources Ltd*.⁹⁰ The circumstance of the case was that the arbitrator delegated the assessment of damages to the Deputy Registrar of the High Court. It is a well-known principle of arbitration that there

⁸⁶ AA2000, s 17.

⁸⁷ AA2000, s 19.

⁸⁸ Refer to the Law Reform (Limitation of Actions, Etc.) Act ('Limitation Act'), Chapter 72 of the Laws of Zambia 'adopts' the Limitation Act 1939 of the United Kingdom with some changes for claims based on personal injury reducing the period from 6 years to 3 years

⁸⁹ See AA2000, s 21.

⁹⁰ SCZ select judgment no. 37 of 2016, 1344

can be delegation of assessment to a third party, unless of course the parties had such an agreement.⁹¹

The parties, by agreement, had registered the award for enforcement purposes. The Setting aside proceedings were not an option as the recipient of the damages neglected to apply for remission or setting aside the offending portion of the award within the three months' time allocated under the AA2000 from date of receipt of the award.⁹² Any such application would have thus been time barred in accordance with case law.⁹³ Strangely, the SCZ even though the affected party never applied for remission but was seeking to enforce the assessment of damages by the Deputy Registrar of the High Court, remitted that part of the award. The decision did not state what AA2000 provision the court applied to effect the remission. This was despite the fact that such remission was years out of time provided under AA2000, s17(3) allowing for an application to be made for institution of setting aside proceedings of which remission is a remedy, which is three months from the date of receipt of the award. In this case no such setting aside application was ever before any court.

Thus, this SCZ decision opens a possible avenue for setting aside awards years after the three months period had elapsed and with no application before any court, unless some distinguishing is made. Clearly further exploration of the impact of this decision is needed.

With regard to professional misconduct of arbitrators, if the Code of Conduct is to work as was the intention when enacted, then a number of things must be done. One, is ensuring that the provisions in the AA2000 include negligent acts of the arbitrator and the replacement of the reference to ZAA as the disciplining body with another. Substitution of one arbitral institution for another may not, however, work given that these bodies are not perpetual in nature and have voluntary membership and which are then subjected to administer statutory

⁹¹ SCZ select judgment no. 37 of 2016, 1366

⁹² AA2000, S17(3).

⁹³ *Cash Crusaders Franchising Pty Ltd v Shakers and Movers (Z) Ltd* (2012), Z.R Volume 3, 174

provisions. Additionally, disciplinary actions rules should be made by regulations if this is to work and as such it may be better to have a statutory body undertaking the disciplinary functions.

The position on waiver and estoppel may act to defeat justice as they can be misused by a party and should therefore be relooked at perhaps under statute.

A Critique of the Law Governing Capacity of Parties to Enter into an Arbitration Agreement

By: Edwin. N. Kimani & Peter. M. Muriithi***

Abstract

The authors seek to illuminate on the legal framework used to determine the capacity of parties to enter into an arbitration agreement. In several decisions, courts have set aside arbitration awards based on the lack of capacity of parties to enter into an arbitration agreement. In doing so, courts have relied even on laws not chosen by the parties in the arbitration agreement. These decisions are a reminder that the law chosen by the parties to govern the contract does not cover all aspects of the legal relationship between the parties, and that other laws may become applicable despite the parties' choice of law.¹ This discourse seeks to in-depthly analyze the legal framework governing capacity of parties to enter into an arbitration agreement. In so doing, the paper will analyze both local and international laws. Insights offered by various scholars and various salient decisions of courts greatly inform this discourse. In the end, the paper will offer a conclusion to the discourse, capturing the authors view on the law governing capacity of parties to enter into an arbitration agreement.

1.0 Introduction

Arbitration is a private consensual process in which disputing parties decide to present their grievances to a third party for resolution.² One of its seminal attributes is party autonomy. This attribute allows parties to tailor-make the

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¹Giuditta Cordero Moss, Legal capacity, arbitration and private international law, *Convergence and Divergence in private International Law, Liber Amicorum Kurt Siehr*, Utrecht 2010

² 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.

arbitration process they consensually submit to, to meet their needs and expectations e.g. choosing the applicable law.³

However, despite the liberty parties have to choose the law to be applicable in the arbitration process, other laws not chosen by the parties affect the process. For example; in matters of international commercial arbitration, several systems of law may simultaneously have an application to a commercial dispute. To bring this into perspective, we could take an example of a Mauritian corporation. This corporation has an existing contract with a Kenyan corporation. The contract expressly provides that the English Law will govern the contractual relationship.

The contract also specifically provides that any dispute arising will be submitted to an arbitration process in Nairobi, pursuant to the Arbitration Rules of the International Chamber of Commerce. It is apparent that a number of systems of law may be relevant in this case. These will include, amongst others:

- a. The law applicable to determine the capacity of a party to enter into the arbitration agreement;
- b. The law applicable to the arbitration agreement itself;
- c. The law applicable to proceedings (*lex arbitri*)
- d. The law applicable to dispute (*lex causae*); and,
- e. The law applicable in the enforcement of an award issued by an arbitral tribunal.

Premised on the above understanding this discourse analysis the legal framework governing capacity of parties to enter into an arbitration agreement.

2.0 Critiquing the Law Governing Capacity of parties to Enter into an Arbitration Agreement.

A party to an arbitration dispute can establish whether its' capacity to enter into an arbitration agreement, only when it knows which laws apply to its dispute.

³ Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* page 3

Essentially, there is no explicit and complete code, which has a general international application for determining applicable laws.

On this basis, the legal system of each state has its particular approach of establishing laws that apply to a particular arbitration. This includes the law applicable to determine the capacity of a party to enter into the arbitration agreement. However, it is noticeable that globally certain approaches are accepted as guidelines for establishing the capacity of parties to enter into an arbitration agreement. Discussed below are the approaches with general global acceptance:

2.1.1 General Approaches to Determining Capacity of Parties to Enter into an Arbitration Agreement.

An arbitration agreement is the basis of all arbitrations. Basically, it is an agreement where the parties undertake that specified matters arising between them shall be resolved by a third party acting as an arbitrator and that they will honour the decision (award) made by that person.⁴

Defining arbitration agreement succinctly, it is an agreement between two or more parties in which they agree to refer disputes to arbitration for determination.⁵ Section 3 of the Arbitration Act No. 4 of 1995⁶ defines “*arbitration agreement*” as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Further, an arbitration agreement is a separate contract, procedural in nature⁷ and ancillary to the main contract, which does not create substantive rights between the parties, but provides how disputes, which may arise, should be

⁴ W. Turner, “Arbitration Agreements”, 66(3) *Arbitration* 230 (2000)

⁵ Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes* page 97

⁶ Cap No. 4 of 1995

⁷The Tobler case (1933) 59

resolved.⁸In addition, an arbitration agreement is described as an agreement, which creates collateral rights to the main contract.⁹

In essence, then, an arbitration agreement is a written contract in which two or more parties agree to use arbitration, instead of courts, to decide all or certain disputes arising between.¹⁰

Notably, an arbitration agreement may permit either one or both parties to refer a dispute to arbitration. Parties agree to arbitrate before or after the dispute arises (ad hoc or relate to future dispute).¹¹ Typically, parties agree to arbitrate by executing an agreement or contract, which has an arbitration clause or a stand or a standalone arbitration agreement.¹²

It is generally accepted that parties must have the requisite legal capacity to enter into a contract. Where parties lack the requisite legal capacity the contract they enter into is invalid *ab initio*. This also applies to an arbitration agreement *mutatis mutandis*, as it is a contract as illustrated above.¹³ The general rule is that any natural or juridical person with the capacity to enter into a legal contract also has the capacity to enter into an arbitration agreement. The lack of capacity by either person to the agreement makes the arbitration agreement void, inoperative or incapable of being performed.¹⁴ Recognition and enforcement of the award may be rejected by a competent court on the basis that one of the

⁸Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes* page 97

⁹ Paul Wilson & Co. vs Partenreederei[1983] AC 854, 917 *Per Lord Diplock* referring to *Heyman v Darwins* [1942] AC 356

¹⁰Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (3rdEdn Glenwood Publishers Ltd, 2017) page 36

¹¹ Susan Blake, Julie Browne, and Professor Stuart Sime, *A practical approach to Alternative Dispute Resolution*, 2nd edition page 399.

¹²Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (3rdEdn Glenwood Publishers Ltd, 2017) page 35

¹³ Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes* page 97

¹⁴New York Convention, Article II.3; Model Law, Article 8(1)

parties to the arbitration agreement is “under some incapacity”¹⁵ under the applicable law.

In further elaborating on the issue of legal capacity, this paper will discuss the general approaches in determining the capacity of natural persons, corporations, states and state agencies.

a. Natural Person

The New York Convention and the Model Law, show that the parties’ capacity to enter into an arbitration agreement is an indispensable matter. It is required of the parties to an arbitration agreement to have the capacity to enter into that agreement under the law applicable to them.¹⁶ The capacity of an individual to enter into a contract within his/her place of domicile and residence will depend on the law of that state; but in the context of an international contract, it may become necessary to have regards also to the law of the contract. The importance of these considerations can be explained in the following perspective.

A person aged nineteen may have the capacity to enter into an arbitration agreement under his law, but not under the law governing the transaction in question, which has the age of capacity starting at twenty-one. If the transaction failed, the nineteen-year-old might rely on the law that incapacitates him/her as a reason for not carrying out his/her part of the contract.

However, such quibbling can be legally dealt with. For example, the Rome Convention under Article 11 for example provides:

“In a contract concluded between persons who are in the same country, a natural person who would have the capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the

¹⁵New York Convention, Article V.1 (a); Model Law Article 36(1)(a)

¹⁶Otherwise, the agreement will be regarded as invalid and accordingly unenforceable. See the provisions of the New York Convention and the Model Law cited *supra*.

contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence”¹⁷

b. Corporations

Corporate capacity in simple terms is used to describe whether a company has the legal capacity to enter into a particular transaction. The contractual capacity of a corporate entity may be defined and limited by a statutorily mandated objects clause in the company’s memorandum of association and the law of its place of incorporation.¹⁸

It is of further importance to consider the law governing that agreement in matter international commercial arbitration. For example, a corporation may be prevented under its own law and Constitution from entering into certain transactions, but allowed to do so in a particular country by local law. Generally, a corporation is mandated to act through its directors and officers in accordance with its statutorily mandated objects clause in the company’s memorandum of association and the law of its place of incorporation. If a corporation enters into a contract, which is *ultra vires* to its powers, the contract fails *ab initio*.¹⁹

If such a contract fails, it would be open to the corporation to argue that the agreement was not binding on it and that it was not obliged to arbitrate any dispute. To guard against this possibility, it is not unusual for states to have

¹⁷ The Rome Convention on the Law Applicable to Contractual Obligations was concluded in 1980 by the then Member States of the European Community. The uniform rules of this Convention do not apply to questions involving the status.

¹⁸ <<https://strictlylegallaw.wordpress.com/2015/02/04/introduction-to-corporate-capacity/>> accessed on 10/06/20

¹⁹ The case of *Ashbury Railway Carriage and Iron Company v. Riche* (1875) 3 set out the standard for the *ultra vires* rule. A company had contracted to build a railway line, the objects clause was contained within the company’s memorandum, stating that the company had in fact been established to make, sell or lend railways carriages. Due to this clause, the company was permitted to manufacture train stock and parts but not actual railway lines. The courts held the contract to be void and Ashbury were entitled to have the contract rescinded

specific rules of law that restrict or abrogate the doctrine of *ultra vires*, to protect persons dealing in good faith with corporations.²⁰

c. State and State Agencies

It is usual to find state and state agencies that are not permitted to refer to disputes between themselves and a private party to the arbitration. France is an example of a country that does not permit its state agencies to participate in the arbitration. Under Article 2060 of the Civil Code of France, disputes concerning public entities such as state agencies and matters involving public policy may not be referred to arbitration.²¹

For a drafter drafting an arbitration agreement and a party intending to enter into an arbitration agreement, it is always advisable to check the persons entering the contract on behalf of the entity and ascertain that they have the requisite authority to do so. Of equal importance is the need to check that any necessary procedures for obtaining consent to an arbitration agreement are followed and the consent is obtained. It is sensible to include statements in the contract to this effect.

For example; if the arbitration agreement provides that the arbitration involving a state will be undertaken at International Centre for Settlement of Investment Disputes (herein referred to as ICSID) then the ICSID Convention establishing ICSID requires consent to be submitted to ICSID by the state in question.²² To this end, Article 25(1) of the ICSID Convention verbatim provides:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in

²⁰For example, within the European Union, the First Directive on Company Law (1968) J.O. 165/7

²¹The exception to this rule is shown in the case of Decision of the French Supreme Court in the *Galakis case*, *Cass. Civ May 2 1966. DS, 1966, 575*

²²Article 25(1) of the ICSID Convention

writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally..."

Where state agencies are involved, the ICSID Convention specifically requires state approval of any consent submitted to ICSID by a state agency. To this end, Article 25(3) of the ICSID Convention verbatim provides:

"Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required..."

Ordinarily, it is unsatisfactory for a state agency to be entitled to rely on its own law to defeat an agreement that it has freely entered into. An attempt to deal with this issue is manifested in the European Convention on International Commercial Arbitration.²³

Article II (1) and (2) of the European Convention on International Commercial Arbitration states that persons considered by the law applicable to them to be legal persons of public law should have the right to conclude valid arbitration agreements. Further, it provides that if a state wished to limit this facility, it should say so on signing, ratifying or acceding to the Convention.²⁴ This provision, however, has not been very successful. However, progressive states have dealt with cases with a similar approach. The Swiss law, for example, provides that:

*"If a party to the arbitration agreement is a state or enterprise or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to arbitration or the arbitrability of a dispute covered by the arbitration agreement."*²⁵

²³ European Convention on International Commercial Arbitration Geneva, 21 April 1961.

²⁴European Convention 1961, Art II.1 and 2

²⁵Article 177(2) of the Swiss PIL Act of December 18, 1987.

This is a provision that all states would do well to follow. One of the judges of the Swedish Court of Appeal stated, in relation to a plea of state immunity:

“It has become even more common during recent years that states and state-owned organs act as parties to agreements of a commercial nature. If such agreements provide for arbitration, it is shocking per se that one of the contracting parties later refuses to participate in the arbitration or to respect a duly rendered award. When a state party is concerned, it is, therefore, a natural interpretation to consider that the said party, in accepting the arbitration clause, committed itself not to obstruct the arbitral proceedings or their consequences, by invoking immunity.”²⁶

Some scholars and practitioners²⁷ have argued that restrictions imposed by a state on its capacity to enter into an arbitration agreement should not be qualified as issues of capacity, but rather as issues of arbitrability. Accordingly, it should be treated as a matter of subjective arbitrability, rather than as a matter of capacity.

In practice, the important point is that there may be restrictions on the power of a state or state entity to enter into an arbitration agreement, whether these restrictions are qualified as matters of the capacity of subjective arbitrability.

2.1.2 International Instruments Governing Capacity of Parties to enter into an Arbitration Agreement

a) The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention, or the Convention) was prepared under the auspices of the United Nations and adopted on 10th June 1958 at United Nations

²⁶Court of Appeal, Stockholm, June 19, 1980 (1981)20 *International Legal Material* 893

²⁷See for example, Fouenard, Gaillard and Goldman *“Traite De L’arbutrage Commercial International’* Litec 1960 no. 539; Paulsson, “May a state invoke its internal law to repudiate consent to international commercial arbitration?” (1986) 2 *Arbitration International* 90; Hanoitiau, *‘The Law Applicable to the Issue of Arbitrability’* ICCA Congress, Series No. 14, Paris 1998.

Headquarters in New York. The Convention is now hailed as ‘one of the most important and successful United Nations treaties in the area of international trade law, and the cornerstone of the international arbitration system’.²⁸

The two basic actions contemplated by the New York Convention are the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.²⁹ The New York Convention sought to remove unnecessary obstacles to recognition and enforcement and to maximize the circulation of foreign arbitral awards.³⁰

The New York Convention creates a uniform law on the enforcement of awards. This Convention briefly addresses the issue of capacity under Article V (1) (a).³¹ Article V (1) (a) of the aforementioned Convention, states that that one of the grounds for refusing recognition or enforcement of an award is that one of the parties of the arbitration agreement was under some incapacity under its own law, or that the arbitration agreement was invalid under the law that the parties subjected it to, or failing a choice made by the parties, under the law of the place where the award was rendered. This clearly seeks to delimit the capacity of parties who are signatory to the Convention.

b) UNCITRAL Model Laws

On 21st June 1985, The United Nations Commission on International Trade Law (UNCITRAL) adopted a model law on international commercial arbitration. The

²⁸Message from the Secretary of UNCITRAL, published on the <newyorkconvention1958.org website>accessed on 10/06/20

²⁹<<http://www.newyorkconvention.org/in+brief>> accessed on 10/06/20

³⁰ See Philippe Fouchard, ‘Suggestions to Improve the International Efficacy of Arbitral Awards’, in A J van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No. 9 (1999), page 602.

³¹1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards

model law was drafted and developed by the Working Group on International Contract Practices, which was entrusted with the project in 1981.³²

The UNCITRAL model law was intended to serve as a model of domestic arbitration legislation, harmonizing and making more uniform the practice and procedure of international commercial arbitration while freeing international arbitration from the parochial law of any given adopting state. Its existence was of particular value not only in countries, which would benefit from modernization but also in those countries, which may be adopting or expanding their arbitration laws for the first time,³³

Addressing capacity of parties, the UNCITRAL Model Law, adopted Article V (1) (a) of the New York Convention as a basis for its own rules on annulment of awards and on the possibility to refuse recognition or enforcement respectively under Articles 34(2) (a) (i) and 36(1) (a) (i).

2.1.3 Conflict Rules used to determine Capacity of parties to Enter into an Arbitration Agreement

There is no uniform conflict rule to identify which law governs the legal capacity of the party to a contract. In Common Law countries, however, the legal capacity is sometimes considered a question of contract, and may, therefore, be governed by the law that governs the contract.³⁴ In all circumstances, the applicable law is always that law which governs the party to the agreement.³⁵ There is no

³²Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, 40 U.N. GAOR Supp. (No. 17), U.N. Doc. A/40/17 (1985)

³³Michael F. Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration* page 1

³⁴ See for the US Restatement, Second, Conflict of Laws page 198 and E. Scoles, P. Hay, P. Borchers and S. Symeonides, *Conflict of Laws*, 4th ed., page 18.2. A similar approach has English law, although only in respect of restrictions to the legal capacity, and without taking into consideration the law chosen by the parties: see Collins, L. Collins et al., *Dicey, Morris, Collins: The Conflict of Laws*, 14th ed. 2006, page 30-021ff.

³⁵ See, for Germany, J. Kropholler, *Internationales Privatrecht*, 2006, 581 and for Switzerland the Private International Law Act, article 155(c). The 1980 Rome Convention on the Law Applicable to Contractual Obligations, now replaced by the Rome I Regulation and representing the private international law in the European

generally accepted rule to what law parties ought to use to govern the arbitration agreement. Parties could either use two proposed approaches. These are:

- a. the conflict rule that designates the law of the state where the legal entity is incorporated or registered;³⁶ and
- b. the conflict rule that designates the law of the state where the legal entity has its central administration or main place of business (the so-called “real seat”).³⁷

The rationale for choosing one or the other connecting factor is clear: if the governing law depends on the place of registration, a company is recognized and can operate without having to adapt to company law rules of the countries where it has activity. The countries where the company carries out its activity are; in other words, ready to accept the criteria and rules of the company’s

Community, excludes from its scope of application the choice of law relating to whether an organ may bind a company, which means that within Europe there is no harmonization of the conflict rule applicable to the legal capacity of the parties, and each state has its own conflict rules to determine the law deciding whether the parties had the competence to enter into a contract. See, however, article 11 of the Rome Convention and article 13 of the Rome I Regulation, according to which, in the event of a contract entered into by persons located in the same state, the foreign party cannot invoke the foreign applicable law on legal capacity to assert his or her own legal incapacity, if that person had legal capacity under the law of the state where the contract was entered into (unless the other party was aware of the incapacity of that party). It is controversial whether this can be extended to companies; see Kropholler, cit., 581.

³⁶Collins, cit., page 30-002 ff., US law, see the Restatement, Second, Conflict of Laws page 296 f. (1971) and Scoles, Hays, et al., cit., page 23.2ff., the Swiss Private International Law Act, article 154, the Italian Private International Law Act, article 25.

³⁷ Kropholler, cit., 568ff. Where the real seat is deemed to be is not necessarily evident: While the Brussels Convention on Jurisdiction and The Recognition of Judgments, as well as the parallel Lugano Convention, left the criteria for determining where the seat is to the law of the forum, the Brussels Regulation EC 44/2001 has adopted a compromise solution for the purpose of determining where a legal entity is deemed to have a domicile, and makes reference to the state or states where the entity has any of its statutory seat, its central administration or its principal place of business. The New Lugano Convention, which is expected to come into force soon, reflects the Brussels Regulation.

country of origin without questioning their suitability or expecting adjustment to their own standards.³⁸

2.1.4 Approaches to Capacity of parties to Enter into an Arbitration by Notable Jurisdictions

a) Sweden approach to Capacity of parties to Enter into an Arbitration Agreement

The decision of the Sweden Court of Appeal (Svea Court of Appeal) best captures the Sweden approach to the issue of the capacity of parties to enter into an arbitration agreement.

The Swedish Decision: The Incapacity Route

In the case of *State of Ukraine v Norsk Hydro ASA, Svea Hovrätt*,³⁹ the court of appeal decided that the law, which governed a Ukrainian party, was applicable to an arbitration agreement.⁴⁰

The salient facts of the case were that two officers of the defendant signed a Shareholders' Agreement. They appended their name beside the line for signature, which was left empty for the signature of the defendant's Chairman. The Chairman never signed, and the defendant challenged the averments that the agreement had become binding on it. The Shareholders Agreement contained a choice of law clause that determined Swedish law as the governing law.

³⁸http://www.jus.uio.no/ifp/english/research/projects/choice-of-law/events/2009/presentations/article_cordero_moss.pdf accessed on 10/06/20

³⁹See Monthly Report, Kluwer arbitration, May 2008, Volume VI, Issue 5, T 3108-06, 17th December 2007

⁴⁰The legal incapacity to enter into the arbitration agreement is a ground for invalidity of the award according to article 34(1) of the 1999 Swedish Arbitration Act, see the preparatory works: SOU 1994:81 p. 77 and prop. 1998/99:35 p. 48, as well as L. Heuman, S. Jarvin, *The Swedish Arbitration Act of 1999, five years on: a critical review of strengths and weaknesses*, 2006, pp. 237 f.

In the new act, the invalidity is no longer "absolute", which means that it must be raised by the interested party as a defense within a certain term: see prop 1998/99:35 p. 138 f.

The Court, however, affirmed that Ukrainian law was applicable to the question of the capacity of a person to sign an agreement with binding effects for a Ukrainian entity.

The Court further examined the authority of the two officers and found that one of them was vested with proper authority under Ukrainian law to bind the defendant. The other had no authority. The Court also inquired into the issue of the prerequisite under Ukrainian law for the effectiveness of the signatures appended under the agreement. It concluded that, under Ukrainian law, the Shareholders Agreement would have required two signatures, whereas the arbitration agreement contained in the arbitration clause could become binding with only one signature. Thanks to the doctrine of severability, this could have been sufficient to consider the arbitration agreement binding on the defendant, as a matter of Ukrainian law.

However, the Court examined the location of the signatures beside the signature line and established, based on witness evidence, that the two signatures were not meant as binding signatures, but as visa put on the document by the administration for the benefit of the Chairman, who would thus know that the document is ready for being executed. The Court found that, as a matter of Ukrainian law and practice, such visa do not correspond to the execution of a contract, and a proper signature is necessary. The Chairman never signed the agreement, and therefore the Court found that the arbitration agreement never came into effect for the defendant.

The award rendered on the basis of that arbitration agreement was declared null by the Court of Appeal in accordance with Section 20(1) of the old Swedish Arbitration Act. However, it is notable that if the decision was made in accordance with the new Swedish Arbitration Act, the award would have been set aside based on Section 34(1) of the Act.

In the upshot, the Court of Appeal in this decision considered that for there to be the legal capacity to enter into an agreement and make it binding on parties, the agreement had to be governed by the law applicable to that party despite

the agreed law to be used in the agreement. On the issue of whether a signatory could bind parties to the agreement, the court also opined that the law and practice governing the party was applicable as opposed to the law agreed on by the parties' to the agreement.

It should be noted that the Svea Court of Appeal decision was presented to the Supreme Court for appeal, but the Swedish Supreme Court denied leave to appeal.⁴¹ Thus, the Svea decision is final, and the Court of Appeal's position that; *the legal capacity of a party is governed by the law applicable to that party* was indirectly confirmed by the Supreme Court.

b) England approach to Capacity of parties to Enter into an Arbitration Agreement

To elaborate the England approach to the issue of the capacity of parties to enter into an arbitration agreement below is a salient English decision.

The English Decision: The Invalidity Route

In *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*⁴², the court refused to enforce an award rendered in the frame of the International Chamber of Commerce in Paris on the ground that the arbitration agreement was not valid.

The party resisting enforcement of the award was the Government of Pakistan, which successfully argued that it was not bound by the arbitration agreement. The contract, including the arbitration clause, had been signed by a trust established by the Pakistani Government as a separate legal entity. The Government had participated in the negotiations of the contract but had not signed it.

⁴¹ Decision dated 2 June 2008, case no T 339-08

⁴² [2008] EWHC 1901 (Comm)

The Court found that, according to section 103(2)(b) of the English Arbitration Act, enforcement of an award may be refused if the arbitration agreement was not valid under the law to which the parties had subjected it or, failing any indication thereon, under the law of the country where the award was made. The Court decided that this section on the invalidity of the arbitration agreement applies also to the issue of whether someone was a party to the agreement. After having established that the parties had not chosen a governing law specifically for the arbitration agreement, the Court proceeded to apply French law, it being the law of the place where the award was rendered. The Court specified that it had to apply French substantive law and not its conflict of laws rules.

However, the Court found that French substantive law had generously made provisions on what elements must be taken into consideration when evaluating whether there was a common intention by the parties to be bound by the agreement. Among them were issues of foreign law, and the Court proceeded, therefore, to examine Pakistani law, as the law of the party the intention of which was to be established.

The Pakistani Constitution contained various restrictions to the possibility to enter into agreements binding on the state, i.e. that the agreement must be made in the name of the president and with his authority. The Court found that it was not necessary to ascertain whether this rule was mandatory or not because its very existence was sufficient to convince the Court that there had been no subjective intent to bind the state.

The High Court thus took the opposite route in respect of the Svea Court: it did not approach the matter from the point of view of the legal capacity of the party based on the law of their domicile or residence; it approached it from the point of view of the validity of the agreement under the law governing that agreement. The rules on the legal capacity of Pakistani law were taken into consideration through the provisions of the law governing the agreement as elements and that was French Law. Irrespective of the differences in approach, both decisions end up refusing to give effect to an international arbitral award

on the ground that the losing party was deemed, under the law of that party, not to be bound by the arbitration agreement.

2.1.5 An International Basis for Both Routes

It must be pointed out that both the Swedish and the English approach find a basis in international instruments on arbitration. *The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards*, which successfully creates a uniform law on the enforcement of awards in the about 150 countries that have ratified it (including Sweden and England).

Article V (1)(a) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards provides that; one of the grounds for refusing recognition or enforcement of an award is that one of the parties of the arbitration agreement was under some incapacity under its own law, or that the arbitration agreement was invalid under the law that the parties subjected it to, or failing a choice made by the parties, under the law of the place where the award was rendered.

Moreover, the UNCITRAL Model Law, adopted in about 50 countries, has used this Article of the New York Convention as a basis for its own rules on annulment of awards and on the possibility to refuse recognition or enforcement, respectively Articles 34(2) (a) (i) and 36(1) (a) (i). It must be pointed out that neither Sweden nor England has adopted the Model Law. However, both countries used the Model Law as a reference when they reformed their respective arbitration laws.

As a result, the grounds for invalidity that are being examined here are common both to annulment and to the enforcement of awards in the countries that adopted the Model Law, as well as in Sweden and England. The decisions presented here, therefore, are not only representative for the respective jurisdiction in which they were rendered but also correspond to rules that are in force in a large number of states.

3.0 A Kenyan Perspective to Capacity of Parties to Enter into an Arbitration Agreement

Kenya's approach to governing the capacity of parties to enter into arbitration agreements is largely no different to Commonwealth jurisdictions. Various statutes guide it and other legislations like statutorily mandated objects clauses in the company's memorandum of association for corporations. Perhaps, the most important of the statutory frameworks are the Arbitration Act No. 4 of 1995 and the Law of Contract Act No. 2 of 2002.

a) Law of Contract

An arbitration agreement is without a doubt a contract hence it must meet the basic requirements of a contract for it to be valid and enforceable;⁴³

- (i) Offer and acceptance
- (ii) There must be a consideration
- (iii) Parties must have the capacity or legal ability to contract.
- (iv) The subject matter of the contract must be legal
- (v) The agreement must be in writing.

Section 3 of the Law of Contract Act No. 2 of 2002 further provides that for a contract to be valid, it must be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.⁴⁴ Generally, every person is in law presumed to be competent to enter into contracts except for those who are minors, prevented by legal status (such as bankruptcy) or mental infirmity; do not have the capacity to enter into legally binding relations.⁴⁵

Contracts entered into by minors or persons of unsound mind are either void or voidable at the instance of the contractor who lacks capacity and is not

⁴³Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (3rdEdn Glenwood Publishers Ltd, 2017) page 39-40

⁴⁴ The Law of Contract Act, Section 3.

⁴⁵<<https://www.upcounsel.com/competent-parties-to-a-contract>>accessed on 10/06/20

enforceable. As respects, age, the Age of Majority Act, 1974 fixes the age of majority at eighteen years below which a person lacks the capacity to enter into a legally binding contract other than a contract for necessities.

The Infants Relief Act, 1874 (UK) as a statute of general application in Kenya, governs contracts entered into by minors. Such contracts are subject to the common law as modified by the Act.

The Kenyan case law captures these sentiments in the case of; *Grace Wanjiru Munyinyi & another v Gedion Waweru Githunguri & 5 Others* (2011) eKLR. In this case, the court ruled that for a contract to be valid, the parties must have attained the age of majority and be of sound mind at the time of entering the contract. It held that where a person has lost the ability to reason by disease, grief or other accident and can be shown not to have understood the contents of the agreement because of his mental condition, any contract other than a contract for necessities made by such a person is not binding on him.⁴⁶

In this regard, all contractual requirements as are required in other contractual agreements are also applicable to arbitration agreements. It is informative that other laws governing contracts in Kenya are:

b) The Arbitration Act No. 4 of 1995

Section 3 of The Arbitration Act No. 4 of 1995 defines “arbitration agreement” as an agreement by parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.⁴⁷ The Arbitration Act No. 4 of 1995 governs both domestic and international arbitration agreements. Section 2 stipulates that on one hand, a domestic arbitration agreement is one where the individuals are nationals of Kenya or are habitually resident in Kenya.⁴⁸

⁴⁶ *Grace Wanjiru Munyinyi & another Vs Gedion Waweru Githunguri & 5 Others* (2011) eKLR

⁴⁷ The Arbitration Act No. 4 of 1995, Section 3

⁴⁸ The Arbitration Act No. 4 of 1995, Section 2

The Arbitration Act No. 4 of 1995 under Section 35 (2) (i) provides for the basis upon which an arbitral award can be set aside by the High Court. To this end, it provides that an arbitral award may be set aside if a party to the arbitration agreement was under some incapacity. This is further buttressed by Section 37 (1) (a) (i) of the Arbitration Act No. 4 of 1995. This provision provides that one of the grounds for refusal of recognition or enforcement of an arbitration award by the court is if a party to the arbitration agreement was under some incapacity.

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In the case of: *Dorothy Seyanoi Moschioni v Andrew Stuart & another* [2014] eKLR⁵⁰ the court expounding what constitutes incapacity stated:

“...Section 35 of the Act uses very specific words “...a party to the arbitration agreement was under some incapacity...” I would imagine that incapacity in the sense of section 35 of the Arbitration Act would include the state of being a minor or of unsound mind or such other physical incapacity which is recognized by law as disabling or depriving legal capacity.”

For corporate entities in domestic arbitration, they must be incorporated in Kenya or their central management should be exercised in Kenya. On the other hand, arbitration is international if the parties to the agreement have their places of businesses in different states.⁵¹

The formal requirements for an arbitration agreement are set out under Section 4 of the Arbitration Act Cap No. 4 of 1995 and the first thing the statute provides for is that an arbitration agreement may be in the form of an *arbitration clause in a contract* or it may be in the form of a *separate agreement altogether*.⁵² So for example in a contract between the government and a building road contractor, the contract will set out what the works are and the instructions from the engineer and one of the clauses in that agreement may simply be the clause that

⁴⁹The Arbitration Act No. 4 of 1995, Section 35 (2) (a) (i) & Section 37 (1) (a) (i)

⁵⁰ Civil Case 312 of 2012

⁵¹ The Arbitration Act No. 4 of 1995, Section 2

⁵² The Arbitration Act No. 4 of 1995, Section 4.

says any or all the disputes arising from this contract shall be referred to Arbitration. That is one option.

The other option is where the contract is silent on whether it should bind the parties to the arbitration.⁵³Section 4(2) of the Arbitration Act Cap No. 4 of 1995 requires an Arbitration Agreement to be *in writing*, it is a requirement that it be not oral.

Section 4 (3) of the Arbitration Act Cap No. 4 of 1995, proceeds to explain what constitutes writing. It provides that an arbitration agreement is in writing if it contains

1. a written document by the parties;
2. an exchange of letters; telex, telegram or other means of telecommunications which provide a record of the agreement;
3. an exchange of statements of claim and defence in which the existence of the agreement to arbitrate is alleged by one party and not denied by the other party.

Section 4 (4) of the Arbitration Act Cap No. 4 of 1995, provides that the reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the record is in writing and the reference is to make that arbitration clause part of the contract. This is talking of incorporation of an arbitration agreement by reference.

c) Foreign Judgments (Reciprocal Enforcement) (Cap. 43)

Primarily, the enforcement of foreign judgments is governed by the Foreign Judgments (Reciprocal Enforcement) (Cap. 43). It provides for the enforcement of foreign judgments of superior or subordinate courts of particular countries,

⁵³Kenya legal resources

<<http://www.kenyalawresourcecenter.org/2011/07/arbitration-agreement.html>>accessed on 10/06/20

which have reciprocal provisions in their laws relating to the enforcement of the judgments of Kenya's superior courts.

The assessment on whether a country qualifies as a reciprocating country, and its designation under the Act as such, is done by executive order. However, if the foreign judgment is not covered under the Act, the common law principles on the enforcement of foreign judgments incorporated into Kenyan jurisprudence apply. This legislation is also applicable to an award in arbitration proceedings, if the award has, under the laws in force in the country where it was made, become enforceable in the same manner as a judgment given by a designated court in that country

d) Nairobi Centre for International Arbitration Act, No 26 of 2013

The Nairobi Centre for International Arbitration Act, No 26 of 2013 provides for the establishment of a regional centre for international commercial arbitration and the Arbitral Court.⁵⁴ It further seeks to administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices.

e) The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015

The Arbitration Rules apply to arbitration agreements entered into under the Nairobi Centre for International Arbitration Rules. Rule 5(2) of the rules stipulates that a request for arbitration should specify the contact details of each of the parties and the claimant's representative which contacts include telephone, facsimile or email address.⁵⁵ The request must also be accompanied by a copy of the contract in which the arbitration clause is provided or in respect of which the arbitration arises or a copy of a separate arbitration agreement invoked by the claimant.

⁵⁴ The Nairobi Centre for International Arbitration Act, No 26 of 2013

⁵⁵ The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015

In addition, Rule 24 (2) provides that an arbitration clause which forms part of a contract shall be treated as an arbitration agreement independent of other terms of that contract, and a decision by the Arbitral Tribunal that such contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.⁵⁶ These prescriptions by the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, to a great extent aid in the determination of the capacity of parties for all arbitration matters referred to the Nairobi Centre for International Arbitration for resolution.

4.0 International Legal Framework

Over and above the domestic legal framework Kenya is a party to several international treaties that play a crucial role in the resolution of disputes through arbitration. By dint of Article 2(5) and 2(6) of the Constitution of Kenya 2010, all International Conventions ratified by Kenya now form part of Kenyan law. The International Conventions must be ratified in accordance with the Treaty Making and Ratification Act No. 45 of 2012. Succinctly stated, Part III of Cap No. 45 of 2012 outlines the procedure to be adhered to before ratification of a treaty.

The procedure that leads to the ratification of a treaty must be adhered to religiously. This includes approval by the Cabinet and the National Assembly as provided by Section 7 and 8 of Cap No. 45 of 2012 respectively. In essence, these provisions of the Constitution provide a means by which international law becomes part of the Kenya legal framework.

It is on this that the following international laws earlier discussed are applicable in determining the capacity of parties to enter into arbitration agreements in Kenya. These include:

- a) Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September 1927)

⁵⁶ The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015

- b) The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985
- c) The Geneva Protocol of 1923
- d) International Convention on Settlement of Investment Disputes
- e) The New York Convention

5.0 In Conclusion

There is no black and white legislation governing the capacity of parties to enter into an arbitration agreement. It is apparent from the above discussion that conglomerations of different laws both local and international are applicable when determining the capacity of parties to enter into an arbitration agreement. It goes without saying from the above analysis the local legal framework forms the bulk of legislation used to delimit the capacity of parties to enter into an arbitration agreement.

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The Rome Convention on the Law Applicable to Contractual Obligations 1980

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Third Party Funding and Investment Arbitration – The Ménage À Trois Conundrum of International Arbitration?

*By: Jacqueline Waihenya**

This paper considers Third Party Funding as an evolving phenomenon within the context of international arbitration. This concept has gained significant ground particularly following the financial turmoil experienced during this new millennium, great technological strides and the emergence of high value awards on the global plane. The sector is largely variable and is becoming populated by players who though highly invested prefer to operate in the background with potential to significantly influence and alter the playing field. Considering that the sector is in flux and given its international nature subject to different and constantly conflicting dynamics in different jurisdiction there is a case to be made for policy and regulatory reform to respond to the ethical conundrums that have emerged and continue to develop.¹

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¹ This paper is inspired by the presentation entitled Third Party Funding & Investment Arbitration made during Session 8 of the 4th International Arbitration Conference themed Africa and ADR in an Evolving Landscape organized by the Chartered Institute of Arbitrators Kenya Branch in November 2020. The author moderated this session which was presented by 3 distinguished experts in ADR Practice, to wit, **Prof. Ike Ehiribe** FCIArb, FAiARB, C.Arb, QDR (Barrister, Chartered Arbitrator & Accredited Mediator); **SC John Ohaga** FCIArb, Chartered Arbitrator & Accredited Mediator (Managing Partner & Co-Head Dispute Resolution TripleOKLaw LLP Advocates) and **Abayomi Okubote** MCIArb, PhD Candidate Queens University (Senior Associate &

1. An Introductory Overview to The Concept of 3rd Party Funding:

The role of Third-Party Funding (TPF) in international arbitration is a trend that is real and is growing increasingly. Given that it has made significant inroads in investment arbitration as well as international commercial arbitration varied shades of opinion regarding its application, its efficacy and its challenge to the time held tenets of confidentiality and conflict of interests abide. For purposes of this paper international arbitration will be considered within the context of its 2 predominant constructs (1) investment arbitration where foreign investors assert rights against states; and (2) international commercial arbitration arising from disputes between private parties in international commercial transactions.²

Third Party Funding has a surprisingly long history and tradition in some sectors notably the maritime sector in the form of protection and indemnity clubs.³ Further in the 1960s the investor-state dispute settlement (ISDS) system allowed foreign investors to bring claims against host States based on bilateral investment treaties (BITs) or other international agreements creating the possibility of large monetary settlements incentivizing funders to take a stake in investment arbitration.⁴ TPF has only more recently made a significant impact in international commercial arbitration.⁵ The spike being attributable to the global entrenchment of access to justice as a public policy ideal, post 2008 turmoil in the financial markets, technological advancements, increasing costs

Team Lead Olaniwun Ajayi LP). The author has attempted to capture the essence of the presentations and the key contributions made

² Gus Van Harten, *'The Public-Private Distinction in the International Arbitration of Individual Claims against the States'*, *The International and Comparative Law Quarterly*, Apr., 2007, Vol. 56, No. 2 (Apr., 2007), pp. 371-394 Cambridge University Press on behalf of the British Institute of International and Comparative Law Stable. Available on <https://www.jstor.org/stable/4498073> Last accessed on 5 Jan 2021

³ ICCA - *International Council for International Arbitration-Queen Mary Task Force on Third Party Funding in International Commercial Arbitration Report*, ICCA Report No.4 (2018) Available at <https://perma.cc/B4L8-BR5S> Last accessed on 5 Jan 2021

⁴ Sherry Xin Chen & Kirrin Hough, *Researching Third-Party Funding in Investor-State Dispute Settlement* (May 2019) Available at https://www.nyulawglobal.org/globalex/Third-Party_Funding_Investor-State_Dispute_Settlement.html Last accessed on 5 Jan 2021

⁵ ICCA Ibid Supra Note No.4 pg.9

in international commercial arbitration and investment arbitration, rapidly changing attitudes towards champerty agreements in common law countries as well as within the global context and critically the now widespread applicability of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards commonly referred to as the New York Convention.⁶

Almost concurrently, Lord Justice Jackson published his report following his civil litigation costs review which made wide ranging recommendations and included a consideration of third-party funding in litigation.⁷ The report identified the benefits of TPF to include the following⁸:

“I remain of the view that, in principle, third party funding is beneficial and should be supported, essentially for 5 reasons:

- 1) Third party funding provides an additional means of funding litigation and, for some parties, the only means of funding litigation. Thus, third party funding promotes access to justice.*
- 2) Although a successful claimant with third party funding foregoes a percentage of his damages, it is better for him to recover a substantial part of his damages than to recover nothing at all.*
- 3) The use of third-party funding (...) does not impose additional financial burdens upon opposing parties.*
- 4) Third party funding will become even more important as a means of financing litigation if success fees under CFAs become irrecoverable.*

⁶ Victoria A Shannon, 'Harmonizing Third-Party Litigation Funding Regulation' (2015) 36 *Cardozo L Rev* 861 Available on Heinonline Last accessed on 5 Jan 2021

⁷ Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report' (2009) Available at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> Last accessed on 5 Jan 2021

⁸ Jackson Report Ibid Supra Note No.8 pg.117

- 5) *Third party funding tends to filter out unmeritorious cases, because funders will not take on the risk of such cases. This benefits opposing parties.”*

In due time these foregoing developments set the stage and created the need to form the ICCA-Queen Mary Taskforce who then published their Third-Party Funding in International Commercial Arbitration Report in April of 2018.⁹ This report proposed certain principles revolving around voluntary disclosure by the parties and where necessary to empower tribunals to compel disclosure with a view to attending to potential conflicts of interest.¹⁰ Principles relating to privilege and professional secrecy to the effect that the existence and identity of a funder is not covered by legal privilege, however particulars of a TPF agreement may be covered by privilege and where disclosure is required redaction may be permitted,¹¹ principles regarding the allocation of costs in the final award,¹² as well as the principles surrounding awarding of security for costs where a party has a TPF arrangement.¹³ These principles have made it into the various reform efforts that have since emerged.

1.1 Definition: What is TPF?

It is to be note however that to date there does not exist a universally accepted definition of TPF.¹⁴ However, TPF can be said to arise where a third party to the proceedings and who has no direct interest in the issues at hand nevertheless finances a litigation or arbitration proceeding with a view to recovering their capital and a considerable profit thereby taking a chance that the party they fund will reap a positive substantial monetary outcome in the said

⁹ ICCA Ibid Supra Note No.4

¹⁰ ICCA Ibid Supra Note No.4 pg.14

¹¹ ICCA Ibid Supra Note No.4 pg.15

¹² ICCA Ibid Supra Note No.4 pg.15

¹³ ICCA Ibid Supra Note No.4 pg.16

¹⁴ Wilhelm H. van Boon, *Third Party Financing in Investment Arbitration*, Erasmus School of Law, Rotterdam, Netherlands, December 2011 pg.25. Available at <https://dx.doi.org/10.2139/ssrn.2027114> Last accessed on 5 Jan 2021

proceedings.¹⁵ According to the ICCA-Queen Mary Report anecdotal evidence at the time suggested that the global levels of TPF in litigation and arbitration combined then exceeded US\$10billion¹⁶ and in its simplest form the third party funder provides financing to one of the parties usually the claimant (or a respondent with a counter claim) on a non-recourse basis, that is, they do not have any recourse where the party funded is unsuccessful.¹⁷

The third-party funding industry includes entities such as specialized litigation firms, insurance companies, investment banks, and hedge funds¹⁸ and third-party clients include companies, law firms, individuals and even sovereign states involved in the prosecution of defence of a claim in international investment arbitration or international commercial law.¹⁹ There are various constructs of third-party funding models with the traditional model being that the funder contracts with the client (claimant/respondent) who remains a party in the case and the claim or liability is not assigned and where the funder contracts to receive a percentage or portion of the proceeds of the case but receives nothing where the case is not successful. Variants of this traditional model also exist such that (1) the party may sell the claim and walk away; (2) where it is an insurer they may subrogate and further be named in the claim as a party; or (3) funders may finance a law firm for the case in question or for a portfolio of cases using the law firms accounts receivables or contingency fees as collateral.²⁰ The various models have their benefits, drawbacks and regulatory challenges.²¹

¹⁵ Eric de Brabandere & Julia Lepeltak, *Third Party Financing in International Investment Arbitration*, Grotius Centre Working Paper No.2012/1, Leiden University, the Netherlands pg.3. Available at <http://ssrn.com/abstract=2078358> Last accessed on 5 Jan 2021

¹⁶ ICCA Ibid Supra Note No.4 pg.17

¹⁷ ICCA Ibid Supra Note No.4 pg.18

¹⁸ L. Bench Nieuwveld and V. Shannon Sahani, *Third-Party Funding in International Arbitration*, 2nd edn. (Kluwer 2017)

¹⁹ Victoria A. Shannon, *Harmonizing* Ibid Supra Note No.7 at pg. 872

²⁰ Victoria Shannon Sahani, 'Reshaping Third-Party Funding' (2017) 91 Tul L Rev 405 Available on Heinonline Last accessed on 5 Jan 2021 pg.417

²¹ Victoria Shannon Sahani Reshaping Ibid Supra Note No.21 pg.418

However, it cannot be gainsaid that the TPF industry is not the most transparent and information on the cases subject to TPF funding requires to be mined such as was done by Students from Boston College Law School's Working Group on Investment Reform who have apparently collated at least 29 cases of TPF around the world 26 of which involved developing countries²² and includes cases such as *Cortec Mining v. Kenya*²³ where the claimant is said to have received TPF and in which case the funder being dissatisfied with the tribunal's interpretation of an "implicit legality requirement" sought to overturn the denial of jurisdiction in the case.²⁴

1.2 Why TPF & When is it Appropriate?

The biggest why-for TPF is access to justice particularly since dispute resolution processes like arbitration and litigation are fairly costly where parties incur lawyers' fees, tribunal charges and fees, witness costs, expert expenditures and remuneration, opportunity costs as well as indirect costs²⁵ which may render a litigant unable to pursue their rights where they do not have sufficient resources or are unwilling to take the risk due to being risk averse or otherwise not being familiar with the processes such that the time and cost are beyond what they are willing to put together.²⁶

1.3 Advantages & Disadvantages:

The advantages of TPF revolve around access to justice particularly to the weaker party, generally an investor and claimant. Availability of funding enables them access to much needed resources and in the case of investment

²² Sherry Xin Chen & Kirrin Hough Supra Ibid Note No.5

²³ Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No.ARB/15/29

²⁴ Brooke Guven & Lise Johnson, 'The Policy Implications of Third-Party Funding in Investor-State or-State Dispute Settlement', CCSI Working Paper 2019 - Columbia Centre on Sustainable Investment, Columbia Law School. Available at https://scholarship.law.columbia.edu/sustainable_investment_staffpubs
Last accessed on 5 Jan 2020

²⁵ Ronen Perry, 'Crowdfunding Civil Justice' (2018) 59 BC L Rev 1357 pg.1362 Available on Heinonline Last accessed on 5 Jan 2021

²⁶ Ronen Perry Ibid Supra Note 26

arbitration reduces the gap between the claimant and a state though it is important to note that this does not of course preclude states from seeking TPF on their part.²⁷ Per the High Court of Australia Kirby J, in Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited²⁸,

*[b]y "organising" persons into a legal action for the vindication of their legal rights, representative proceedings are not creating controversies that did not exist. Controversies pre-existed the proceedings, even if all those involved in them were unaware of, or unwilling earlier to pursue, their rights. A litigation funder [...] does not invent the rights. It merely organises those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law.*²⁹

Other key advantages include (1) having the funder shoulder the liability for costs giving the claimant greater leeway to organizing themselves financially; (2) having the funder undertake a detailed and exhaustive cost-benefit analysis and it stands to reason that the only reason a third-party funder would take on a case is because the case is meritorious;³⁰ (3) for lawyers TPF it enables them to work without shouldering the risk of non-payment;³¹ (4) for the funder international commercial arbitration and investment arbitration are a promising area due to the prevalence of high monetary value claims;³² and TPF is a useful tool for enabling claimants who already have beneficial awards meet the costs of enforcement which in an of themselves can be fairly steep.³³

²⁷ Eric de Brabandere & Julia Lepeltak Ibid Supra Note No.16 at pg.8

²⁸ Campbells Cash and Carry Pty Ltdl v. Fostif Pty Limited, [2006] HCA 41

²⁹ Campbells v. Fostif Ibid Supra Note No.29 pg.202

³⁰ Eric de Brabandere & Julia Lepeltak Ibid Supra Note No.16 at pg.8

³¹ Vienna Messina, 'Third-Party Funding: The Road to Compatibility in International Arbitration', Brooklyn Journal of International Law Volume No.45 Issue No.1 Article No.10 (2019) pg.448. Available at:

<https://brooklynworks.brooklaw.edu/bjil/vol45/iss1/10> Last accessed on 5 Jan 2021

³² Vienna Messina Ibid Supra Note No.32 at pg.450

³³ Vienna Messina Ibid Supra Note No.32 at pg.451

Conversely, there are disadvantages that are inherent in the involvement of a funder/funders which for their part may be enumerated to be (1) it may skew the advocate-client relationship; (2) elongate any settlement potential where a funder is inclined to make the highest possible return; (3) the tripartite relationship between the claimant, advocate and funder may create complex dynamics which may impact the proceedings; (4) advocate-client privilege may also be compromised;³⁴ (5) increased involvement of funders may have the effect of increasing the number of international arbitrations and cause a strain on tribunals in terms of capacity and availability; (6) the commodifying of arbitration claims through the artificial inflation of damages; (7) any party using a funder also requires to be alive to the different dynamics that may be applicable due to conflict of laws governing not only the arbitration proceedings but also the funding agreements; (8) for a funder there is also the real possibility of not being able to recover on their investment.³⁵

2. Practical Tips on How to Approach A Funder

There are a variety of funding options especially for parties seeking funds and are constrained looking for off balance sheet solutions. For the most part funders view the arbitration proceedings as a financial asset, an investment in exchange for a return upon the success of an arbitration/litigation and typically funders consider a variety of factors always keeping an eye at the fundamental goal being to recover their capital plus investment and success fee³⁶

2.1 Finding A Funder:

It was noted that funders are not easy to obtain and brokers have emerged in various markets. Further, funders will closely examine the claim in question and ultimately only fund cases with a suitable return and against respondents who have a capacity to pay. Key considerations necessarily include lawyers' fees, expert fees, filing fees, any litigation that may ensue, estimated enforcement costs. Further, funders have become very creative using the claim as collateral

³⁴ Eric de Brabandere & Julia Lepeltak Ibid Supra Note No.16 at pg.9

³⁵ Vienna Messina Ibid Supra Note No.32 at pg.452

³⁶ This section draws substantially from the presentation made by SC John Ohaga during the 4th International CIARB Arbitration Conference, Kenya.

to support the claim, working capital funded and thereafter taking on a portfolio finance approach where they may at times outrightly purchase a claim and/or award which may ultimately be refinanced or financed by a group as opposed to a single entity the primary consideration of course being to spread the risk. The legal ramifications of this are diverse and birth challenges for all concerned within this tripartite arrangement including and at times especially for the law firm concerned as they are likely signatories to the third-party funding agreement and there may be express and/or implied times that have far reaching impact and may have the effect of significantly testing long held traditions in arbitration and/or litigation.

2.2 Packaging the Claim:

Steven Harwood LLP UAE³⁷ consider the factors funders will look at to include whether or not the recoverable sums will be sufficient to justify the investment required to finance the dispute. The chances of funding increase with the quantum of the claim or where smaller whether it can fit into an existing or portfolio-based approach. These are weighed against the potential and/or existing risks with especial emphasis on the known ability of a respondent to satisfy the award plus the value of the respondent's assets in the event enforcement becomes necessary. Also, technical considerations such as whether the respondent will seek to challenge jurisdiction, the grounds and anticipated chances of success as well as any counterclaims that the respondent may pursue.³⁸

Our presentation for its part summarised key factors to include (1) the value and complexity of the claim; (2) the amount of the claim; (3) the likelihood of success; (4) other interested parties; (5) jurisdiction(s) involved; (6) arbitral institution; (7) the existence of a counterclaim; (8) the legal merit of the claim; and (9) the ease of enforcement of the arbitral award.

³⁷ Nicholas Sharratt & Michael Hartley, 'Third party Funding in International Arbitration' (7 Sep 2020) Lexology. Available at <https://www.shlegal.com/insights/third-party-funding-in-international-arbitration> last accessed on 5 Jan 2020

³⁸ Nicholas Sharratt & Michael Hartley Ibid Supra Note No.38

3. TPF Dynamics for The Funder, The Parties & The Tribunal:

The dispute resolution process harbours within it dynamic inherent risks constantly in flux namely (1) systemic risk comprising of rules, procedures, inefficiencies, inadequacies and unknowns that affect whether a party will win, the quantum of the win and the quantum of costs recoverable;³⁹ (2) behavioural risks of the parties, lawyers, witnesses, experts, judges/arbitrators and funders who may not comport themselves as expected through error or even outright deception⁴⁰; and (3) regulatory compliance risks in the face of a regulatory framework is at worst non-existent and at best inadequate and confusing rendering compliance uncertain, unpredictable and challenging;⁴¹ all of which impact upon each of the players involved. Further, TPF is considered to still be within its “wild, wild west phase”⁴² due to a dearth of regulation and where regulation exists a dire lack of uniformity and an array of conflicting laws from jurisdiction to jurisdiction⁴³ thereby creating great potential for the emergence of serious difficult ethical conundrums which generally constitute the riddle of confidentiality, conflict of interest and disclosure.

4. The Ethical Conundrum:

TPF initially encountered ethical common law doctrines prohibiting maintenance and champerty agreements which in many common law jurisdictions have now been abolished by statute or relaxed through court precedent. The development of TPF notwithstanding its advantages does nonetheless create some legal and ethical challenges which arise due to the introduction of a funder with financial muscle and a strong interest in the outcome of an arbitration proceeding particularly in relation to the influence on the attorney-client relationship, on the independence and impartiality of arbitrators, which in turn may affect the arbitral proceedings.⁴⁴

³⁹ Victoria Shannon Sahani *Reshaping* Ibid Supra Note No.21 pg.422

⁴⁰ Victoria Shannon Sahani *Reshaping* Ibid Supra Note No.21 pg.422

⁴¹ Victoria Shannon Sahani *Reshaping* Ibid Supra Note No.21 pg.423

⁴² Victoria A. Shanon *Harmonizing* Ibid Supra Note No.6

⁴³ Victoria A. Shanon *Harmonizing* Ibid Supra Note No.6

⁴⁴ Valentina Frignati, *Ethical implications of third-party funding in international arbitration* Arbitration International, 2016, 0, 1-18 Oxford University Press on behalf of the London

From the legal counsels perspective key ethical challenges include (1) the erosion of advocate-client privilege where confidential information is disclosed to a funder; (2) the intermeddling by the funder with the advocate-client relationship particularly where there emerge divergent views regarding settlement vis-à-vis proceeding to the final award; and (3) control of critical aspects of the proceedings including choice of arbitrator/tribunal and strategic decisions on the conduct of the arbitration. Regardless of the existence of a TPF arrangement legal counsel are enjoined to remain objective, independent and to give impartial and unbiased advise.⁴⁵ From the perspective of the Tribunal especially where an arbitrator wears multiple hats such as counsel in one proceeding with a funder and arbitrator in another where the parties are funded either by the same funder or within a portfolio. This necessarily creates grey areas that could conceivably cross the bounds set out in the IBA Guidelines on Conflicts of Interest in International Arbitration which are the oft used industry standard.⁴⁶ Ultimately, the procedural status of the financier in the dispute will be an important factor although in Ambiente Ufficio v. Argentina, CSOB v. Slovakia, Teinver v. Argentina where this question was raised the Tribunal determined that the existence of a funder does not affect the status of the parties.⁴⁷ In that case role of the funder NASAM was articulated to be to coordinate and fund the arbitration as well as being a conduit with the legal counsel in the case.⁴⁸

This benign acknowledgement of the existence of a funder is an expression of the traditional baseline preference for many funders to err towards non-disclosure of funding arrangements with a strong suspicion that disclosure

Court of International Arbitration. Available at <http://arbint/aiw011> Last accessed on 5 Jan 2021

⁴⁵ Valentina Frignati Ibid Supra Note No.45 pg.8

⁴⁶ Valentina Frignati Ibid Supra Note No.45 pg.9

⁴⁷ Elena V. Sitkareva, Yulia A. Artemyeva , Svetlana Mendosa-Molina, *Third-party Funding: Practical, Ethical and Procedural Issues* (February 2019) Available at <https://www.researchgate.net/publication/336103881> Last accessed on 5 Jan 2021

⁴⁸ Ambiente Ufficio SPA and Other (Case formerly known as GIORDANO ALPI AND OTHERS) v. The Argentine Republic (ICSID Case No. ARB/08/9) pg.63

could adversely influence the tribunal.⁴⁹ However, there is a case to be made for the disclosure a TPF at the commencement of the arbitration specifically in regards to the existence of the same as well as the identity of the funder. This is for purposes of ensuring the actual and apparent independence of a tribunal⁵⁰ considering the international arbitration space is a fairly confined space with an almost determinate number of players who consistently and interchangeably wear the different hats of tribunal and counsel in various references.

5. Existing TPF Guidelines And/Or Regulations:

TPF Guidelines and/or regulations have recently begun to emerge seeking to reform the sector particularly with regards to investment arbitration where the involvement of states has given impetus to consider transparency, independence and conflicts of interest in ISDS proceedings. These have come through investment treaties or free trade agreements which are making efforts to include provisions that consider TPF.⁵¹ Arbitration Institutions are also taking steps to provide for TPF within their rules such as Singapore International Arbitration Centre (SIAC)⁵² and China International Economic and Trade Arbitration Commission (CIETAC).⁵³ Others have further included the issue of

⁴⁹ William Stone, 'Third Party Funding in International Arbitration: A Case for Mandatory Disclosure' (2015) 17 Asian Disp Rev 62 at pg.68. Available at Heinonline last accessed on 5 Jan 2021

⁵⁰ William Stone Ibid Supra Note No.50 pg.68

⁵¹ Sherry Xin Chen & Kirrin Hough Supra Ibid Note No.4

⁵² Article 24(l) of SIAC Investment Arbitration Rules, 2017 empowering a tribunal to require disclosure of TPF. Available at <https://www.siac.org.sg/our-rules/rules/siac-investment-arbitration-rules> Last accessed on 5 Jan 2021.

⁵³ Article 27 of CIETAC International Investment Arbitration Rules, 2017 effective 1 October 2017 requiring disclosure of particulars of funders. Available at <http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en> Last accessed on 5 Jan 2021

TPF in their working papers for instance ICSID⁵⁴ and UNCITRAL⁵⁵ with an inclination to support disclosure of TPF as well as its impact on security for costs. For its part the International Chamber of Commerce through its 2021 rules which came into effect on 1st January 2021 further makes it compulsory at Article 11(7) for a party to disclose the existence of TPF and the identity of such funder in that document referred to as a non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.⁵⁶

6. Conclusion:

TPF is a phenomenon that is catching on particularly in the wake of the COVID 19 pandemic and the anticipated disputes that will emerge therefrom appears to be hurtling towards permanence rather than demise. As a construct of access to justice and as a control to nurture only those cases that are meritorious within the context of international arbitration it is invaluable.

However, the ethical conundrums are prevalent and they manifest with varying degrees of complexity across global borders and there is therefore a case to be made to pursue the current initiatives for legal reform within this space as well as considering and establishing best practice within the sector to minimize the inherent systemic risks to which it is subject. This can only be achieved by demystifying the subject, inviting scholarly and jurisprudential input to

⁵⁴ Rule 14 (Arbitration Rules) of Working Paper No.4 proposes to make it mandatory for a notice to be issued by a party who has received third party funding whether directly or indirectly and further empowering the Tribunal to order disclosure from such funder as it may deem necessary. Similar provisions for other ADR mechanisms have also been made. Available at

<https://icsid.worldbank.org/resources/rules-and-regulations/icsid-rules-and-regulations-amendment-working-papers> Last accessed on 5 Jan 2021

⁵⁵ UNCITRAL Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5-9 October 2020) Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/report_wg_iii_advance_copy.pdf Last accessed on 5 Jan 2021

⁵⁶ ICC 2021 Arbitration Rules Available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/rules-of-arbitration-2021/#article_11 Last accessed on 2 Jan 2021

ventilate what promises to become an interesting area for academic discourse given its public-private law qualities and its greater than passing similarity to the public interest dynamic.

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ICSID Arbitration Rules Working Paper No.4. Available at <https://icsid.worldbank.org/resources/rules-and-regulations/icsid-rules-and-regulations-amendment-working-papers> Last accessed on 5 Jan 2021

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General Issues Affecting Alternative Dispute Resolution

By: David Njagi Ngonge*

Abstract

Alternative dispute resolution (ADR) has proven to be one of the most preferred dispute resolution mechanism globally, regionally and locally. The adoption of this mechanism which comprise mediation, arbitration and negotiation among other techniques is however faced with many challenges. This paper aims to establish the key issues facing the full adoption of alternative dispute resolution. Specifically, the paper argues that alternative dispute resolution has more flexibility in bringing together disputing parties using an environment that reduces tensions. Examples from global, regional and local cases successfully solved using alternative dispute resolutions will be employed to demonstrate the strength of this mechanism while highlighting the challenges faced. It is expected that the policy designers, law makers and stakeholders in dispute resolution will benefit from this paper as well as scholarly practitioners in strengthening the application of this ADR mechanism of dispute resolution.

Key words: *Dispute Resolution, Alternative Dispute Resolution, Arbitration, Mediation & Negotiation*

Introduction

Alternative dispute resolution was there from time immemorial with the kings and rulers using it to keep peace in the land but also to ensure sensitive conflict cases were kept less inflamed through such a mechanism¹. The common practice in all societies takes the form of referring conflicts to the institutions of laws and regulations of the land which in many cases have courts as the main institution

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¹ Edwards, H. T. (1986). Alternative dispute resolution: Panacea or anathema? Harvard Law Review, 99(3), 668-684

for solving cases. However, both the old and modern world have had alternative forms of dispute resolution with common examples including open forums involving old wise people perceived as neutral in the dispute or case at hand.

Other forums have involved invitation of an objective party holding brief at a neutral location from the dispute zone with provision for more persons to participate in such a forum. The main reasons for such alternative dispute resolutions have always been the nature of the dispute and the composition of the parties involved in the dispute. Various communities and societies treat conflicts differently but once the courts have exhausted their scope of the law, it becomes almost mandatory to have the alternative dispute resolution mechanism². The environment of the dispute has also played a huge role in deciding on this mechanism in which hostile environments of any kind present the need for this alternative dispute resolution.

An environment that is extremely hostile for disputing parties would be strenuous to host such a forum thus necessitating the neutral venue selection for this alternative dispute resolution mechanism (ADR). Depending on the nature of the dispute, commonly used ADRs include mediation, conciliation, arbitration, settlement conferences, neutral evaluation and community dispute resolutions all which face successes as well failures as experienced in the past and present. In some countries, ADR remains the only means of resolving disputes specifically when the rule of law is not completely assured as witnessed in extremely warring parts of the world including South Sudan, Libya, and Somalia³. Apart from such extremes, common civil cases have called for ADR as the best mechanism when there is fear of long court periods as well costly processes that normally characterize the court procedures.

² de Werra, J. (2016). Alternative Dispute Resolution in Cyberspace: The Need to Adopt Global ADR Mechanisms for Addressing the Challenges of Massive Online Micro-Justice. *Swiss. Rev. Int'l & Eur. L.*, 26, 289.

³ Sabala, G. M. (2019). Principles, Effectiveness and Challenges of Traditional Dispute Resolution Mechanisms: A Review of Cases from Kenya, Rwanda, Sudan and Uganda. *Journal of Living Together*, 6(1), 162-172.

The world has witnessed an increase in the adoption of ADR mechanism following the increase in the forums that result in the creating of conflicts as well as the highly increasing awareness of people about rights. One thing that is clear on ADR mechanism is that the more people get informed through education and general society openness, the more ADR mechanism is embraced. Similarly, as observed by professionals in the legal field, the tedious procedures and apparently complex nature of law interpretation has led to the increased resort to the ADR mechanism that cuts across all forms of economic standards.

Contrary to the old beliefs that ADR is meant for those not able to pay for the law costs, the ADR mechanism is embraced by society members of all classes. Democracy notwithstanding, the ADR mechanism is also adopted across all political systems from the traditional era to the modern times. As one would expect however, there are serious challenges facing the ADR mechanism.

Evolutionary problems of ADR

From the beginning of time, ADR has acted as the resort to those who have either failed to agree with the court system or those who specifically feel the legal court system cannot have the adequate and intricate tools deemed necessary to solve a dispute⁴. This inherent trait of keeping off the legal courts has led to the suspicion of ADR as either being biased or fraud with non-qualified people⁵. Traditionally, it was deemed that those who understand the law were in a certain high class leading to the belief that anyone seeking an alternative to legal system was either of low class or avoiding specific truths that could be unearthed if law professionals examined their case⁶. However, the truth has emerged over the years indicating that not all courts give the best solution nor do they have all facts to prosecute or make a judgement on the cases before them.

⁴ Edwards, H. T. (1986). Alternative dispute resolution: Panacea or anathema?. *Harvard Law Review*, 99(3), 668-684

⁵ Ibid

⁶ Menkel-Meadow, C. (2015). Mediation, arbitration, and alternative dispute resolution (ADR). *International Encyclopedia of the Social and Behavioral Sciences*, Elsevier Ltd.

Again, ADR was always deemed voluntary by the participants with no cost to be incurred leading to the misconception that it is for the poor or even the lazy in the society⁷. Another traditional weakness of the ADR mechanism is the perception that those who are involved had something to hide from the legal court system for example land cases involving prominent political figures⁸. This however has proved not always true and the need to rectify that perception arises from time to time with the variety of society members and cases that have been referred to the ADR mechanism.

In spite of the evolutionary and inherent problems in ADR mechanism, there is hope that ADR is getting embraced across all forms of society. There is a growing realization that the mechanism not only serves the society widely and objectively, but has helped in easing court congestion that continue to hamper socio-economic progress as well as enabling citizens move on to other issues away from resolution processes as envisaged in the Kenya Constitution 2010 Article 159⁹.

The more ADR mechanism is adopted the more there will be realization to have dedicated resources for enabling more scope for ADR mechanism. The key in this transformation require not just sensitization but a demonstration by the people in ADR environment that the mechanism works and could be used as a first step mechanism unlike its common usage as a last resort mechanism. However, what is clear is that the inherent perceptions of the ADR mechanism are not ease to erase in the minds of most people especially where high stakes exist.

Socio-demographics in ADR sphere

Both traditionally and in modern times, socio-demographic factors have played a big role in determining the ADR mechanism success and adoption.

⁷ Stipanowich, T. J. (2004). ADR and the "Vanishing Trial": the growth and impact of "Alternative Dispute Resolution". *Journal of Empirical Legal Studies*, 1(3), 843-912.

⁸ Obi, N. N. (2018). Resolving Political Party Disputes through Alternative Dispute Resolution. *Journal of Political Science and Leadership Research*, 4(4), 28-41.

⁹ www.klrc.go.ke/Acts

Specifically, the key factors are normally age groups, gender and race. It has always been witnessed that age differences lead to the need to have ADR mechanism¹⁰. This is even more applicable in cases where the age difference is quite substantial. On many occasions, civil cases involving inheritance matters have comprised the age group extremes pitting old society members and the youth or generally younger generation.

Whereas, the youth would prefer the court procedural route, it is evident that the older generations have a perception that ADR gives a chance to the older members of the society to exercise wisdom reasoning¹¹. This is an issue that still plays a key role with a demonstration that ADR has really eased the tension between the wide gaps in age that is common in inheritance disputants. Examples in which adolescents or people under parental guidance enter a dispute with the elderly have always had the need to have ADR mechanism¹². The other issue of gender also plays a part in that societies have always found themselves in situations where gender privacy could be the key to solving a dispute without necessarily denying justice to either side of the dispute¹³.

Race and religion have also played a key role in the adoption of ADR mechanism as witnessed in situations where sensitivity of the case requires mixing of both modern law and considerations of what racial or religious backgrounds affect the dispute in question¹⁴. Different regions of the globe have different leanings towards specific religions with interpretation of laws heavily leaning on the religious background.

¹⁰ Barrett, J. T., & Barrett, J. (2004). A history of alternative dispute resolution: The story of a political, social, and cultural movement. John Wiley & Sons).

¹¹ Hensler, D. R. (2003). Our courts, ourselves: how the alternative dispute resolution movement is re-shaping our legal system. *Penn St. L. Rev.*, 108, 165.

¹² Muigua, K. (2018). Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya.

¹³ Vatum, S. (2013). The "women's court" in India: an alternative dispute resolution body for women in distress. *The Journal of Legal Pluralism and Unofficial Law*, 45(1), 76-103

¹⁴ Wanjama, L. (2020). Gender Dynamics Determining Men and Women's involvement in Community Conflicts through Alternative Dispute Resolution (ADR) Mechanisms in Kapsokwony, Kenya. *Methodology*, 10(21).

The Middle East is one such example where religion and race could have a clash in which a non-Muslim with a dispute finds it hard to find fair trial. Similarly, nations in the South East Asian nations have religion and race in conflict requiring ADR mechanism in solving conflicts. It also happens that locally, the various conflicts between various communities in Kenya require consideration of the tribal background and religion in question. The complication arising is due to the fact in a court of law, such considerations are not factored in and hence the need for ADR mechanism.

Matters of gender have also raised sensitive forums in disputes that could take normal legal court system a complicated compilation of facts. In most cases, the so-called weaker sex has poor representation in courts of law and due to their low education levels across many communities in Kenya, they tend to have unfair decisions against them¹⁵. The ADR mechanism provides an opportunity for both girls and female adults of the society to express themselves more freely devoid of the cultural, religious and male-dominated legal court system that does not provide equal playing ground for them as provided in the constitution.

Class Considerations

The traditional class divisions in society have always led to people choosing a forum that can show their status in society. The legal system in particular has tended to favour the middle and upper class of the society hence the apparent need for ADR mechanism in initially covering the needs of the low class in dispute resolution. However, even the middle and upper class divisions of the society have fully embraced the ADR mechanism on many occasions and this proves that the approach requires full support yet it still faces challenges based on class differences.

The notion that ADR mechanism is free has to an extent helped in driving the doubts in the system by members of the society¹⁶. As experienced in Asia and

¹⁵ Nyukuri, E. (2006). *Women, Land and Resource Conflicts: Policy Implications and Interventions in Kenya*. African Centre for Technology Studies (ACTS), Nairobi, Kenya

¹⁶ Merry, S. E., & Silbey, S. S. (1984). What do plaintiffs want? Reexamining the concept of dispute. *The Justice System Journal*, 151-178.

many parts of Europe, high class people would rather have costly legal system in which their financial muscle makes them sustainable while winning disputes¹⁷. Hearsay or not, the same perception of sustaining a long court process is witnessed in low class of many societies where the low class party feeling financial capable would rather go for the legal court system and exhaust the other party from similar low class than have ADR mechanism.

There is also a tendency for class divisions to hinder legal court system due to high fees that would normally discriminate indirectly against the low class. As long as the society continues to have these silent or open classifications, ADR mechanism will stand the best chance of equalising the legal inequalities that would arise if the only mechanism existing was the legal court system¹⁸. The disputes that go across all society classes means that ADR mechanism is here to stay and everything needs to be done to further sensitize the existence of this critical route of dispute resolution.

Techniques of ADR mechanism

The one issue that has kept ADR mechanism evolving is the technique of application for this approach. In the ancient world, ADR mechanism was strictly for the wise men of the society whereas modern society allows for various people of different backgrounds to be on the ADR teams. The wide variety of techniques available for ADR approach has enhanced the scope of people participating into the ADR system¹⁹. Starting with the now popular ADR technique of mediation, this employment related approach has managed to bring into focus various people from all kinds of employment. Although the technique has worked successfully in largely industrialised nations as well as the South East Asian countries, there is a challenge to raise capacity for the technique.

¹⁷ Cupido, R. V. (2016). Online Dispute Resolution: An African Perspective. In International Workshop on Law and Politics, Istanbul.

¹⁸ Owino, K. (2019). Challenges Facing Implementation of Administrative Justice by the Kenyan Ombudsman (Doctoral dissertation, University of Nairobi).

¹⁹ Kumari, P. (2020). Alternative Dispute Resolution (ADR). Available at SSRN 3626625.

Mediation has suffered from apparent perception that mediators might not have adequate knowledge of handling the employment cases before them²⁰. Lack of legal background in most mediation members has also been a challenge to the technique leading to some unbinding agreements heading to legal court system thus defeating the ADR mechanism²¹. Mediation also works in case of political conflicts as witnessed in the many cases across Africa where elections are disputed and well solved through mediation process. However, repeated mediations could also tire a particular party in the dispute leading to legal court system thus defeating the ADR mechanism.

The Ombudsman even though found in many constitutions has proved very controversial with critics pointing out that it is a compromised technique used as a puppet of the ruling government in the developing countries²². However, the equivalent of Ombudsman in many developed countries appear to work in democracies that allow such system. In the developing nations, the question of transparency and openness has remained highly contentious. The selection of this Ombudsman mode of ADR technique is always questionable given that in most developing countries the selecting power is placed in the hands of the country leadership with vested interest thus taking away the neutrality required of this ADR approach.

The other ADR techniques have proved to be expensive or costly to apply even though in specific cases, they are the only methods that can be applied. These include the fact finding, settlement conference and peer review approaches which all require thorough preparation with large research budgets thus discouraging their usage. It therefore calls for the government and its law

²⁰ Ali, M., & Geng, L. L. (2019). Alternative Dispute Resolution (Adr) In Pakistan: The Role of Lawyers in Mediation Procedure. *International Journal of Research*, 6(7).

²¹ Owino, K. (2019). Challenges Facing Implementation of Administrative Justice by the Kenyan Ombudsman (Doctoral dissertation, University of Nairobi).

²² Marzionna, P. (2019). Complaining to the Ombudsman: Alternative Dispute Resolution in Brazilian Organizations. In *Advances in Industrial and Labor Relations*. Emerald Publishing Limited.

making organs to support all the techniques in use or potential usage for the growth of ADR mechanism in the society.

Professionalism in ADR mechanism

Traditionally perceived as the system of those who have no adequate means of getting justice in its fullness, ADR mechanism should not be taken for granted nor a system of volunteerism. The wide variety of cases in the society clearly calls for immediate review of professionalism in the ADR sphere. People who use the legal court system call on professionals to provide or analyse evidence whereas in most traditional ADR mechanisms, the selected members of the ADR forum might not be professionals in that specific environment of the dispute in question.

In many developing nations, the ADR mechanism is still treated with the volunteerism tag thus reducing the expansion of full professional courses in ADR mechanism specialising in various professions, cultures, religions as well as class²³. Indeed, this is still being treated as a strictly law and order sphere. This implies that the involvement of people who can understand underlying issues in a conflict is still left out of the equation. For example, in Kenya, pastoralist community conflicts have on many occasions left out women involvement and hence not grooming women professionals not just in specific fields but generally across board²⁴.

It therefore becomes difficult to get any professional of any kind of female gender to participate in ADR mechanism, leave alone female professional ADR personnel. The education system also does not openly advocate for ADR mechanism instead promoting the legal court system to produce lawyers who represent people across board as opposed to people from each profession getting to specialise in ADR mechanism. Without really putting the ADR into strict professional category, the approach will continue to have the perception

²³ Crowe, J. (2017). Mediation ethics and the challenge of professionalisation. *Bond L. Rev.*, 29, 5.

²⁴ Nurse, A. (2020). *Alternative Dispute Resolution and Redress*. In *The Citizen and the State*. Emerald Publishing Limited.

of volunteerism and a second route in disputes resolution. More needs to be done to put the spotlight on curriculum designers to emphasize on the profession of ADR mechanism. It is viably possible for every profession to have a specialization in ADR mechanism. It simply makes sense to go this route as it will never lack disputes in the society. In so doing, there is need to insist on gender balance from an early stage or simply total inclusivity in the professionalism pursuit.

Education in ADR mechanism

The key ingredient of education in any society can never be far off the table when discussing issues of any kind. The ADR mechanism is not unique in its need for proper education across board. Western countries in the developed world have demonstrated the importance of education at every level in the formation of ADR mechanism. Specifically, the education system in these developed nations has a provision for identifying need for ADR. This is also in practice across the Asian countries although slightly different in the Middle East where the Sharia laws have been practiced or simply where the law court system has a strong Islamic backing.

By education this means that a country has to run studies throughout its curriculum indicating that apart from the legal court system, the ADR mechanism is not only existing but that it has professional level systems and that it is a full system on its own that has to be practised by all in the society. Apart from formal school systems, the informal system of elders and wise people also require some upgrading of skills in sensitization and mobilization of ADR mechanism understanding.

The example of Kenya is such that ADR mechanism is directed through law schooling as opposed to embracing all other categories of higher studies. Again, the idea of ADR is only introduced at the law schools yet this should go across all schools professionally. Essentially, ADR mechanism should not be taken as

a side subject but a fully-fledged unit that is based on professional pursuit²⁵. This would lead to ease of case scheduling both at the legal court system as well as the ADR environment.

Funding of ADR mechanism

The perception that ADR mechanism is volunteerism as well as forced has always affected its funding across many administrations with the perception that the approach is free of any costs²⁶. This perception has contributed to the apparent selection of ADR members on a seemingly one sided criteria dictated to a large extent by the sponsors of the ADR forum. The western developed nations have various office systems that support the funding or budget plans of ADR mechanism at most socio-economic settings. In fact, countries like the UK, USA and Canada as well as Australia and India have fully running offices supported in law and goodwill by governments and the citizens²⁷. On all the mentioned nations, the offices are not run as parallel support offices but on a full time budget planning fully equipped with professionals²⁸.

This however pales in comparison with the developing nations especially in the regional space across Africa and locally in Kenya²⁹. There is poor funding for the ADR mechanism with citizens generally not pushing for their sustenance. Most budgets for ministries and departments have not included the ADR mechanism in their budget plans. Similarly, strategic plans have been calling for strengthening of the legal court system with little room provided for considerations of the ADR mechanism in the Kenya. To a large extent, ADR

²⁵ Owino, K. (2019). Challenges Facing Implementation of Administrative Justice by the Kenyan Ombudsman (Doctoral dissertation, University of Nairobi).

²⁶ Legg, M. (2016). The future of dispute resolution: online ADR and online courts. Forthcoming - Australasian Dispute Resolution Journal

²⁷ Price, C. (2018). Alternative Dispute Resolution in Africa: Is ADR the Bridge between Traditional and Modern Dispute Resolution. *Pepp. Disp. Resol. LJ*, 18, 393.

²⁸ de Werra, J. (2016). Alternative Dispute Resolution in Cyberspace: The Need to Adopt Global ADR Mechanisms for Addressing the Challenges of Massive Online Micro-Justice. *Swiss. Rev. Int'l & Eur. L.*, 26, 289

²⁹ Owino, K. (2019). Challenges Facing Implementation of Administrative Justice by the Kenyan Ombudsman (Doctoral dissertation, University of Nairobi).

mechanisms have received funding from non-governmental players while lack of specific accommodation across the country for the ADR teams make it hard for their budget requests to be a thing of discussion.

In Kenya, the seemingly mobile design of the ADR office in which members move from location to location further complicates their proper funding thus reinforcing the perception that the approach is volunteerism hence requiring less funding if any. In fact, the few physical offices by the ADR mechanism are self-supporting and not fully government funded. The need to have more members, increase the education of the general population on importance of ADR mechanism all call for increased funding. As it stands, this is one of the main obstacles of building the ADR mechanism not just globally but specifically in Kenya.

Conclusion

The continuing need for ADR mechanisms continues to concern more than just people in disputes and the legal court system across the globe. Civil litigation has always received goodwill from the citizens yet the very citizens have not pushed for their full inculcation of the same in their budgeted strategic plans. It is clear that perceptions and historical support keeps pushing the ADR mechanism to the periphery leading to the many challenges highlighted. These evolutionary challenges of the ADR mechanism have led to poor adoption of the approach with fewer professionals having taken up the profession. Technology advances have helped in the easing of cases across all spheres but more of the same has not spread into the various forms of ADR forums.

The need to increase not just funding but sensitization of the ADR mechanism is a thing of high consideration in which not just the government but also the civil society has of late tried to promote ADR although with little to show. For many years cultural and religious forms of ADR have practised their application but recognized to different levels of acceptance across variety of citizens³⁰. As

³⁰ Duursma, A. (2020). African Solutions to African Challenges: The Role of Legitimacy in Mediating Civil Wars in Africa. *International Organization*, 74(2), 295-330.

mentioned in the past, different nations interpret the reliance on religion and culture for ADR mechanism differently thus benchmarking becomes very difficult.

Still, the demonstration that ADR mechanism works in some countries better than in others is a show of both strength and weakness of this approach. The referencing of ADR mechanism into the country academic curriculum has tended to focus on law profession and not others yet there is clear need for professionals from other professions other than law to adopt the ADR mechanism. Finally, there is continued negligence of the gender inclusivity across the ADR mechanism reflected in the many ADR forums that have taken place. Time for change is now.

Way Forward in ADR mechanism

To harmonize the old generic challenges and those of modern times, there is need to have the ADR mechanism inculcated into the school system from an earlier stage while also ensuring there a spread of that same ADR across all major subjects. Land cases in the country have been part of the most disputed issues in the country and there is need to push for ADR mechanism supported at grassroots level with support from the government. Involvement of the religious and cultural groups requires that support for such groups get a strategic planning leading to a good budget for such.

The old wise men who are involved in such ADR forums require good motivation both in terms of receiving some form of training to tally with modern technology changes as well maintaining their socio-economic status. Inclusivity is a huge consideration for ADR mechanisms since traditionally, parties have not been well presented yet modern society require this to be a priority. Not only do governments need the ADR mechanisms, they have to do more than just providing an environment for their operations. The procedures put in place for ADR mechanisms also need a review with a view to changing or reducing the length of completion of cases on a reliably better time scale than the legal

court system. If the ADR mechanism is going to grow, it needs to be treated not as a second chance, but a real go-to methodology in dispute resolutions. This apparently will happen when ADR mechanism is treated with the seriousness that it deserves.

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Arbitration of Insurance Disputes

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Abstract

Arbitration has been used for years to resolve insurance disputes and is now being used frequently in all insurance disputes. This paper will focus on arbitration provisions in insurance policies by analysing how they should be drafted and how a party to an insurance dispute can negotiate the terms of the provision before buying an insurance policy. A well-drafted arbitration provision in a policy ensures that both the insurers and policyholders become more comfortable with arbitration features, making it more attractive to parties in a dispute.

1.0 Introduction

Historically, arbitration has been used in the insurance arena to resolve disputes among insurers in the reinsurance¹ context and between insured and insurers under high excess catastrophic liability policies known as Bermuda Form.² Arbitration is being used more now frequently in all types of insurance disputes. Insurance policies contain an arbitration provision that policyholders rely on to decide whether to proceed with arbitration either after denying a claim or when procuring a policy's placement.³ Arbitration works best when both parties agree to buy into the process from the beginning as arbitration often faces difficulties

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¹ A reinsurance contract is where the initial insurer cedes risk to another insurer, who becomes the reinsurer

² A Bermuda Form is a unique policy form developed in Bermuda in the mid-1980s that includes special provisions for arbitration of disputes, usually in London under the substantive law of New York. Policyholders should carefully consider Bermuda Form Policies' purchase and structure them as favourably as possible to maximize coverage. For instance, if claims arise, policyholders can employ several strategies to ensure that the claim is presented with an eye towards Bermuda Form Policies' unique aspects.

³ Peter Halprin, 'Arbitration in Insurance Coverage Disputes: Pluses and Minuses' (2014) 23 Policyholder Advisor 3.

when one party feels that it was imposed on them.⁴ Imposing arbitration clauses often comes about through mandatory arbitration clauses in non-negotiable policies, which include domestic, excess and surplus lines.

In many instances, insurance policies contain a mandatory arbitration provision applicable to any dispute arising under the policy. A policy containing an arbitration provision will often provide details regarding the location of the arbitration; the law to be applied to the dispute; the process for the selection of the arbitral tribunal; the arbitration rules and procedures to be applied; and other factors regarding how the arbitration will be conducted.⁵ Insurance arbitrations proceed under either the standard commercial arbitration model in which the parties select one neutral arbitrator or a tripartite panel of arbitrators; or a modified neutral reinsurance model where the parties each select a neutral arbitrator, often someone with insurance experience.⁶ Policyholders should not purchase a policy with a mandatory arbitration provision without considering all the pros and cons of such a provision.

2.0 Drafting arbitration agreements governing insurance policies

Parties drafting arbitration agreements governing insurance policies should consider issues relating to the scope, forum, governing rules, the number of arbitrators and how those arbitrators are appointed, consolidation, confidentiality and the form of the award.⁷

2.1 Scope

An arbitration agreement can cover all the disputes among the parties except claims of different contractual remedies or those relating to the insurance

⁴ Andrew Nadolna, Adrienne Publicover and Daniel Garrie, 'Why Arbitration Clauses May Make Sense in Cyber Insurance Policies' (2017) 19 *Cardozo Journal of Conflict Resolution* 43, 43.

⁵ 'A Policyholder's Primer on Commercial Insurance in the United States | Association of Corporate Counsel (ACC)' 125 <<https://www.acc.com/resource-library/policyholders-primer-commercial-insurance-united-states>> accessed 5 January 2021.

⁶ Halprin (n 3) 7.

⁷ Halprin (n 3) 10.

policy's interpretation.⁸ The arbitration clause should carefully define the scope of the disputes that are subject to mandatory arbitration. It can also state whether as a preliminary matter, the court or an arbitrator should address arbitrability issues of insurance disputes or the arbitration clause's enforcement.

2.2 Forum, governing law and rules

The forum may include the venue of the hearing and the institution charged with administering the arbitration.⁹ An arbitration clause should also include the governing law; however, despite this inclusion, conflict of laws issues are likely to be determined by the conflict of laws principles of the forum state. Concerning the procedural rules, parties should not create a set of governing procedural rules but can choose a particular arbitration institution by naming the institution in the arbitration clause then following the institutions' rules. However, the parties in arbitration can modify the governing rules about evidence and discovery to enable the process to unfold in a manner that best suits the parties' needs.¹⁰

2.3 Number of arbitrators and how those arbitrators are appointed

The number of arbitrators, be it one or three arbitrators, should be specified by the parties while they draft the arbitration agreement. The parties need to differentiate between an insurance-industry insider and an expert in insurance law. This is because insurance company insiders are bound by ethical duties when they act as arbitrators, therefore, building a pro-insurer bias into the arbitration process.¹¹

⁸ Tyrone R Childress, 'The Use of Arbitration in Insurance Coverage Disputes: A Policyholder Perspective' [2010] *Aspatore* 4.

⁹ Michael Young, 'Insurance Coverage Arbitration' *College of Commercial Arbitrators* 11 <<https://www.ccarbitrators.org/>> accessed 5 January 2021.

¹⁰ 'AAA Drafting Dispute Resolution Clauses: A Practical Guide - Part I-1 - Soft Law in International Arbitration | *ArbitrationLaw.Com*' 7

<<https://arbitrationlaw.com/library/aaa-drafting-dispute-resolution-clauses-practical-guide-part-i-1-soft-law-international>> accessed 5 January 2021.

¹¹ Childress (n 8) 1.

2.4 Consolidation and confidentiality

Consolidation is the process where multiple disputes are addressed in a single arbitration and should be provided for under an arbitration clause. The rule of confidentiality then applies across all the consolidated arbitrations. The parties may opt to include a clause that allows either party to seek consolidation with arbitration between the policyholder and another insurer¹² in the same tower of insurance¹³.

2.5 Form of the award

The form of the award should be specified in the arbitration agreement, and the parties may find it necessary to require a reasoned award where the arbitrator sets forth the facts, governing law, and the basis for the ruling.¹⁴

3 Insurance policy arbitration clauses: considerations for policyholders

As stated above, more and more insurance policies contain arbitration clauses calling for policyholders to arbitrate rather than litigate any dispute over insurance coverage. It is important to note that arbitration usually provides advantages for insurance companies that few policyholders fully comprehend at the time of insurance purchase.¹⁵ Policyholders should, therefore be wary of purchasing insurance policies purporting to require arbitration.

Parties to arbitration must pay the hourly rates of the arbitrator for the hearing, reading, deliberation, and drafting time, the costs of the hearing facilities, travel-related costs to an international location, as well as administrative costs in the case of institutional arbitration. This is unlike litigation where the state pays the judges. The advantage of arbitration under this is that the successful party may

¹² Young (n 9) 12.

¹³ The individual insurance policies that an insurance company carries form is what is known as the tower. The position of insurance coverage tower is crucial to interpreting any expected settlement number.

¹⁴ Young (n 9) 12.

¹⁵ Joshua Gold, 'Insurance Policy Arbitration Clauses: Perils and Considerations for Policyholders' [2007] *Corporate Counsel*
<<https://www.andersonkill.com/webpdfext/CorporateCounsel-December2007.pdf>>
accessed 5 January 2021.

recover some or all its expenses in an award of costs, but an unsuccessful party may find itself paying these costs in addition to other damages.

Policyholders may object to arbitration where they feel that proceeding to arbitration may be of a disadvantage. The standard confidentiality and private status of arbitration, which is one of arbitration's main advantages, make it a two-edged sword. It gives the insurance company license to take more extreme positions than it would in court where a public process would create leverage that usually benefits the policyholder.¹⁶ It also allows insurance companies to avoid negative publicity and reputational risk. On the other hand, policyholders may increase pressure on insurers to settle insurance coverage disputes through arbitration by arguing that litigation risks creating an adverse precedent in a published opinion that may impact the insurance industry. This risk does not exist in arbitration as no precedent is set and all proceedings are confidential thus not published.¹⁷

If policyholders prefer arbitration, they should take advantage of the perceived benefits such as selecting the arbitrator, thus ensuring that they select an arbitrator who is neutral and with subject matter expertise. Someone with dispute-specific expertise will decide the outcome of the dispute.¹⁸ The arbitration process allows parties to choose the arbitral tribunal thus enabling parties to an insurance dispute to select a tribunal from persons with significant insurance industry experience through specific requirements in the arbitration clause or the arbitration selection process.¹⁹ The arbitration clause can be drafted to include specific requirements such as specific educational, professional or occupational requirements of the arbitral tribunal. The disadvantage of this selection process where the tribunal has industry experience is that insurance companies are repeat customers with insurance arbitrators, unlike the

¹⁶ Nadolna, Publicover and Garrie (n 4) 65.

¹⁷ *Drennen v Certain Underwriters at Lloyd's of London (In re Residential Capital, LLC)*, 575 BR 29 | *Casetext Search + Citor*.

¹⁸ Halprin (n 3).

¹⁹ Stephen J Choi, Jill E Fisch and Adam C Pritchard, 'The Influence of Arbitrator Background and Representation on Arbitration Outcomes' [2012] SSRN Electronic Journal 518 <<http://www.ssrn.com/abstract=2109712>> accessed 5 January 2021.

policyholders, posing a risk, especially where the arbitrators are former insurance companies executives.

While drafting arbitration clauses, insurance companies tend to choose the law explicitly viewed as insurer friendly, therefore making the relief in arbitration more limited than what can be obtained in court.²⁰ The relief can be limited by eliminating the possibility of recovering the advocates' fees, limited punitive damages, or interest on the amount in dispute. Compared to arbitration in terms of affording leverage or increasing the risk to insurers, litigation provides more leverage for policyholders to ensure maximum risk.²¹

The rules of interpretation differ between litigation and arbitration proceedings. In litigation, the rules of interpretation favour the policyholder where there is ambiguity, as the doctrine of *contra preferentem* provides that the preferred meaning of a contractual term or clause should be against the party that drafted the contract or clause in dispute. On the other hand, arbitration allows for an arbitration clause to be altered to allow for something closer to an interpretation that assumes equal bargaining power between the parties in dispute.²²

4 Ways of negotiating changes to the wording of arbitration agreements

The best choice for any insurance buyer is to request for the arbitration clause to be deleted where they believe that arbitration will be biased and may not yield their desired outcome. However, if deleting the arbitration clause is not possible, or the policyholder believes that including an arbitration clause is beneficial for the policyholder, there are ways through which policyholders can negotiate the wordings in the agreement thus protecting their interests. The main goal of these steps is to improve the cost and fairness of the arbitration process. These ways of negotiating changes to the arbitration clause's wording are based on an insurer, reinsurer and expert witness in policyholder disputes.²³

²⁰ Gold (n 15).

²¹ Nadolna, Publicover and Garrie (n 4) 47.

²² Gold (n 15).

²³ James W Macdonald, 'Arbitration Clauses in Specialty Liability Policies' (2013) Fourth Quarter ARIAS 6.

4.1 Include non-binding mediation as an alternative or precondition to arbitration or litigation

Non-binding mediation is an alternative to arbitration that can be provided under the arbitration agreement and can provide positive results to a dispute. Below are examples of non-binding mediation clauses required before litigation and non-binding mediation clause as an alternative to arbitration.

Non-binding mediation required before litigation

All disputes with regard to coverage for a Claim under the policy, including a dispute over whether any amounts constitute Loss under the Policy, will be submitted to nonbinding mediation to be administered as mutually agreed by the parties ... Neither the Insureds nor the Insurer will commence any civil proceeding until sixty (60) days after the conclusion of the nonbinding mediation

Source: Genesis D&O Policy

Non-binding mediation as an alternative to arbitration

All disputes or differences which may arise under or in connection with this policy, whether arising before or after the termination of this policy, shall be subject to the alternative dispute resolution process (ADR) set forth in this clause. Either the Insurer or the Insureds may elect the type of ADR discussed below; provided, however, that the Insureds will have the right to reject the insurer's choice of ADR at any time prior to its commencement, in which case the Insureds' choice of ADR will control.

The Insurer and Insured agree that there will be two choices of ADR: (1) Nonbinding mediation administered by the American Arbitration Association, in which the insurer and insured will try in good faith to settle the dispute by mediation under or in accordance with its then-prevailing Commercial Mediation Rules; or (2) arbitration submitted to the American Arbitration Association under or in accordance with its then-prevailing commercial arbitration rules, in which the arbitration panel will be composed of three disinterested individuals....

Source: AIG Employment Practices Liability Form 67548 (4/97), Condition 17, "Dispute Resolution Process"

4.2 Request an exemption for disputes contesting the validity of the policy

Arbitration clauses found in insurance policies often state that any and all disputes be subject arbitration. However, some reinsurance agreements exempt any dispute contesting the agreement's validity or arguing for rescission, thus improving the fairness of the arbitral proceeding.²⁴ Parties in dispute may choose to dispute the policy's validity with binding arbitration even after the exemption is provided for in the arbitration agreement.

4.3 Clarify the qualifications for an arbitrator's eligibility

As discussed above, the requirement that the arbitrator ought to have insurance experience often leads to bias. Therefore, the arbitration clause should provide that the arbitrator be disinterested with no financial or personal interest in the dispute's outcome. Below are two examples of how an arbitrator's qualification may be clarified in an arbitration clause.

Independent and experienced arbitrator
All arbitrators will be neutral and disinterested active or former officials of insurance or reinsurance companies or Syndicates of Lloyd's or lawyers, <i>not under the control or management of either party to this agreement, having at least ten (10) years of insurance or reinsurance experience.</i>

Source: James W Macdonald, 'Arbitration Clauses in Specialty Liability Policies' (2013) Fourth Quarter ARIAS 8

The impartial and disinterested arbitrator
Unless otherwise mutually agreed, the members of the panel shall be impartial and disinterested. The members of the panel may not be: <ol style="list-style-type: none"> 1. <i>In the control of any Party or its parent affiliate or agent.</i> 2. <i>A former director or officer of any Party or its parent affiliate or agent; or</i> 3. <i>A likely witness in the arbitration.</i> <p>The requirement of impartiality means that <i>all members of the panel will have the same obligation to approach the panel's duties and decisions with fairness and</i></p>

²⁴ Macdonald (n 23) 6.

without consideration for the fact that panel members may have been appointed by one of the Parties. The requirement of impartiality does not mean that any arbitrator can have no previous knowledge or experience with respect to issues involved in the dispute or disputes.

Source: James W Macdonald, 'Arbitration Clauses in Specialty Liability Policies' (2013) Fourth Quarter ARIAS 8

4.4 Carefully consider a "baseball" arbitration clause

A baseball arbitration clause is one which requires the arbitration panel to wholly accept the final decision of one party or the other.²⁵ Below is a sample of baseball arbitration wording from a reinsurance agreement.

"Baseball" arbitration wording

Within 60 days following the appointment of the umpire, the parties shall exchange their claims and underwriting files relating to the reinsurance contract. Within 60 days of each exchange, each party shall submit, in writing, a settlement offer to the arbitration panel, including the terms that each party is willing to accept in final settlement of the dispute. Following receipt of each party's settlement offer, the arbitration panel may, at its discretion, conduct a hearing concerning each party's offer, at which each party may present evidence supporting its offer.

The arbitration panel, within 10 business days of the submission by the parties of their settlement offers or a hearing after such submission, shall make a final and binding award, and the arbitration panel, in making its final award, shall be limited to awarding only one or the other of the two settlement offers submitted by the parties.

Source: James W Macdonald, 'Arbitration Clauses in Specialty Liability Policies' (2013) Fourth Quarter ARIAS 11

4.5 Address the panel's right to consolidate arbitration proceedings

The orderly and efficient resolution of disputes of a similar nature involving more than one underwriter on the same policy or reinsurance is considered one of the most complicated issues for stakeholders in the insurance industry. Many

²⁵ Macdonald (n 23) 11.

reinsurance agreements have included some guidance on how an arbitration tribunal should address consolidation of:²⁶

- i. The same reinsurance agreement, a single subscribing reinsurer.
- ii. Multiple agreements, single subscribing reinsurer; and
- iii. Same agreement, multiple reinsurers.

The table below shows an example of a reinsurance wording that clarifies the arbitration tribunal's rights and duties and the parties to the agreement when the same dispute arises.

Consolidation reinsurance language
If more than one reinsurer is involved in the same dispute, all such reinsurers shall constitute and act as one party for the purposes of this Article, and communications shall be made by the Company to each of the reinsurers constituting the one-party provided, however, that nothing therein shall impair the rights of such reinsurers to assert several rather than joint defences or claims, nor be construed as changing the liability of the reinsurer under the terms of this contract from several to joint.

Source: James W Macdonald, 'Arbitration Clauses in Specialty Liability Policies' (2013) Fourth Quarter ARIAS 12

4.6 Weigh the pros and cons of timing requirements for each phase of the arbitration process, including the final decision

Timing requirements in an arbitration bring about different issues to consider that affect the arbitration process's cost and fairness. These timing issues include:

- i. Whether the arbitration clause survives the life of the policy.
- ii. How much time each party has to name its arbitrator.
- iii. When these arbitrators need to agree on an umpire; and
- iv. How much time the panel has to hold its organizational meeting.

The tables below show examples of wordings that address these issues.

²⁶ (n 23) 12.

Employment Practices Liability Insurance (EPLI) Policy

All disputes or differences which may arise under or in connection with this policy, *whether arising before or after termination of this policy...* shall be subject to the alternative dispute resolution process (ADR) set forth in this clause....

Source: Lexington Insurance, EPLI, 1999

Excess Policy

The Board of Arbitration shall fix, by a notice in writing to the parties involved, a reasonable time and place for the hearing and may prescribe reasonable rules and regulations governing the course and conduct of the arbitration proceeding, including, without limitation, discovery by the parties.

Source: ACE Excess Excess Liability Form 005-3/96, Condition N2

Medical D&O Policy

Each party to this policy shall submit its case with supporting documents to the arbitration panel within thirty (30) days after the appointment of the third arbitrator. However, the panel may agree to extend this period for a reasonable time.

Source: BCS Mutual Insurance Company, Condition N, Form 91.212G (01/07)

Reinsurance Policy

The claimant shall submit its initial brief within forty-five (45) days from the appointment of the umpire. The respondent shall submit its brief within forty-five (45) days thereafter, and the claimant may submit a reply brief within thirty (30) days after the filing of the respondent's brief.

Source: Broker and Reinsurer Market Association (BRMA), Arbitration Form 6B, item 3

5. Conclusion

Most insurance policies offer a limited optional arbitration clause that requires both parties' consent to move to arbitration and have a general reference to some existing set of arbitration rules. Arbitration clauses may involve a situation where a modular approach is preferable. A modular approach entails having a clause that provides different elements that parties in a dispute can choose and combine. For example, the clause can state that arbitration is one way mandatory, therefore one party may opt to have the dispute resolved through arbitration, and the other party would have no right to object.

Insurers have more confidence in the industry experts to resolve disputes than they have in courts. As discussed earlier, arbitration favours confidentiality, and the non-creation of precedent over the right to appeal is an advantage for insurers. On the other hand, policyholders favour litigation and appellate rights to expertise and confidentiality offered by arbitration. Assuming that negotiations are possible before buying an insurance policy, there should be a trade-off between the insurance company and the policyholder where they discuss whether or not to have an arbitration clause; and the terms of the arbitration clause where the parties agree to one.

The use of arbitration in insurance disputes is developing and changing as both the insurers and policyholders become more comfortable with arbitration features, making it more attractive to parties in a dispute. For instance, as discussed above, including arbitration provisions is a relatively recent development, and it is more common to encounter them in current policies.

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The Place of Human Rights in Environmental and Natural Resources Conflicts Management in Kenya

*By: Kariuki Muigua**

Abstract

Article 19 of the Constitution of Kenya 2010 provides that Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. It further states that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The Constitution also outlines the principles of national security as including the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests. In addition to these, the Constitution provides for and envisages the enjoyment of the right to clean and healthy environment and other environmental rights therein, realisation of sustainable development and outlines national values and principles of governance which are geared towards protection of the human rights of all persons, environmental protection and the creation of a peaceful society. This paper argues that it is possible, in the application of some of the environmental conflict management mechanisms, to achieve undesired results that violate or fail to protect the rights of the target groups in a given conflict. The author offers insight on how the conflicts may be addressed in a way that upholds the various rights of groups in a conflict. The paper argues for adoption of a rights-based approach to environmental protection and conflict management.

1. Introduction

International concerns with human rights have expanded considerably in the past several decades.¹ Universal human rights are often expressed and

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guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law, with the international human rights law laying down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.²

In the same breadth, over the years, the environment has secured a special place in the international law discourse. This has been evidenced by various legal instruments that are meant to provide directions and guidelines to the key players and the states in coming up with domestic environmental protection and conservation laws.³ The debate is however informed by two major approaches namely, anthropocentric and ecocentric approaches. While the ecocentric approach is mainly concerned with the moral concern for nature in its own right as deserving protection and conservation, the anthropocentric approach, places humans as the central concern in environmental conservation and protection while the environment is considered secondary.⁴ Thus, ecocentrism is nature-centered, while anthropocentrism is human-centered. International legal instruments on environmental conservation and protection are divided between the two approaches, with some adopting the ecocentrism while others are based on anthropocentrism.⁵

¹ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice; 2002* < https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

² 'OHCHR | What Are Human Rights'
<<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> accessed 10 August 2020.

³ Ibid.

⁴ Helen Kopnina and others, 'Anthropocentrism: More than Just a Misunderstood Problem' (2018) 31 *Journal of Agricultural and Environmental Ethics* 109.

⁵ Vito De Lucia, 'The Ecosystem Approach between Anthropocentrism and Ecocentrism' (2015); Louis Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7 *Global Journal of Comparative Law* 5; Vito De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 *Journal of Environmental Law* 91; Marie-Catherine Petersmann, 'Narcissus' Reflection in the Lake: Untold Narratives in

A dual rights-based approach, where the intrinsic value of humans and nature co-exist in an interconnected manner can pool the benefits of both approaches. Both approaches are important and all that is needed is to strike a balance.⁶ Notably, while the sustainable development agenda debates accommodate both approaches, they lean more towards the anthropocentrism. The *2030 Agenda on Sustainable Development Goals*⁷ (SDGs) define sustainable development broadly to cover issues such as poverty, inequality, gender equality, health, education, governance, climate change and environmental protection.⁸ The SDGs rest on three core elements of sustainability which include:⁹ Economic: An economically sustainable system that must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and to avoid extreme sectoral imbalances which damage agricultural or industrial production; Environmental: An environmentally sustainable system which must maintain a stable resource base, avoiding over-exploitation of renewable resource systems or environmental sink functions, and depleting non-renewable resources only to the extent that investment is

Environmental Law Beyond the Anthropocentric Frame' (2018) 30 *Journal of Environmental Law* 235; Mohamed El-Kamel Bakari, 'Mapping the "Anthropocentric-Ecocentric" Dualism in the History of American Presidency: The Good, the Bad, and the Ambivalent' [2017] *Consilience* 1; Abadir Ibrahim, 'A Human Rights Approach to Environmental Protection: The Case of Ethiopia' (2009) 1 *Contemporary Legal Institutions*; Louis J Kotzé, 'Human Rights and the Environment in the Anthropocene': [2014] *The Anthropocene Review*
<<https://journals.sagepub.com/doi/10.1177/2053019614547741>> accessed 11 August 2020.

⁶ See generally, K. Muigua, *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁷ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice; 2002* <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

⁸ See United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

⁹ Jonathan M Harris, 'Basic Principles of Sustainable Development' [2000] *Dimensions of Sustainable Development* 21, Global Development and Environment Institute, Tufts University, Working Paper 00-04, June 2000
<http://www.buyteknet.info/fileshare/data/ambides_lect/Harris_PrinSD.pdf>
Accessed 10 August 2020, pp.5-6.

made in adequate substitutes. This includes maintenance of biodiversity, atmospheric stability, and other ecosystem functions not ordinarily classed as economic resources; and Social: A socially sustainable system which must achieve distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation.¹⁰

Environmental resources access, use and control are central to meeting human needs.¹¹ That is why environmental conflicts emerge, both nationally and internationally, when one group of persons feel that their rights in this respect are threatened. This is because historically, as the United Nations has observed, environmental resources have often been an indicator of the wealth of those being in a position to utilize them.¹²

Various mechanisms are therefore employed in managing these conflicts and while some sufficiently address the human rights issues that emerge, others may not necessarily achieve as much. This paper critically evaluates the various approaches to environmental conflicts management with a view to recommend the most suitable ones in ensuring that human rights, which mainly inform the anthropocentric approach, are secured. The paper vouches for a rights-based approach to environmental issues and the related conflicts as a way of securing human rights while managing environmental conflicts.

¹⁰ Ibid, p.6.

¹¹ 'Our Planet, Our Health' <<http://ciesin.org/docs/001-232/chpt1.html>> accessed 11 August 2020; Jean-Louis Martin, Virginie Maris and Daniel S Simberloff, 'The Need to Respect Nature and Its Limits Challenges Society and Conservation Science' (2016) 113 Proceedings of the National Academy of Sciences 6105; Steven C Rockefeller, 'Principles of Environmental Conservation and Sustainable Development: Summary and Survey' [1996] unpublished paper prepared for the Earth Charter Project; 'Global Conservation: Balancing Nature and Human Needs' <<https://www.macfound.org/press/publications/global-conservation-balancing-nature-and-human-needs/>> accessed 11 August 2020.

¹² Daniel Schwartz and Ashbindu Singh, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999) < <https://na.unep.net/siouxfalls/publications/Conflicts.pdf>> Accessed 10 August 2020.

2. Linking Human Rights and the Environment

Human rights may be defined as universal, inalienable rights inherent to all human beings, which they are entitled to without discrimination.¹³ The *Universal Declaration of Human Rights of 1948*¹⁴ (UDHR) set the stage for the recognition, protection and promotion of human rights the world over. UDHR places an obligation on all states to employ progressive measures to ensure recognition of human rights provided therein. Notably, the Declaration recognises the need for mobilization of resources by States so as to ensure realization of these rights. Art. 22 thereof provides that everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. The UDHR created a basis for the formulation of *International Covenant on Civil and Political Rights*, (ICCPR) 1966¹⁵ and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1966.¹⁶ ICCPR provides under Article 47 thereof that nothing in that Covenant should be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources. Further, ICESCR, under Article 1.2, provides that all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

¹³ 'OHCHR | What Are Human Rights'

<<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> accessed 10 August 2020.

¹⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

¹⁶ *International Covenant on Economic, Social and Cultural Rights*; adopted 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force 3 Jan. 1976).

Principle 1 of the *Stockholm Declaration*¹⁷ is however credited as the first international legal instrument which expressly formed a foundation for linking human rights, health, and environmental protection, declaring that: Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.¹⁸ However, while the language of Article 1 of both the *Stockholm Declaration* and the *Rio Declaration*¹⁹ seem to connote a human rights approach to the environmental conservation, during the conferences, various proposals for a direct and thus unambiguous reference to an environmental human right were rejected²⁰. It is arguable that the conferences created an oxymoronic circumstance, in denying what would only be in the nature of 'the right to adequate conditions of life in an environment of a quality that permits a life of dignity and well-being'.²¹

Draft Principles on Human Rights and the Environment of 1994,²² (1994 Draft Principles) is an international instrument that comprehensively addresses the linkage between human rights and the environment. The *1994 Draft Principles* provide for the interdependence between human rights, peace, environment and development. Principle 1 thereof declares that human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.

¹⁷ UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

¹⁸ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice; 2002* < https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

¹⁹ Rio Declaration on Environment and Development, A/CONF.151/26, vol. I, 1992.

²⁰ Handl, G., 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' (United Nations Audiovisual Library of International Law, 2012).

²¹ 1972 Stockholm Declaration Principle 1. It reads in full: "Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".

²² Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994).

In the first human rights-based approach to environmental protection, environmental protection is seen as a pre-condition to the enjoyment of internationally-guaranteed human rights, especially the rights to life and health, making it an essential instrument in the effort to secure the effective universal enjoyment of human rights.²³ Indeed, some domestic statutes and constitutions, such as the Constitution of Kenya 2010, have expressly recognised the right to a clean and healthy environment as a justiciable right.²⁴ The place of a clean and healthy environment in realisation of other human rights was well captured in the following words:

*Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.*²⁵

The second rights-based approach to environmental protection views environmental protection not as an essential element of human rights, but instead it views certain human rights as essential elements to achieving environmental protection, which has as a principal aim the protection of human health, as illustrated by the Rio Declaration on Environment and Development.²⁶

²³ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice; 2002* < https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 3.

²⁴ Constitution of Kenya 2010, Art. 42.

²⁵ D Shelton, *Human Rights. Health & Environmental Protection: Linkages in Law & Practice; 2002* < https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 4.

²⁶ *Ibid*, p. 4; Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613.

The third approach views the links as indivisible and inseparable and thus posits the right to a safe and healthy environment as an independent substantive human right.²⁷

Recognition of the relationship between abuse of human rights of various vulnerable communities and related damage to their environment is found in the concept of environmental justice. Environmental justice theory recognizes how discrimination and marginalization involves expropriating resources from vulnerable groups and exposing these communities to the ecological harms that result from use of those resources. Environmental justice is based on the human right to a healthy and safe environment, a fair share to natural resources, the right not to suffer disproportionately from environmental policies, regulations or laws, and reasonable access to environmental information, alongside fair opportunities to participate in environmental decision-making.²⁸

Thus, environmental protection should and has in the recent years been treated as a human rights issue because a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans, thereby serving to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life.²⁹

²⁷ Ibid, p.4; Bridget Lewis, 'Environmental Rights or a Right to the Environment: Exploring the Nexus between Human Rights and Environmental Protection' (2012) 8 Macquarie J. Int'l & Comp. Envtl. L. 36.

²⁸ Scottish Executive Social Research, *Sustainable Development: A Review of International Literature*, (Scottish Executive Social Research, 2006)

< <http://www.gov.scot/resource/doc/123822/0029776.pdf> > Accessed 10 August 2020, p.8.

²⁹ Boyle, A., 'Human Rights and the Environment: Where Next?' *The European Journal of International Law*, Vol.23, No. 3, 2012.

There is, thus, a direct co-relation between the environment and the right to life³⁰, human dignity³¹, right to reasonable standards of sanitation³², the right to food³³, and, the right to clean and safe water in adequate quantities.³⁴

The linkage of human rights and the environment is the entire basis upon which the sustainable development debate rests.³⁵ Sustainable development has been defined as a combination of elements, such as environmental protection, economic development, and most importantly social issues.³⁶ Human rights are inextricable from sustainable development, since human beings are at the centre of concerns for sustainable development.³⁷

³⁰ See Constitution of Kenya 2010, Art. 26.

³¹ Ibid, Art. 28.

³² Ibid, Art. 43(b).

³³ Ibid, Art. 43(c).

³⁴ Ibid, Art. 43(d).

³⁵ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613; Dias, Ayesha. "Human rights, environment and development: With special emphasis on corporate accountability." *Human Development Report* (2000); Geiser, Hans. *Sustainable development from a human rights perspective and the challenges it represents for the Caribbean SIDS (a discussion paper)*. ECLAC, 2010; 'Human Rights Council (HRC):: Sustainable Development Knowledge Platform' <<https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=225&menu=3170>> accessed 11 August 2020; 'Human Rights and Development' (*Icelandic Human Rights Centre*) <<http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-development>> accessed 11 August 2020; 'Human Rights and the Environment' (*Icelandic Human Rights Centre*) <<http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-the-environment>> accessed 11 August 2020.

³⁶ Salustiano del Campo Momoh Tomoko Hamada, Giancarlo Barbiroli, Saskia Sassen, Eleonora Barbieri-Masini, Paul Nchoji Nkwi, Owen Sichone, Abubakar (eds), *Social And Economic Development – Volume VIII* (EOLSS Publications 2010).

³⁷ 1992 *Rio Declaration*, Principle 1, which reads in full: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

The human rights-based approaches to environmental issues provide a powerful framework of analysis and basis for action to understand and guide development, as they draw attention to the common root causes of social and ecological injustice.³⁸ Human rights standards and principles then guide development to more sustainable outcomes by recognizing the links between ecological and social marginalization, stressing that all rights are embedded in complex ecological systems, and emphasizing provision for need over wealth accumulation.³⁹ Internationally, there are two major approaches to human rights and the environment, which are the greening of already existing human rights and the introduction of a third generation of human rights.⁴⁰ While this paper does not delve into this debate and the debate is still ongoing on the proper place of human environmental rights⁴¹, what is not deniable is the fact that there is an important link between human rights and the protection and conservation of the environment.

3. Environmental and Natural Resources Conflicts: Overview of Conflict Management Mechanisms

It is worth pointing out that there exist various mechanisms which may be used in dealing with certain types of conflicts. For instance, Article 33 of the *Charter of the United Nations* provides that the parties to any dispute should, first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial*

³⁸ Aled Dilwyn Fisher, 'A Human Rights-Based Approach to the Environment and Climate Change' [2014] Practitioner Guide for The Global Initiative for Economic, Social and Cultural Rights, March 2014.

³⁹ Ibid.

⁴⁰ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613; Boyle, Alan. "Human rights or environmental rights? A reassessment." *Fordham Environmental Law Review* (2007): 471-511; West, Thomas Ernest Riversdale Barker. "Human and nonhuman rights approaches to environmental protection." PhD diss., University of Nottingham, 2017; Horn, Laura S. "Reframing human rights in sustainable development." *Journal of the Australasian Law Teachers Association* (2013): 1-15.

⁴¹ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613.

*settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice (emphasis added).*⁴²

Conflict may be defined as a struggle over values or claims to status and resources, in which the aim of the conflicting parties is not only the desired values but also neutralize, injure or eliminate their rivals.⁴³ There are many factors that determine the emergence, persistence, and even management of conflicts ranging from internal to relational and contextual factors.⁴⁴

Social conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs.⁴⁵ Conflict is also regarded as undesirable in many societies since, in its violent form, it claims the lives of many people, destroy property, and diverts human as well as financial resources away from development.⁴⁶

Natural resource conflicts may be defined as social conflicts (violent or non-violent) that primarily revolve around how individuals, households, communities and states control or gain access to resources within specific economic and political frameworks.⁴⁷ They are the contests that exist as a result

⁴² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

⁴³ Mengesha, Abebe Demewoz, Samson Seid Yesuf, and Tessema Gebre, "Indigenous Conflict Resolution Mechanisms among the Kembata Society." *American Journal of Educational Research*, 2015, Vol. 3, No. 2, pp. 225-242 at pp. 225-226.

⁴⁴ L Kriesberg, *Factors Shaping the Course of Intractable Conflict. Beyond Intractability* (Electronic source [200705 04] 2003).

⁴⁵ Adan, Mohamud, and Ruto Pkalya. "Conflict Management in Kenya-Towards Policy and Strategy Formulation." (2006); Muigua, Kariuki. "Managing Environmental Conflicts through Participatory Mechanisms for Sustainable Development in Kenya." (2018).

⁴⁶ Mengesha, Abebe Demewoz, Samson Seid Yesuf, and Tessema Gebre, "Indigenous Conflict Resolution Mechanisms among the Kembata Society." *American Journal of Educational Research*, 2015, Vol. 3, No. 2, pp. 225-242 at p.227.

⁴⁷ Mikkel Funder, Signe Marie Cold-Ravnkilde and Ida Peters Ginsborg, *Addressing Climate Change and Conflict in Development Cooperation: Experiences from Natural Resource Management* (DIIS Report 2012) <

of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Natural resource conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.⁴⁸ Natural resource conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.⁴⁹

Conflict management may be defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.⁵⁰ Conflict management is seen as a multidisciplinary field of research and action that addresses how people can make better decisions collaboratively.⁵¹ Thus, the roots of conflict are addressed by building upon shared interests and finding points of agreement.⁵² The conflicts under review in this paper are those associated with environmental and natural resources. The environment-conflict nexus is a subset of “environmental security” – a field of inquiry that seeks to determine whether or not traditional notions of security (which emphasize countering military threats with military power) should be adapted to include threats

https://www.researchgate.net/profile/Mikkel_Funder/publication/259324612_Addressing_Climate_Change_and_Conflict_in_Development_Cooperation_Experiences_from_Natural_Resource_Management/links/0046352b01b1a81862000000/Addressing-Climat-Change-and-Conflict-in-Development-Cooperation-Experiences-from-Natural-Resource-Management.pdf > Accessed 10 August 2020, p. 17.

⁴⁸ Toepfer, K., “Forward”, in Schwartz, D. & Singh, A., *Environmental conditions, resources and conflicts: An introductory overview and data collection* (UNEP, New York, 1999). p.4

⁴⁹ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁵⁰ Ibid.

⁵¹ Anderson, J., et al, ‘Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,’

< <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> > Accessed 10 August 2020.

⁵² Ibid.

posed by population growth and diminishing quantity and quality of environmental goods and services.⁵³

Majority of cases of resource conflicts, often revolve around the following: conflict over resource ownership; conflict over resource access; conflict over decision making associated with resource management; and conflict over distribution of resource revenues as well as other benefits and burdens.⁵⁴

The structure of relations between parties to the conflict and the way parties interpret the same may affect the course of the conflict and its management.⁵⁵ The relation factors include differences in sizes (group conflicts), economic endowment (resources), coerciveness between the parties, and cultural patterns of conduct.⁵⁶ They also include the nature and degree of integration between adversaries in economic, social, and cultural domains.⁵⁷ Thus, if any of the

⁵³ Daniel Schwartz and Ashbindu Singh, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999) < <https://na.unep.net/siouxfalls/publications/Conflicts.pdf>> Accessed 10 August 2020, p.6.

⁵⁴ The United Nations Department of Political Affairs and United Nations Environment Programme, *Natural Resources and Conflict: A Guide for Mediation Practitioners*, (2015, UN DPA and UNEP), p. 11.

⁵⁵ 'The Structure of International Conflict Management: An Analysis of the Effects of Interactability and Mediation - Jacob Bercovitch, Patrick M. Regan; *The International Journal for Peace Studies*' <https://www.gmu.edu/programs/icar/ijps/vol4_1/bercovitch.htm> accessed 11 August 2020; Swanström, Niklas LP, and Mikael S. Weissmann. "Conflict, conflict prevention, conflict management and beyond: A conceptual exploration. Concept paper." *Central Asia-Caucasus Institute and Silk Road Studies Program, Johns Hopkins University-SAIS and Uppsala University* (2005).

⁵⁶ Muigua, Kariuki. "Managing natural resource conflicts in Kenya through negotiation and mediation." (2016); Alao, Abiodun. *Natural resources and conflict in Africa: the tragedy of endowment*. Vol. 29. University Rochester Press, 2007; Bavinck, Maarten, Lorenzo Pellegrini, and Erik Mostert, eds. *Conflicts over natural resources in the Global South: conceptual approaches*. CRC Press, 2014.

⁵⁷ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

mechanisms used to address these conflicts is to be considered successful, it must deal with one or more of these factors.⁵⁸

Conflicts ought to be managed effectively and a number of mechanisms are used in achieving this, each with its own distinct merits and demerits. This section offers an overview of the various mechanisms used in management of environmental conflicts. Notably, conflict management mechanisms mostly used take either the form of conflict settlement or conflict resolution.⁵⁹ Conflict settlement deals with all the strategies that are oriented towards producing an outcome in the form of an agreement among the conflict parties that might enable them to end an armed conflict, without necessarily addressing the underlying conflict causes.⁶⁰ Settlement is an agreement over the issues(s) of the conflict which often involves a compromise.⁶¹ Parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.⁶² As such, settlement mechanisms may not necessarily address the human rights issues relevant to the emergence and management of the conflict.

⁵⁸ Bercovitch, Jacob. "Conflict and conflict management in organizations: A framework for analysis." *Hong Kong Journal of Public Administration* 5, no. 2 (1983): 104-123; Jin Lim and AsscProfDr Rashad Yazdanifard, 'The Difference of Conflict Management Styles and Conflict Resolution in Workplace' (2012) 1 *Business & Entrepreneurship Journal* 141.

⁵⁹ Bloomfield, David. "Towards complementarity in conflict management: Resolution and settlement in Northern Ireland." *Journal of Peace Research* 32, no. 2 (1995): 151-164.

⁶⁰ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁶¹ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol. 32, No. 2(May, 1995), p.152; Mwagiru Makumi, 'Conflict in Africa: Theory Processes and Institutions of Management' [2006] Nairobi: Centre for Conflict Research 115.

⁶² Baylis, C., and Carroll, R., "Power Issues in Mediation", *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, p.135.

On the other hand, conflict resolution deals with process-oriented activities that aim to address and resolve the deep-rooted and underlying causes of a conflict.⁶³ Conflict resolution mechanisms include negotiation, mediation and problem solving facilitation.⁶⁴ This is in recognition of the fact that the view of what is just and what is unjust are not universally shared, and as such, divergent views of justice often cause social conflicts.⁶⁵ This is attributed to the fact that frequently, the parties involved in conflicts are convinced that their own view is the solely valid one.⁶⁶ It is, thus, suggested that since there is no access to an objective truth about justice, conflicts may be reconciled by the judgement of an authority accepted by all parties or by a negotiated agreement between the parties: agreements are just when the parties are equally free in their decision and equally informed about all relevant facts and possible outcomes.⁶⁷ A resolution approach to management of environmental conflicts is therefore more desirable since it gives the groups involved a chance to participate in environmental decision-making as well as expressing their ideas, thus creating an opportunity to address their needs and rights.⁶⁸

⁶³ 'Negotiation and Mediation Techniques for Natural Resource Management' <<http://www.fao.org/3/a0032e/a0032e03.htm>> accessed 11 August 2020.

⁶⁴ Udezo, Benson OS. "Concepts and methods of conflict resolution and Peace-Building: Imperatives for religious leaders in Nigeria." *Journal of Religion and Human Relations* 1, no. 2 (2009); Fisher, Ron. "Sources of conflict and methods of conflict resolution." *International Peace and Conflict Resolution, School of International Service, The American University* (2000).

⁶⁵ corissajoy, 'Principles of Justice and Fairness' (*Beyond Intractability*, 29 June 2016) <https://www.beyondintractability.org/essay/principles_of_justice> accessed 11 August 2020; Scott D Campbell, 'Sustainable Development and Social Justice: Conflicting Urgencies and the Search for Common Ground in Urban and Regional Planning' (2013) 1 Michigan Journal of Sustainability <<http://hdl.handle.net/2027/spo.12333712.0001.007>>.

⁶⁶ 'Learning to See Things from Another's Perspective, Opinion News & Top Stories - The Straits Times' <<https://www.straitstimes.com/opinion/learning-to-see-things-from-anothers-perspective>> accessed 11 August 2020.

⁶⁷ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁶⁸ 'Environmental Conflicts' (ACCORD) <<https://www.accord.org.za/ajcr-issues/environmental-conflicts/>> accessed 11 August 2020; 'Negotiation and Mediation Techniques for Natural Resource

The institutional framework in Kenya on environmental management and conflict management includes: the Environment and Land Court⁶⁹, the National Environmental Management Authority,⁷⁰ National Environmental Complaints Committee⁷¹, National Environment Tribunal and other various informal community based resource governance bodies.⁷² The existing legal mechanism for managing natural resource conflicts as enshrined in the environmental law statutes include the courts of law both under civil and criminal law,⁷³ statutory tribunals set up under various laws (such as the Land Adjudication Boards)⁷⁴ and customary law systems of conflict management.⁷⁵

4. Human Rights Protection in Environmental and Natural Resources Conflicts: Prospects and Challenges

Some authors rightly pointed out over 25 years ago that ‘political and strategic impact of surging populations, spreading disease, deforestation and soil erosion, water depletion, air pollution, and possibly, rising sea levels – developments that will prompt mass migration and, in turn, incite group conflicts – will be the core foreign-policy challenge in the twenty-first century’.⁷⁶ Predictably, all these issues and more have continued to inform the

Management’ <<http://www.fao.org/3/a0032e/a0032e04.htm>> accessed 11 August 2020.

⁶⁹ Established under the Constitution of Kenya 2010 and *Environment and Land Court Act*, 2011.

⁷⁰ Established under S.7 of the EMCA (Cap 8 of 1999).

⁷¹ Environment Management and Co-ordination Act, Act. No. 8 of 1999; Environmental Management and Co-ordination (Amendment) Act, 2015 (No. 5 of 2015).

⁷² Some communities like the Meru, Maasai, Giriama, etc, have councils of elders who sit and resolve small scale disputes that erupt within their respective communities.

⁷³ Environment Management and Co-ordination Act, Act. No. 8 of 1999, Part XIII Ss. 137-146

⁷⁴ Established under Land Adjudication Act, Cap. 284, Laws of Kenya.

⁷⁵ Mbote, P.K., ‘Towards greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention,’ IELRC Working 2005-1. <<http://www.ielrc.org/content/w0501.pdf> > Accessed 10 August 2020.

⁷⁶ Daniel Schwartz and Ashbindu Singh, *Environmental Conditions, Resources, and Conflicts: An Introductory Overview and Data Collection* (United Nations Environment Programme 1999) < <https://na.unep.net/siouxfalls/publications/Conflicts.pdf>> Accessed 10 August 2020.

international debates on development and environmental conservation and protection. Nothing captures this better than the *United Nations 2030 Agenda on Sustainable Development*⁷⁷ which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by the year 2030.⁷⁸ The *2030 Agenda for Sustainable Development*⁷⁹ is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom and was formulated in recognition that eradicating poverty in all its forms and dimensions, including extreme poverty, which is seen as the greatest global challenge and an indispensable requirement for sustainable development.⁸⁰

The participants resolved, between 2015 and 2030, to end poverty and hunger everywhere; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to protect human rights and promote gender equality and the empowerment of women and girls; and to ensure the lasting protection of the planet and its natural resources. They resolved also to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities.⁸¹ Notably, in order to build peaceful, just and inclusive societies, management of environmental and natural resource-based conflicts is paramount. However, for the world states to also ensure that they protect human rights and promote gender equality and the empowerment of women and girls, the conflict management mechanisms

⁷⁷ *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

⁷⁸ United Nations Development Programme, 'Sustainable Development Goals (SDGs),' <<http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html>> Accessed 10 August 2020.

⁷⁹ *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015, [without reference to a Main Committee (A/70/L.1)], Seventieth session, Agenda items 15 and 116, 21 October 2015.

⁸⁰ Ibid, Preamble.

⁸¹ Ibid, Agenda No. 3.

employed must be used in a way that does not result in a conflict between the two goals.

This section highlights some of the challenges that are likely to arise in select environmental and natural resource-based conflict management mechanisms used internationally and nationally as far as securing human rights is concerned.

a. Human Rights and Environmental Litigation

National legal systems governing natural resource management are mostly based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.⁸² Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.⁸³ The judicial systems mostly employ the conflict settlement approach, with all its associated advantages and disadvantages.⁸⁴ Litigation does not afford the affected parties a reasonable and fair opportunity to participate in finding a lasting solution because, apart from the coercive nature of the process, litigation is also subject to other procedural technicalities which may affect its effectiveness.⁸⁵

⁸² Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

⁸³ *Ibid.*

⁸⁴ See Muigua, K., *Settling Disputes through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers, Nairobi – 2017; Abdualla Mohamed Hamza, Miomir Todorovic and Knez Mihajjeva Street, 'Peaceful Settlement Of Disputes' 7 G.J.C.M.P., Vol.6(1):11-17.

⁸⁵ Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29, p. 29.

While it is true that the Constitution of Kenya vests the courts with the authority to uphold and enforce the Bill of Rights,⁸⁶ some environmental conflicts require active participation in decision-making with full disclosure of the relevant information. However, the nature of the representative leadership in the country may not always allow this to happen. Political leaders may purport to speak and make decisions on behalf of a certain group, with minimal or no participation and access to information by the group in question and the same may unfortunately be treated as a reflection of the group's position on the issues in question.⁸⁷ As such, some of their rights and/or needs may not be adequately protected or realised. It is also possible that power relations and lack of access to courts may come in the way of accessing justice for a marginalised or a disadvantaged group of persons.⁸⁸ It is thus arguable that the court may not always deliver what the particular group needs or deserves. Thus while such approaches as litigation or arbitration may be the most appropriate in some reliefs such as: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and/or an order of judicial review,⁸⁹ they may fail to address the deep rooted causes of a conflict.⁹⁰ Procedural rights are limited by technicalities thus denying the group of persons in question an

⁸⁶ Constitution of Kenya, Article 23; See also Article 70.

⁸⁷ Jacobsen, Dag Ingvar. "Are the relations between politicians and administrators at the local level determined by the degree of central government regulations?." In *ECPR, Joint Sessions Workshops*, no. 21. 2001; Kanyinga, Karuti. "Kenya: Democracy and political participation." (2014).

⁸⁸ Magdalena Sepulveda Carmona and Kate Donald, 'Access to Justice for Persons Living in Poverty: A Human Rights Approach' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2437808 <<https://papers.ssrn.com/abstract=2437808>> accessed 11 August 2020; 'Law and Justice Foundation - Access to Justice and Legal Needs. Stage 1: Public Consultations' <<http://www.lawfoundation.net.au/report/consultations>> accessed 11 August 2020.

⁸⁹ See Constitution of Kenya 2010, Article 23 (3).

⁹⁰ Mwagiru Makumi, 'Conflict in Africa: Theory Processes and Institutions of Management' [2006] Nairobi: Centre for Conflict Research 115.

opportunity to actively and meaningfully participate in decision-making processes.⁹¹

b. Alternative Dispute Resolution Mechanisms and Human Rights in Environmental Matters

The phrase Alternative Dispute Resolution (ADR) refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.⁹² However, while arbitration is considered as part of ADR mechanisms, due to its coercive nature and great similarity to litigation, for purposes of this discussion, arbitration is grouped together with litigation. As such, the use of the term ADR in this paper should be construed to refer to mediation, conciliation, negotiation and traditional/community based dispute management mechanisms.

ADR methods have been associated with the advantages of being cost effective, expeditious, informal and participatory.⁹³ As a result, parties retain a degree of control and relationships can be preserved. Conflict management mechanisms such as mediation encourages “win-win” situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal,

⁹¹ Benjamin Richardson and Jona Razzaque, ‘Public Participation in Environmental Decision Making’; OITA US EPA, ‘Public Participation Guide: Introduction to Public Participation’ (US EPA, 24 February 2014) <<https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation>> accessed 11 August 2020; Canberra corporateName=Commonwealth Parliament; address=Parliament House, ‘Citizens’ Engagement in Policymaking and the Design of Public Services’ <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1112/12rp01> accessed 11 August 2020; NU CEPAL, ‘International Human Rights Standards Applicable to Access to Information, Public Participation and Access to Justice. Executive Summary (Preliminary Version)’.

⁹² Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁹³ Ibid; Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi, 2015; Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2013.

flexible and attempts to bring all parties on board.⁹⁴ ADR mechanisms allow public participation in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management.⁹⁵

Traditional Dispute Resolution Mechanisms (TDRMs) include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others.⁹⁶ It has been observed that where traditional community leadership is strong and legitimate it has positive impacts in promoting local people's priorities in natural resource management.⁹⁷ The traditional and customary systems for managing conflict are associated with: encouraging participation by community members, and respect local values and customs; are more accessible because of their low cost, their flexibility in scheduling and procedures, and their use of the local language; they encourage decision-making based on collaboration, with consensus emerging from wide-ranging discussions, often fostering local reconciliation; they contribute to processes of community empowerment; informal and even formal leaders may serve as conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of both the process and its outcomes.⁹⁸

⁹⁴ Fenn, P., "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CI Arb, London, 2002), p.10.

⁹⁵ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi, 2016.

⁹⁶ Muigua, Kariuki. "Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems." *Alternative Dispute Resolution* (2017): 1-80; Dahal, Dev Raj, and Chandra Dev Bhatta. "The relevance of local conflict resolution mechanisms for systemic conflict transformation in Nepal." *Berghof Foundation for Peace Support* (2008).

⁹⁷ Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' *Overseas Development Institute Natural Resource Perspectives*, No. 76, March 2002, p.4.

⁹⁸ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

ADR and TDRM processes are therefore more likely to afford communities or disgruntled groups procedural rights, and in effect, help in achievement of environmental justice and environmental democracy.⁹⁹ They would provide a viable platform for access to justice which is essential as it affords the means by which the public challenge application of and implementation of environmental laws and policies.¹⁰⁰

While ADR and TDR mechanisms may suffer from the unenforceability of their outcomes and potential gender bias,¹⁰¹ they may provide a good platform for the realisation of procedural rights and the ability to recognise and address deep rooted causes of conflicts while coercive mechanisms such as litigation may come in handy in realisation of substantive rights.¹⁰²

⁹⁹ Ilaria Beretta, 'Some Highlights on the Concept of Environmental Justice and Its Use' [2012] e-cadernos CES <<http://journals.openedition.org/eces/1135>> accessed 11 August 2020; Alma L Lowry, 'Achieving Justice through Public Participation: Measuring the Effectiveness of New York's Enhanced Public Participation Plan for Environmental Justice Communities'; 'Environmental Democracy? Does Anyone Really Care?' (*E-International Relations*, 26 October 2012) <<https://www.e-ir.info/2012/10/26/environmental-democracy-does-anyone-really-care/>> accessed 11 August 2020.

¹⁰⁰ Alfonso Peter Castro and Antonia Engel, *Negotiation and Mediation Techniques for Natural Resource Management. Case Studies and Lessons Learned* (Food & Agriculture Org 2007) (e-book).

¹⁰¹ Muigua, Kariuki. "Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems." *Alternative Dispute Resolution* (2017): 1-80; Deborah R Hensler, 'Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don't Know' <<https://core.ac.uk/reader/147643940>> accessed 11 August 2020; Todd B Carver and Albert A Vondra, 'Alternative Dispute Resolution: Why It Doesn't Work and Why It Does' [1994] *Harvard Business Review* <<https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does>> accessed 11 August 2020; Lorna McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26 *European Journal of International Law* 607.

¹⁰² Tom Tyler and Rebecca Hollander-Blumoff, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] Faculty Scholarship Series <https://digitalcommons.law.yale.edu/fss_papers/4992>.

5. Securing Human Rights in Environmental and Natural Resources Conflict Management

While there are other regulatory approaches to achieving environmental protection and addressing or avoiding environmental conflicts that are not rights-based such as economic incentives and disincentives, criminal law, and private liability regimes¹⁰³, a human rights based approach is arguably the most effective one that ensures that conflicts and all or most of their root causes are effectively addressed thus limiting any chances of reemergence of these conflicts.¹⁰⁴ While the emphasis on responsibilities rather than rights may still have its place in environmental protection and management of environmental conflicts, recognising the rights of conflicting groups and upholding them could be more effective.¹⁰⁵ The two approaches should therefore be used but with a rights-based one getting significant recognition. For instance, the Constitution of Kenya 2010 provides for environmental rights which include the right to clean and healthy environment for every person¹⁰⁶ but also spells out the duty of every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.¹⁰⁷

Where conflict cannot be contained in a functional way, it can erupt in violence, war, and destruction, loss of life, displacements, long-term injuries, psychological effects as a result of trauma suffered especially in case of violent

¹⁰³ D Shelton, *Human Rights, Health & Environmental Protection: Linkages in Law & Practice; 2002* <https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf> Accessed 10 August 2020, p. 4.

¹⁰⁴ 'What Is HRBAP? | Human Rights-Based Approach to Programming' (UNICEF) <https://www.unicef.org/policyanalysis/rights/index_62012.html> accessed 11 August 2020; 'A Human Rights Approach to Conflict Resolution' (*Ethics & International Affairs*, 9 September 2019) <<https://www.ethicsandinternationalaffairs.org/2019/a-human-rights-approach-to-conflict-resolution/>> accessed 11 August 2020.

¹⁰⁵ 'A Human Rights Approach to Conflict Resolution' (*Ethics & International Affairs*, 9 September 2019) <<https://www.ethicsandinternationalaffairs.org/2019/a-human-rights-approach-to-conflict-resolution/>> accessed 11 August 2020.

¹⁰⁶ Constitution of Kenya 2010, Article 42.

¹⁰⁷ Constitution of Kenya 2010, Article 69 (2).

conflicts, and deep fear, distrust, depression, and sense of hopelessness.¹⁰⁸ All these raise significant but diverse human rights issues. However, while failure to address conflicts is likely to give rise to the listed adverse effects on human life, use of the inappropriate mechanism(s) to deal with the conflicts may address the problem for one group of persons while plunging the other one into deeper problems.¹⁰⁹ Scholars have argued that deep-rooted conflicts are caused by the absence of the fundamental needs of security, identity, respect, safety, and control which many find non-negotiable.¹¹⁰

It has also been argued that deep-rooted conflicts are caused by the absence of the fundamental needs of security, identity, respect, safety, and control which many find non-negotiable.¹¹¹ The clash of interests can take many forms. It could be over resources such as land, food, territory, water, energy sources, and natural resources.¹¹² Conflict could also be associated with power and control of the resources.¹¹³ Conflicts could also be over identity,¹¹⁴ namely cultural, social and political identities to which people feel tied. Conflicts over status may arise, relating to whether people feel treated with respect and dignity and whether their traditions and social position are respected.¹¹⁵ Conflicts could be caused by differences of values, particularly those embodied in systems of government,

¹⁰⁸ See K Annan, G Machel and B Mkapa, 'Back from the Brink: The 2008 Mediation Process and Reforms in Kenya' [2014] Nairobi: African Union Commission.

¹⁰⁹ Blondel, Alice. "Climate change fuelling resource-based conflicts in the Asia-Pacific." *Asia-Pacific Human Development Report Background Papers Series 12* (2012).

¹¹⁰ Burton, J., *Conflict: Human Needs Theory* (New York: St. Martin's Press), 1990; Kelman, H., *International Behavior: A Social Psychological Analysis* (New York: Holt, Rinehart and Winston), 1965.

¹¹¹ *Ibid.*

¹¹² Buckles, D. & Rusnak, D., 'Conflict and collaboration in natural resource management,' (International Development Research Centre, 2005), p. 2.

¹¹³ *Ibid.*, p. 2.

¹¹⁴ See Rothman, J., *Resolving Identity-Based Conflict: In Nations, Organizations, and Communities*. (San Francisco: Jossey-Bass Publishers, 1997).

¹¹⁵ EAIM, 'Peace and Stability Are Prelude to Economic Development and Prosperity,' <http://www.togoruba.org/togoruba1964/mainTogorubamap/mainMap/headingMap/English/2006/Art.sFeb-2006/1802EAIM06-06EA.html> Accessed 10 August 2020.

religion, or ideology.¹¹⁶ Further, conflicts have been associated with the changing norms, values, and world views about property rights within formerly subsistence-based (or pastoralist) communities.¹¹⁷ These types of conflicts may be deep seated and the formal approaches to conflict management such as courts may not necessarily address all the issues arising.¹¹⁸ They require participatory approaches that take into account the concerns and rights of the target groups. Empowering these communities through such means as ensuring that they have access to all the information required in decision making and negotiating with them on what trade-offs may be necessary can potentially achieve environmental protection while at the same time ensuring that the human rights of these groups are protected.¹¹⁹ This is because, conflicts do not occur in vacuum and to a large extent, they are dependent on the context.¹²⁰ As such, the needs of target groups differ and must be treated as such.

¹¹⁶ Adamu, A & Ben, A., 'Migration and Violent Conflict in Divided Societies: Non-Boko Haram violence against Christians in the Middle Belt region of Nigeria,' *Nigeria Conflict Security Analysis Network (NCSAN) Working Paper No. 1*, (World Watch Research, Abuja, Nigeria, March 2015).

¹¹⁷ Armitage, D., 'Adaptive Capacity and Community-Based Natural Resource Management,' *Environmental Management*, Vol. 35, No. 6, pp. 703–715, p. 710.

¹¹⁸ Philip Onguny and Taylor Gillies, 'Land Conflict in Kenya: A Comprehensive Overview of Literature' [2019] *Les Cahiers d'Afrique de l'Est / The East African Review* <<http://journals.openedition.org/eastafrica/879>> accessed 11 August 2020; Muigua, Kariuki. "Conflict Management Mechanisms for Effective Environmental Governance in Kenya." (2018); Young, Laura A., and Korir Sing'Oei. *Land, livelihoods and identities: Inter-community conflicts in East Africa*. Minority Rights Group International, 2011; N Rass, 'Policies and Strategies to Address the Vulnerability of Pastoralists in Sub-Saharan Africa'; PY Le Meur and others, 'Conflict over Access to Land & Water Resources within Sub-Saharan Dry Lands: Underlying Factors, Conflict Dynamics and Settlement Processes' [2006] Final report, GRET, Paris.

¹¹⁹ Machingura, Fortunate, and Seven Lally. "The Sustainable Development Goals and their trade-offs." *London: ODI* (2017); Balbo, Marcello, and Giulia Guadagnoli. "United Nations Trust Fund for Human Security Projects implemented by UN-Habitat in Afghanistan, Cambodia and Sri Lanka."

¹²⁰ T Belay, 'Conflicts, Conflict Resolution Practices and Impacts of the War in South Sudan' (2015) 2 *International Journal of School and Cognitive Psychology* S 013.

The 1992 Conference of Rio de Janeiro on Environment and Development formulates a link between human rights and environmental protection largely in procedural terms, declaring in Principle 10 that access to information, public participation and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because environmental issues are best handled with the participation of all concerned citizens, at the relevant level.¹²¹

The Sustainable Development Goals (SDGs) acknowledge that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.¹²² The SDGs recognize the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights, on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.¹²³

A human rights-based approach to environmental protection is therefore capable of not only addressing the conflict but also ensures that all other relevant rights in such scenarios are observed and upheld.¹²⁴ The choice of mechanism to be used is thus equally important.

Considering that conflicts between biodiversity conservation and other human activities are intensifying as a result of growing pressure on natural resources

¹²¹ D Shelton, *Human Rights, Health & Environmental Protection: Linkages in Law & Practice; 2002* < https://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf > Accessed 10 August 2020, p. 4.

¹²² United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

¹²³ Ibid.

¹²⁴ Campese, Jessica. *Rights-based approaches: Exploring issues and opportunities for conservation*. CIFOR, 2009

<http://www.cifor.org/publications/pdf_files/Books/BSunderland0901.pdf> Accessed 11 August 2020.

and associated demands by some for greater conservation,¹²⁵ approaches to reducing conflicts are increasingly focusing on engaging stakeholders in processes that are perceived as fair, that is, independent and where stakeholders have influence, and which in turn can generate trust between stakeholders.¹²⁶ Increased trust through fair participatory processes makes conflict resolution more likely.¹²⁷ Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process.¹²⁸

There is a need for taking local communities into confidence and having confidence in them; engaging with their ideas, experiences, values, and capabilities and working with them, not on their behalf, to achieve resource-conservation objectives and community benefits.¹²⁹ In such approaches, environmental protection is achieved while at the same time, the communities' rights are protected.¹³⁰

It is recommended that conflict resolution mechanisms such as negotiation and mediation should be utilised more in management of environmental and natural resource-based conflicts as they can afford the parties an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.¹³¹ This is particularly important in ensuring that there will be no future

¹²⁵ Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, pp. 10–17.

¹²⁹ Young, J.C., et al, 'The role of trust in the resolution of conservation conflicts,' *Biological Conservation*, Vol. 195, March 2016, pp. 196–202.

¹³⁰ Ibid.

¹³¹ Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *Working Paper No. 135*, (Overseas Development Institute, April, 2000), p. 16.

flare-up of conflict due to unaddressed underlying issues.¹³² It is arguable that resolution mechanisms have better chances of achieving parties' satisfaction and protecting their rights when compared to settlement mechanisms.¹³³ Settlement mechanisms may first be used to quell any violence after which resolution mechanisms should be employed to address the deep rooted issues which mostly touch on human rights on such issues as dignity, culture and participation among others, since conflict management processes are not mutually exclusive and one can lead to the other.¹³⁴

Notably, the 2010 Constitution of Kenya created an opportunity for exploring the use of ADR mechanisms and TDRMs in managing natural resource conflicts.¹³⁵ ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, should be utilised in addressing the complex issues in environmental conflicts that may not be resolved through the formal methods such as courts.¹³⁶ This is because some mechanisms such as mediation and negotiation can potentially bring about inclusiveness and public participation of all members of the community in decision-making. They are relevant in enjoyment of procedural rights in environmental matters.

6. Conclusion

Human rights fall under substantive and procedural rights. Environmental law is one of the branches of law where procedural rights play a vital role in

¹³² Mwagiru Makumi, 'Conflict in Africa: Theory Processes and Institutions of Management' [2006] Nairobi: Centre for Conflict Research 115.

¹³³ Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2013.

¹³⁴ Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

¹³⁵ Constitution of Kenya 2010, Art. 60; 67; 159(2) (c).

¹³⁶ Muigua, Kariuki, and Kariuki Francis. "alternative Dispute resolution, access to Justice and Development in Kenya." *Strathmore LJ* 1 (2015): 1; Sandford, R. A. "Environmental dispute resolution: mediation, an effective alternative to litigation?." PhD diss., University of Tasmania, 1990.

addressing environmental concerns. This paper has argued that while the formal approaches to environmental protection are important in securing substantive environmental rights, they may not be as effective in achieving procedural rights. It is for this reason that stakeholders should consider and promote active utilisation of other informal approaches such as ADR and TDR in ensuring that all the rights of communities are protected. There is a need to strike a balance between conservation measures and access to resources by communities, through employing approaches that help in understanding the needs of the particular people and responding appropriately and consequently building trust within communities, and between communities and the national government.¹³⁷ In addition, for conflict management to be successful there is a need to employ participatory approaches so that the major issues can be identified, analysed and properly addressed.¹³⁸

A bottom-top approach to natural resource management, including conflict management, creates an opportunity to involve the local people who may have insiders' grasp of the issues at hand.¹³⁹

While conflicts cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and the potential

¹³⁷ Office for ECOSOC Support and Coordination United Nations. *Achieving sustainable development and promoting development cooperation: dialogues at the Economic and Social Council*. UN, 2008; Muigua, Kariuki. "Managing natural resource conflicts in Kenya through negotiation and mediation." (2016).

¹³⁸ Chidhakwa, Z., 'Managing conflict around contested natural resources: a case study of Rusitu Valley area, Chimanimani, Zimbabwe,' *Natural Resource Conflict Management Case Studies: An Analysis of Power, Participation and Protected Areas*, (Southern Alliance for Indigenous Resources).

¹³⁹ Muigua, Kariuki. "Conflict Management Mechanisms for Effective Environmental Governance in Kenya." (2018); 'Negotiation and Mediation Techniques for Natural Resource Management' <<http://www.fao.org/3/a0032e/a0032e04.htm>> accessed 11 August 2020; Hartter, Joel, and Sadie J. Ryan. "Top-down or bottom-up?: Decentralization, natural resource management, and usufruct rights in the forests and wetlands of western Uganda." *Land Use Policy* 27, no. 3 (2010): 815-826; Mark Reed and Julian sidoli del ceno, 'Mediation and Conservation Conflicts: From Top-down to Bottom-Up' (2015).

loss of lives and property. Management of natural resource conflicts also ensures security in terms of a guarantee of continued access to and use of the environmental resources necessary for to survival from generation to generation. Human rights are an integral part of any democracy and should therefore not be sacrificed; the place of human rights in Environmental and Natural resources Conflict management in Kenya is thus central and should remain so.

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Arbitration and Technology Related Disputes

*By: Morris Muriu Mbugua**

The age of technology has taken over modern times more than anticipated, affecting almost every aspect of our day to day activities – from our personal lives to our professional lives. It is almost impossible to go about your day without using some form of technology, so to speak. One can barely get around without using technology solutions to guide them, and at the same time businesses are becoming increasingly innovative, incorporating technology in almost all aspects of their functions. With technology becoming an important part of our lives, technology-related disputes are therefore bound to be on the rise.

Terms such as “high technology” (or “high-tech”) are routinely used in our vocabulary, although its meaning is rather generalised, with one dictionary definition describing it as “technology that uses highly sophisticated equipment and advanced engineering techniques,” such as microelectronics, genetic engineering and telecommunications¹. Unfortunately, even this definition does not capture the true likeness of what we refer to as “tech disputes”.

Tech disputes may arise from contracts containing provisions on tech-related goods and services, including software development contracts, outsourcing arrangements and smart contracts². Such disputes may range from basic contract disputes to multi-billion patent validity and infringement cases, as they can involve start-ups that are dealing with confidentiality and venture capital investment issues, middle market companies that are involved in IP disputes or

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¹ Random House Webster’s Collegiate Dictionary (1999).

² Castro, I, Toscano L. and Gadkowski, A. (2018) An Update on International Trends in Technology, Media and Telecoms Dispute Resolution, Including Intellectual Property Disputes (June 2018). *les Nouvelles* at pg. 116.

Fortune 500 companies such as Apple, Google, HP and Oracle that are engaged in multijurisdictional business³.

Previously, tech disputes have been resolved through litigation where the best-case scenario would be that the dispute is handled by a judge with experience in patents and other complex technology matters. However, most judges both in Kenya and globally do not have the specialty intellectual property experience, technical training or technology law background required to resolve such technology matters⁴. In addition, disputes are increasingly cutting across multiple jurisdictions and the opportunity to have matters decided in a court of choice becomes more difficult.

A good example of the issues surrounding the litigation of tech disputes is the Apple-Samsung smartphone dispute, one of the best-known technology cases⁵. This dispute involved over fifty lawsuits in ten countries. While there were various appeals to the initial judgement, there were so many inconsistent decisions in the matters filed in other foreign jurisdictions that the parties eventually decided to drop all the foreign cases.

As such, it is arguable that litigation may not be the most suitable route for dispute resolution of tech disputes. Alternatively, arbitration may be the most suitable means to resolving tech disputes as some of its core features address the unique concerns posed by tech-related disputes. Arbitration has distinct advantages over litigation when contracting parties have a complex commercial dispute that needs to be resolved promptly, fairly and economically⁶. Disputes

³ Gary L. Benton (2016) *Technology Disputes: Courts or Arbitration*, California, pg. 1.

⁴ Gray W. Brian (2017) *Arbitration in Technology Disputes*, accessed on 17 December 2020 from <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/International/Norton-Rose-Fulbright-US-LLP/Arbitration-in-technology-disputes>. Few countries have specialist courts relating to technology or IP and so runs the risk that the judge may not have sufficient knowledge about this area of law as well as technical requisite expertise.

⁵ Apple and Samsung had been engaged in a seven-year patent infringement case which ultimately ended in a settlement.

⁶ Mawrey, R. B. (2018) *Commercial Arbitration and Information Technology Disputes*. *The Denning Law Journal*, 30 (1), 155-156.

that arise in high-tech fields tend to be among the most complex yet, most time sensitive.

As will be discussed below, arbitration of tech disputes offers parties several benefits over litigation including, but not limited to expert decision-making, party autonomy and flexibility and cost and time efficiencies. For international tech disputes, there are several critically important additional benefits including the availability of a neutral forum, multi-national coordination, and foreign recognition of awards.

Uniqueness of tech-disputes

Tech-related businesses share a number of traits in common that make arbitration a more efficient and effective process to use to resolve disputes.

a. Complexity of disputes

The complexity of tech businesses is mainly due to the fact that majority of tech-related products and services are grounded in the domains of applied science or engineering, and in some instances, both. For example, telecommunications and IT businesses may encounter issues relating to fibre optics, state-of-the-art network equipment, consumer devices as well as digital commerce and communications that enable a broad array of applications⁷. Biotechnology, which is also an example of a tech business, combines the use of science and technology that has led to the development and testing result in new pharmaceutical products, medical devices, and surgical and radiological processes. Biotechnology may provide solutions to many challenges faced globally, but as noted above, is demanding and highly complex⁸. Resolving disputes in such high-tech industries will require an understanding of the complex science or technology behind the business. As such, the ability to sufficiently understand the complexities involved is crucial in the context of resolving a business conflict.

⁷ Raymond G. Bender, JR., *An Ideal Way to Resolve Hi-Tech Industry Disputes* from *Dispute Resolution Journal*, vol. 65, no. 4 (Nov. 2010-Jan. 2011), a publication of the American Arbitration Association, 1633 Broadway, New York, NY 10019-6708, 212.716.5800.

⁸Ibid.

b. Fast-Paced Markets of Technology

Majority of tech-related businesses operate in fast-paced commercial markets resulting from intense competition within the tech industry. These businesses need to be quick and innovative in order to remain technologically competitive and relevant in their markets. High-tech businesses cannot afford to become tied down in lengthy dispute resolution procedures like litigation due to the intense focus on innovation and product development⁹. Moreover, being involved in litigation can also divert the attention of management and employees away from the core business and in addition divert financial resources.

c. Confidentiality of information

Typically, most tech-related businesses possess confidential and proprietary information relating to the business, including trade secrets, from which they derive significant economic value. Examples include engineering methods, computer programs (particularly source code), chemical formulas and algorithms¹⁰. Most tech-related businesses wish for such information to remain confidential. Litigation may lead to public exposure of a business' confidential information and may potentially share confidential information to a direct business competitor.

d. International Business and Commerce

Many tech businesses have international contracts in place with foreign partners, licensees or licensors, distributors, suppliers and customers. Such agreements/contracts can give rise to many different types of disputes leading to the institution of numerous litigations in different jurisdictions which then leads to cost and time inefficiency. For some time, parties to international agreements have chosen international arbitration with an established arbitration institution to resolve cross-border disputes because, among other

⁹ Sandra J. Franklin (2001) "Arbitrating Technology Cases – Why Arbitration May Be More Effective than Litigation When Dealing with Technology Issues," Mich. Bar J. 31, 32.

¹⁰ Ibid.

things, arbitration avoids parties to a contract being forced to litigate in a national court, especially in the home country of the other party¹¹.

e. Regulatory Environment

Various tech-related businesses, both in Kenya and globally are subject to government oversight – particularly in the FinTech (financial technology), insure-tech, telecommunications and biotechnology business, thereby adding further legal and regulatory complexity to the enterprise. Most tech-related disputes not only require skilled scientists and engineers for research and development, but also require knowledgeable lawyers and other professionals to help them address challenging regulatory and compliance issues, as a result of operating in a highly regulated environment. As such, going through the litigation route may prove to be inefficient due to the expertise and knowledge required for the resolutions of such disputes.

Why Arbitration is Ideal

“The lack of expert decision makers in litigation is the principal reason why arbitration is better suited to resolve complex technical or scientific disputes”¹². In litigation, judges are randomly assigned to cases and though highly intelligent, a judge may have little to no experience in the respective tech-related field, and little to no exposure to a tech-related contract or the laws and regulations that apply to it.

Some of the core features offered by arbitration solve this problem and offer other key advantages for parties in tech disputes as discussed below.

a. Qualified Experts to Consider the Specific Complexities

The foremost advantage of arbitration is that the parties can agree to appoint an experienced arbitrator who has knowledge of the industry involved in the dispute, has expertise in the scientific or technological aspects involved, knows

¹¹ Wuraola O. Durosaro (2014) The Role of Arbitration in International Commercial Disputes. *International Journal of Humanities Social Sciences and Education*, Volume 1, Issue 3, pg 3-4.

¹² Supra n. 7.

the “customs” or “usages” in the trade¹³, and is familiar with the applicable legal and regulatory framework relevant to the dispute. The parties may agree to the number of arbitrators depending on factors such as the complexity of the dispute at hand as well as the monetary amount in dispute among other factors, and up to three arbitrators may be on the panel¹⁴. For instance, in a very large dispute involving multiple areas of expertise, it could be helpful to have a panel consisting of arbitrators with expertise on the different relevant fields, such as an engineer, chemist or accountant, to ensure the technical aspects of the dispute are adequately considered. In the alternative, the parties could designate an arbitral institution to select the arbitrator or panel. However, it is common that the administering arbitral institution provides the parties with a list of qualified arbitrators for the parties to consider, where the respective institution only appointing an arbitrator or chair of the tribunal only if the parties are unable to agree¹⁵.

The parties are also free to determine the qualifications they would want the arbitral tribunal to possess and specify them in their arbitration agreement¹⁶. In addition to technical and scientific expertise, parties are also free to consider other important qualifications in appointing an arbitrator such as experience in deciding tech-related disputes, tribunal management skills, and a reputation for fairness and even-handedness¹⁷. Such factors assist in ensuring the efficient and speedy resolution of the dispute. For instance, counsel with experience advising high-tech companies on applicable laws and regulations may better serve as arbitrators where the dispute largely involves legal issues. Likewise, familiarity with patent laws is likely to be desirable in a dispute relating to patent validity

¹³ *Supra* n. 7.

¹⁴ See Rule 7 of the NCIA Rules, Article 5.2 of the LCIA Rules, Article 14 of the WIPO Arbitration Rules, Rule 9 of the Singapore International Arbitration Centre Rules.

¹⁵ See Rule 7 (3), (5) of the NCIA Rules, Article 13 (4) of the ICC Rules, Article 5.6 of the LCIA Rules, Article 19 of the WIPO Arbitration Rules.

¹⁶ However, parties should avoid language that is too specific or limiting to retain flexibility at the time the arbitrator or panel is appointed.

¹⁷ Flip Petillion, Petillion, ‘Choosing an Arbitrator’ accessed on 15 December 2020 from: [https://uk.practicallaw.thomsonreuters.com/w-018-5399?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-018-5399?transitionType=Default&contextData=(sc.Default)&firstPage=true)

or infringement. Practical knowledge of the commercial and regulatory environment also could be considered in the appointment of the tribunal/panel.

Undoubtedly, a panel of skilled arbitrators (whether engineers, industry insiders or technology lawyers) are better qualified to address high-tech disputes in comparison many judges. The autonomy of parties in choosing expert arbitrators would minimize the risk of an erroneous ruling by a judge giving the parties more control in the process of resolving their dispute. Based on this factor alone, arbitration is decidedly superior to litigation for resolving high-tech disputes¹⁸.

b. Privacy and Confidential Information

The preservation of the confidential information such as trade secrets and other proprietary business information is of uttermost importance for tech businesses, where nondisclosure and confidentiality agreements are the norm in undertaking their business¹⁹. Confidentiality is therefore “a giant issue” when a technology-related dispute arises²⁰.

Litigation proceedings are open to the public in most countries and as a result, documents filed with or issued by the court are easily accessible to the public. At least in this country, motions are argued and trials are held in a public courtroom and anyone can enter the courtroom and watch the proceedings.

In contrast, the arbitral process is private and provides an opportunity to parties to resolve their dispute out of the public spectrum. It permits the parties to enter into a confidentiality agreement which shields them from the public view and potential disclosure of the documents and other information exchanged, as well as the very existence of the arbitration process itself. Recognizing the privacy benefits offered by arbitration is also a key compelling reason for resolving tech-

¹⁸ Supra n. 7.

¹⁹ Richard Stim (2001) Non-disclosure Agreement, Protect Your Trade Secrets and More, Nolo.

²⁰ Franklin, supra n. 9, at 32.

disputes through arbitration, due to the concern for trade secrets and other crucial information for the parties²¹.

Most international arbitration rules provide for confidentiality provisions, including the Nairobi Centre for International Arbitration Rules, 2015 (the **NCIA Rules**), which states that the parties shall keep confidential all matters relating to the arbitration, including all materials relevant to the proceedings as well as the award itself, unless the parties agree in writing to the contrary or otherwise where disclosure of information may be required²². The London Court of International Arbitration Rules, 2020 (the **LCIA Rules**) also expressly provide for confidentiality and state that the parties undertake to keep confidential as a general principle all matters relating to the arbitration, including all materials relevant to the arbitration proceedings as well as the award itself²³.

Given the importance of preserving confidentiality with respect to tech-related businesses, arbitration agreements should provide that all arbitration proceedings shall be conducted on a confidential basis, at the very minimum. Disputes relating to the terms of a confidentiality agreement are likewise normally resolved by the arbitrator.

Although there are some instances information relating to the arbitration may be disclosed (such as where a party seeks to enforce or set aside an award by making an application to the court), arbitration remains the ideal dispute resolution mechanism over litigation when referring to tech-disputes as parties are free to expand their limits to confidentiality and are able to resolve the dispute free for the public eye.

²¹ See Charles R. Dyer (2001) "Who Ya Gonna Call?" 3(1) *Newsl. of the St., 27 Court, and County Law Libraries Special Interest Section of the American Association of Law Libraries* No. ("The most compelling reason for arbitrators in this [the high-tech] arena is a concern for trade secrets. When two high-tech companies go after each other, they don't want the actual conflict publicly examined because of the competitive intelligence it gives away to third parties, i.e., the company down the road.").

²² Rule 34 of the NCIA Rules.

²³ Rule 30 of the LCIA Rules.

c. International and Cross-Border Commerce of Tech players

Technology has been a catalyst to international commerce, where technology has enabled many international supply chains and distribution networks to provide products and services on a global scale. Practically all global businesses around the world now rely on some form of technology in running their day to day business to achieve efficiency in their respective business functions²⁴.

Cross-border disputes are bound to arise in international commerce given that the parties are often from different countries with different cultural values and expectations. International arbitration meets the needs of tech businesses operating internationally for various reasons. International litigation may bring about various uncertainties, risks and inefficiencies including instituting multiple claims in different jurisdictions, which increases costs and may lead to inconsistent results. Moreover, the prevailing issue of lack of expertise required in determining disputes also comes into play. In comparison, the core features of arbitration are specifically tailored to deal with such concerns, as mentioned earlier. Litigation can be effectively consolidated into a single arbitration that addresses the dispute at a multinational level. The parties could have the dispute resolved in a single arbitration proceeding conducted in a mutually convenient location, with hearings in other locations as needed. Parties would also be free to appoint experts with the requisite qualifications to ensure the appropriate and efficient adjudication of the dispute, while enjoying the privacy benefits that come with arbitration.

Moreover, while technology knows no boundaries, courts are creatures of territorial definition. A court's power extends no further than the reach of its jurisdiction and a court's jurisdiction is limited by state or national boundaries. As such, courts offer limited benefits in the context of international business disputes, particularly global technology disputes. However, such jurisdictional issues are avoided in international arbitration as the recognition of arbitration agreements and the global enforcement of arbitral awards are provided by both local law and international treaty protections.

²⁴ Supra n.7 pg 7.

d. Swift Processes

It goes without say that the technology sector moves rapidly and what may be relevant today, may be made irrelevant overnight. With the wide range of new products, services and applications being launched almost on a daily basis, the need for a quick and efficient dispute resolution mechanism is ever more imminent so as to ensure that valuable resources (both human and financial) are not directed away from new product development. As previously stated “players in fast-paced technology markets cannot afford to have progress stalled for lengthy and expensive litigation”²⁵. With respect to patents for instance, while they may enjoy statutory protection for roughly 20 years, their effectiveness may diminish more quickly given the rapid advancement of technology²⁶.

Though the uncertainties surrounding lengthy legal battles can disrupt any business, they have an even heavier impact on tech companies, given the pressure to get products to market first and outperform the competition.

The arbitral process has recently been criticized for not living up to its potential as an efficient and economical dispute resolution mechanism, even being dubbed as “the new litigation”²⁷ in some instances. Various factors contribute to such a perception including the introduction of litigation-like techniques into arbitration such as contentious advocacy, uncontrolled discovery, aggressive motion practice, and other adversarial techniques aimed at achieving a “leg-up” in the contest²⁸. Such tactics compromise arbitration’s hallmark features as they invariably increase the duration and cost of the process. However, the arbitrator and the parties’ counsel should stand against such tactics and curb their use and agree to procedures to speed the process without undermining fairness. Delay and costs are contrary to arbitration’s core objectives.

²⁵ Franklin, *supra* n. 9, at 32.

²⁶ M. Scott Donahey (2010) “Unique Considerations for the International Arbitration of Intellectual Property Disputes,” 65(1) *Disp. Resol. J.* 4.

²⁷ Thomas J. Stipanowich (2009) “Arbitration and Choice: Taking Charge of the ‘New Litigation’,” 7(3) *DePaul Bus. & Com. L.J.* 383-436.

²⁸ *Supra* n. 7 pg 5.

e. Finality of the Process with Limited Appeal Rights.

There is no appeal on merits in arbitration as the grounds to vacate an award are limited by statute²⁹. Generally, an arbitrator's ruling may not be overturned on the basis of errors of law³⁰. This principally means that parties that choose arbitration over litigation save money by avoiding time-consuming court appeals.

f. Discovery Process

The discovery process is often blamed for the high cost of litigation where parties are engaged in unlimited discovery. This is usually the result of seeking more discovery than necessary or discovering repetitive information.

In arbitration proceedings, a tribunal is mandated to conduct and maintain an efficient process while at the same time affording each party a fair opportunity to present its case. Although arbitrators do not have unlimited power to restrict discovery where counsel agree to an unreasonable discovery plan, they can use the power of persuasion to urge parties to limit the scope of discovery to what is essential given the nature and complexity of the case³¹.

With a rise in adversarial litigation practices during arbitral proceeding, this impedes the efficiency that comes with choosing arbitration as the preferred dispute resolution mechanism. There is room for improvement in the process where the parties, including counsels participating in the arbitral process are reminded and made aware of their client's goals for an efficient but fair arbitration. Doing away with such practices in arbitration means that high-tech companies can obtain a faster and less costly resolution of their disputes through arbitration³².

²⁹ Section 32A of the Arbitration Act of Kenya, Chapter 49 of the Laws of Kenya.

³⁰ Abdallah A. and Noella C Lubano in the Kenyan chapter of Carter, J. H. (2013) *The International Arbitration Review*, pg 387.

³¹ *Supra* n. 7 pg 5.

³² *Ibid*.

Emerging Trends in the Resolution of Tech Disputes

While arbitration emerges as the preferred dispute resolution mechanism when dealing with tech disputes, innovation continues to demand for more efficient solutions to resolving tech-related disputes where there seems to be a gap.

Silicon Valley has been known to be the global centre for high-tech companies and is home to many start-up and multinational tech companies. The Silicon Valley Arbitration and Mediation Centre (the **SVAMC**) promotes efficient dispute resolution of tech-related businesses, including advancing the use of arbitration and mediation in technology and tech-related business disputes. It promotes the use of ADR procedures for tech-related business facing cutting edge legal issues that require specialized knowledge that often cannot be found in a courtroom setting or in providers with limited emerging growth company expertise. The SVAMC aims to offer specialized ADR procedures to cater to the players in the tech industry, thereby affirming the above analysis that arbitration is a more suitable approach to tech disputes than litigation.

Tech disputes in England and Wales have taken a step ahead with a new adjudication procedure aimed at resolving tech disputes more efficiently. In response to an increase in tech disputes, the Society for Computers and Law (SCL) has launched a contractual adjudication procedure that offers an alternative forum for the resolution of tech disputes including disputes arising from contracts for the provision of tech-related goods and services, including software development contracts, outsourcing arrangements, smart contracts and cloud computing contracts. Some of the key features of the SCL adjudication procedure include a time limit of up to three months for resolving tech disputes (with no restriction on the size or scope of the tech dispute that may be referred), as well as a choice of specialist arbitrators from a preselected panel. Likewise, the SCL procedures reflect the suitability of arbitration with respect to tech disputes.

Being recognised as the tech hub in Africa, Kenya has been home to numerous start-ups and tech companies within the region. With a continued increase in innovation, there is an automatic expectation for there to be an increase in tech

disputes regionally. Certainly, specialised resolution of tech disputes will soon be required, noting the different challenges faced in the tech sector across the region. There remains much more to be done to ensure efficient and effective resolution of tech-disputes, including further research and training into the area.

Conclusion

With innovation and technology as a key driver to our society today, efficient and effective dispute resolution procedures should be at hand when need arises. There is certainly no one-size-fits-all procedures for all tech disputes but it is safe to state that arbitration offers numerous benefits over litigation.

As stated above, the main advantage of arbitration over litigation in tech disputes is the opportunity to select a panel of technology law experts and the ability to undertake a much more efficient and focused proceeding. A panel of qualified arbitrators can collectively reach a reasoned decision on a tech dispute as well as, if not better than, a single judge and almost certainly better than a jury lacking legal or technical background.

Arbitration stands as the most suitable mechanism when it comes to tech disputes. It features allow it to respond to the needs and concerns of tech-related business, over litigation. More specialized proceedings may be useful, specifically where there is a rise in high-tech disputes. However, regard should be given to the specific needs of the nature of the disputes.

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Recent Trends in Arbitration, Mediation and Judicial Settlements

By: Noreen Kidunduhu *

Introduction

Alternative Dispute Resolution (ADR) refers to the different modes of resolving legal disputes without resorting to the court system. ADR as a means of dispute resolution has gained great traction over the past 30 years in consequence of its celebrated benefits, *to wit*, dispatch, flexibility, confidentiality and affordability.¹ Perhaps lending credence to the prevalence, effectiveness and importance of ADR, is the fact that it is now a constitutional imperative in various jurisdictions with judiciaries being enjoined to adopt its use in enhancing access to justice.²

ADR is equally popular with judges in jurisdictions where it is not a constitutional imperative or a judicial mandate. Indeed, trial judges are now more than ever making greater efforts to promote mediated settlements in a bid to quell the escalating number of lawsuits and costs as well as to judiciously dispense with the increasingly complex claims and defenses.³

With regard to litigation of international commercial disputes, majority of the laws that make provision for dispute resolution through international courts require the parties to attempt to resolve any dispute through ADR before

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¹ 'Advantages of Alternative Dispute Resolution' Law Handbook by the Government of Australia <<https://lawhandbook.sa.gov.au/ch27s10s01.php>> accessed on 10 April 2019

² Article 159(2) of the Constitution of Kenya

³ D. M. Provine, Settlement Strategies for Federal District Judges (Federal Judicial Center 1986)

referring the dispute for resolution to such court.⁴ Once the court is seized of the matter, the parties are still allowed to continue or resume negotiations, with or without the court's involvement, and should they reach an agreement to settle the dispute, they may request the court to converted it into a binding judgment.⁵

In international arbitration, after years of debate on whether an arbitrator can and should take a proactive approach and get involved in the parties' settlement efforts, there is now a slow but steady acceptance that part of the mandate of arbitrators is to facilitate settlement between disputing parties. This acceptance is evinced from the growing numbers of institutional rules that either enable and encourage tribunals to facilitate settlement⁶ or make provision for consent awards.⁷

Nevertheless, there is still more controversy than information about the steps judges and arbitrators should take to facilitate settlement. Further, the enforcement of such settlements may prove problematic when they are not converted into binding judgments or consent awards.

As regards international mediation - mediation activities conducted by various international actors with the aim of managing interstate and intrastate conflicts - settlement agreements arising therefrom have a higher chance of performance because they are entered into voluntarily by the parties. Nonetheless, parties may still wish to or find it necessary to have an enforceable agreement when the

⁴ See Section 278 of the German Code of Civil Procedure (*Zivilprozessordnung* - ZPO) that governs proceedings in the Chamber for International Commercial Disputes at the *Landgericht Frankfurt am Main*

⁵ See Rule 7.6.3 of the Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal); and Article 11 of the Supreme People's Court of China's Regulations on Several Issues regarding the Establishment of International Commercial Court

⁶ Article 15/8 of the Swiss Rules of International Arbitration; provided the parties agree, the arbitral tribunal may take steps to facilitate settlement of the dispute before it.

⁷ Article 26.9 of the London Court of International Arbitration Rules; the arbitral tribunal may decide to make an award recording the settlement upon the joint request of the parties

agreed obligations are far in the future or in case of delay or plain refusal to perform. The lack of a regime for expedited enforcement of internationally mediated settlements is often cited as the key challenge to the use of mediation for international disputes.

This paper will first analyse how and to what extent judges in the national courts of Kenya and the United States as well as those in international commercial courts facilitate settlement. It will then equally analyse how and to what extent arbitrators in international commercial arbitrations facilitate settlement. Finally, the paper will discuss the relevance and propriety of the Singapore Convention on Enforcement of Mediated Settlements to international mediation.

Settlements in National Courts

It has been argued that whilst many lawyers desire assistance from judges in removing psychological and informational barriers that stand in the way of settlement, they do not want to lose control over their lawsuits or forgo their rights to proceed to trial.⁸ Judicial intervention for purposes of encouraging settlement of legal disputes inarguably places the judge in a dicey position. Views are divided depending on the legal system that the judge is from.

In the United States (US), the 1983 amendments to the Federal Rules of Civil Procedure encourage judges to take an active role in the settlement of civil suits. Particularly, Section (a) of Rule 16 includes '*facilitating the settlement of the case*' in the list of objectives of pretrial conferences. Section (c) of the same rule was revised to include '*the possibility of settlement*' as one of the items that parties at the pretrial conference can take action to effectuate. The self-same section additionally enjoins judges to '*consider and take action with respect to ... extrajudicial procedures to resolve the dispute*'. Pursuant thereto, trial judges across the United States have been exploring and developing a variety of approaches to promote settlement of disputes. Some of these approaches include: summary jury trial, court-annexed mediation, court-annexed arbitration as well as conducting settlement conferences.⁹

⁸ Ibid (n 3)

⁹ Ibid (n 3)

In Kenya, the Judiciary operationalized a court annexed mediation pilot project in April 2016 for its Commercial and Family Divisions.¹⁰ Upon successful completion of the pilot phase, a Mediation Taskforce was gazetted in July 2017 with the mandate of overseeing a national rollout of court-annexed mediation.¹¹ Presently, every civil action instituted in court is subjected to mandatory screening by the mediation deputy registrar or magistrate, to assess its suitability for mediation and if found so suitable, is referred to mediation by a court appointed mediator.¹²

In both the US and Kenya, any settlement or agreement reached pursuant to the court's intervention is adopted and enforced as a judgment or order of the court. The extent to which judges are involved in the settlement in the two jurisdictions is however, markedly different. In Kenya, the role of the judge is restricted to a manager of the settlement with little to no involvement outside of screening cases, giving interim remedial measures and enforcing the settlement agreements. The US laws on the other hand, accord judges wider room to not just manage settlement but to be proactively involved in assisting parties reach settlement. There has been great debate and discussions in the US on '*judicial overreaching*' and how far the judge should go in negotiating settlements throughout the pretrial process and during settlement conferences.¹³ The weight of opinion, however, decidedly favors mild intervention rather than intrusive forms of intervention.

Settlements in International Courts

International Commercial Courts are a recent phenomenon where a number of jurisdictions across the world have established specialized courts to determine international commercial disputes. Some of these include the China International Commercial Courts, Singapore International Commercial Court, the Chamber for International Commercial Disputes of the District Court of

¹⁰ The Kenya Judiciary Mediation Manual 2nd Edition (2018)

¹¹ Ibid

¹² Republic of Kenya's Practice Directions on Mediation, 2017

¹³ Jeffrey A. Parness & Matthew R. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 IND. L. REV. 33, 54-56 (2003)

Frankfurt/Main, the International Chamber of the Paris Court of Appeal, the Netherlands Commercial Court and the Brussels International Business Court.

The majority of these International Commercial Courts have been systematically incorporated within their respective national judicial orders and the procedural laws thereto invariably make provision for attempts to resolve any dispute through ADR before referring the dispute for resolution to such court,¹⁴ as well as at any stage of the proceedings after the dispute has been seized by the court - with or without the involvement of the court.¹⁵ The extent of the involvement of the court will depend on the jurisdiction's procedural laws. For instance, the rules governing the procedure of the Chamber for International Commercial Disputes of the District Court of Frankfurt/Main make provision for the court to share its preliminary legal and factual assessment of the claim in order to facilitate settlement negotiations.¹⁶ Where the court is involved, the resultant settlement agreement is adopted as a judgment of the court but where the court is not involved, unless the settlement is registered by the court, it cannot be enforced as a court order.

Settlements within International Arbitration

In international arbitration, settlements can be reached prior to, during or even after the hearing of arbitral proceedings while the award is pending. It has now become common practice in international arbitration to exchange 'without prejudice', sealed or open offers of settlement between the parties, with an objective of encouraging settlements between the parties.¹⁷ Where proceedings are bifurcated, it is both common and understandable to see settlements being reached after the first stage of proceedings.

¹⁴ Ibid (n 4)

¹⁵ Ibid (n 5)

¹⁶ Ibid (n 6)

¹⁷ Jayems Dhingra, *It Is Time to Unseal Sealed Offers in International Arbitration: As a Negotiation Strategy or Pressure Tactics?*, *Arbitration International*, Volume 28, Issue 3, 1 September 2012, Pages 511-532, <https://doi.org/10.1093/arbitration/28.3.511>

The extent to which arbitrators can be involved in and even facilitate settlement will depend on the parties' agreement and/or the arbitration or institutional rules adopted by the parties as shown in the table below.

No	Arbitration Rules	Provision
1.	International Chamber of Commerce Rules of Arbitration (ICC Rules)	Appendix IV governs case management techniques. Paragraph (h) thereof provides that the tribunal should inform the parties that they are free to settle all or part of the dispute by ADR and that where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law. Further, Rule 33 of the ICC Rules provides that if the parties reach a settlement after the file has been transmitted to the arbitral tribunal, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so.
2.	London Court of International Arbitration Rules (LCIA Rules)	In the event of any final settlement of the parties' dispute, the arbitral tribunal may decide to make an award recording the settlement if the parties jointly so request in writing. If the parties do not jointly request a consent award, on written confirmation by the parties to the LCIA Court that a final settlement has been reached, the arbitral tribunal will be discharged and the arbitration

		proceedings concluded by the LCIA Court. ¹⁸
3.	UNCITRAL Model Law	Parties can settle the dispute, during the arbitral proceedings. The arbitral tribunal shall then terminate the proceedings and if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. ¹⁹
4.	American Arbitration Association Commercial Arbitration Rules and Mediation Procedures (AAA Rules)	If the parties settle their dispute during the course of the arbitration and upon their request, the arbitrator may set forth the terms of the settlement in a consent award. The consent award is to include an allocation of arbitration costs as well as the arbitrator's fees and expenses. ²⁰
5.	Singapore International Arbitration Centre Rules (SIAC Rules)	In the event of a settlement and the parties so request, the Tribunal may make a consent Award recording the settlement. If the parties do not require a consent Award, the parties are to confirm to the Registrar that a settlement has been reached. The Tribunal is then discharged and the arbitration concluded upon full settlement of the costs of the arbitration. ²¹
6.	Istanbul Center of Arbitration Rules of Arbitration and Rules of Mediation (STAC Rules)	If the Parties reach a settlement after transmission of the file to the Tribunal the arbitration proceedings shall be terminated unless the parties request and

¹⁸ Article 26.9

¹⁹ Article 30

²⁰ Rule R-48

²¹ Rule 32.10

		the Tribunal accepts to record the settlement in the form of an award. ²²
7.	The Swiss Rules of International Arbitration (SRIA)	The arbitral tribunal may take steps to facilitate settlement of the dispute with the agreement of each of the parties; such agreement by a party shall constitute a waiver of its right to challenge an arbitrator's impartiality based on the arbitrator's participation and knowledge acquired in taking the agreed steps. ²³
8.	The German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit - DIS) Arbitration Rules	<p>The DIS Arbitration Rules for the entire spectrum of alternative dispute resolution proceedings including conciliation, mediation, expertise, expert determination, adjudication and Sports Arbitration.</p> <p>The Rules provide that the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues unless the parties object.²⁴ During the case management conference, the arbitral tribunal is enjoined to specifically discuss the possibility of using mediation or any other method of amicable dispute resolution to seek the amicable settlement of the dispute or of individual disputed issues.²⁵</p>

²² Article 38

²³ Article 15(8)

²⁴ Article 26

²⁵ Article 27.4

		At the request of all of the parties, the arbitral tribunal may record a settlement agreement or a decision arising out of proceedings pursuant to the DIS Mediation/ Conciliation/Adjudication/Expert Determination Rules, in the form of an award by consent unless it considers that there are serious grounds not to do so. ²⁶
9.	The Centre for Effective Dispute Resolution Rules for the Facilitation of Settlement in International Arbitration (CEDR Rules)	The arbitral tribunal, if involved in the settlement process, may declare preliminary views and non-binding findings, offer suggested terms of settlement, or chair settlement meetings. ²⁷

As seen above, some rules (e.g. CEDR Rules) enable or in certain instances (e.g. DIS and ICC Rules) encourage arbitrators to proactively participate in promoting settlements whilst other rules (e.g. LCIA and SIAC Rules) only regulate consent awards and envision little to no participation of the arbitrators in reaching the settlement. It is important to note that in all the rules, consent awards are only rendered upon agreement of the parties and only in the cases where the parties do not opt to withdraw or terminate the proceedings, upon reaching settlement.

As in the case of a judge, an arbitrator’s intervention in facilitating settlement, places the arbitrator in a delicate position. This is mainly due to the possible negative effects of such facilitation as to the independence and impartiality of the arbitrator which would then open up the resultant award to challenge during enforcement. The SRIA Rules preclude any challenges to a consent award by providing that an agreement to settle with the assistance of the tribunal constitutes a waiver of the right to challenge the tribunal’s impartiality

²⁶ Article 41.2

²⁷ Article 5

based on the tribunal's participation and knowledge acquired in facilitating the settlement.

The CEDR Rules and the International Bar Association Guidelines on Conflict of Interest in International Arbitration (IBA Guidelines), provide guides to arbitrators to help them protect the integrity of the arbitration proceedings when facilitating settlement. UNCITRAL Notes on Organising Arbitral Proceedings²⁸ also warn arbitral tribunals to be cautious while making proposals to amicably settle disputes. Some of the most notable recommendations are:

- i) the arbitrator should only engage in facilitation of settlement with the agreement of the parties;
- ii) the parties should waive their right to challenge or disqualify the arbitral tribunal from continuing to serve as arbitrator;
- iii) the arbitrator should not meet the parties separately or obtain information from one party that is not shared with the other;
- iv) the arbitrator should disregard substantive matters discussed in settlement meetings in making an award, unless it was already introduced in arbitration;
- v) the arbitration should use techniques intended to obtain further information from the parties with caution;
- vi) the arbitrator should not directly provide a detailed settlement proposal, but rather, either state their preliminary analysis, or provide the parties with general guidelines as to how they may reach settlement;
- vii) the arbitrator should resign if, as a consequence of involvement in the settlement process, the arbitrator doubts his or her ability to remain impartial or independent in the arbitration proceedings.

Settlements in International Mediation

Unlike international litigation and arbitration, international mediation does not result in a binding outcome. Compliance of a mediated settlement agreement largely depends on the good will of the parties. The uncertainties over the effect

²⁸ UNCITRAL Notes on Organising Arbitral Proceedings 18 (2012)

and enforcement of internationally mediated settlement agreement have created an aversion to mediation for the resolution of cross-border disputes.²⁹

Over the last decade, there have been numerous calls for an enforcement convention for internationally mediated settlement agreements so as to:

- a. provide certainty and finality through global recognition and enforcement of mediated settlement agreements;
- b. promote equity amongst parties from different countries in relation to enforcement; and
- c. enhance efficiency and reduce dispute resolution transaction costs by allowing direct international enforcement of mediated settlement agreements.³⁰

On 12th September 2020, the Singapore Convention on Mediation came into force. The Convention is to mediated settlement agreements what the New York Convention is to arbitral awards. It creates a framework within which courts of contracting states will give effect to, recognize and enforce cross-border commercial mediated settlement agreements. The courts of a contracting party will be expected to handle applications to either enforce a settlement agreement which falls within the scope of the Convention or to allow a party to invoke the settlement agreement in order to prove that the matter has already been resolved, in accordance with its rules of procedure, and under the conditions laid down in the Convention. In this regard, the Convention is both timely and relevant as it is the panacea to the age-old drawback of unenforceability of internationally mediated settlement agreements.

²⁹ Sinisa Vukovic, (2014) 'International Mediation as a Distinct Form of Conflict Management', *International Journal of Conflict Management*, Vol. 25 Issue: 1, pp.61-80, <https://doi.org/10.1108/IJCMA-02-2012-0015>

³⁰ Laurence Boulle (2014) 'International Enforceability of Mediated Settlements: Developing the Conceptual Framework' *Contemporary Asia Arbitration Journal* 7(1): 35-68

Conclusion

The need to incorporate negotiated settlements into national and international litigation and arbitration proceedings is incontestable -what is contestable is the level of involvement of the judge or arbitrator in facilitating the settlement. Ordinarily, the procedural rules of the jurisdiction or the arbitration coupled with the agreement of the parties will delimit how and to what extent the judge or arbitrator will be involved in the settlement. For national judges, the weight of opinion favors mild rather than intrusive intervention whilst for international judges and arbitrators more proactivity is preferred provided it is within certain parameters and provided also that the independence and impartiality of the judge or arbitrator is maintained. International mediation has failed to gain traction in resolving cross-border disputes mostly because of the difficulty in enforcing the resultant settlement agreement. The Singapore Convention is therefore a welcome structure for directly enforcing cross-border mediated agreements.

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Case Summary: Bellevue Development Company Ltd Vs Hon. Justice Francis Gikonyo and 3 Others (2020)

By: Wilfred Mutubwa¹

Court: The Supreme Court of Kenya
Case Number: Petition Number 42 of 2018
Parties: Bellevue Development Company Ltd Vs Hon. Justice Francis Gikonyo, Hon. Justice Charles Kariuki, Paul Mwaniki Gachoka and Vinayak Builders Limited
Judges: Maraga, CJ & P, Mwilu, DCJ & V-P, Ibrahim, Wanjala & Lenaola, SCJJ
Date of Delivery: 15th May, 2020

The Petitioner filed the instant Petition on 5th November, 2018 pursuant to the provisions of Article 163(4)(a) of the Constitution, Section 15(2) of the Supreme Court Act and Rules 3, 9 & 33 of the Supreme Court Rules.

In the Petition, the Petitioner sought to set aside the Court of Appeal decision preceding the petition; A declaration that members of the Judiciary do not enjoy absolute immunity under Article 160(5) of the Constitution; A declaration that the decisions made by the 1st and 2nd Respondents violated, denied, infringed upon or contravened the Petitioner's rights under Articles 27(1), 40 and 50(1) of the Constitution; A declaration that the 3rd Respondent denied, infringed upon or contravened the Petitioner's rights under Article 40 of the Constitution; A declaration that the actions by the 4th Respondent denied, violated, infringed upon or contravened the Petitioner's rights under Articles 27(1), 40 and 50(1) of the Constitution and; Costs for the petition, the suits in the High Court and that of the appellate court.

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Summary of Facts

The Petitioner and the 4th Respondent entered into a contractual agreement from which a dispute arose and the matter referred to arbitration. In the course of the arbitration, the Petitioner filed *Civil Suit No 571 of 2011 (OS)*. He consequently filed an application within the suit which came before the 1st Respondent who dismissed the same. The Petitioner then sought review of the judgement before the 2nd Respondent who upon finding that there were no substantial grounds to allow a review, dismissed the application.

Being aggrieved by the decisions of the 1st and 2nd Respondents, the Petitioner filed a Petition at the Constitutional and Human Rights Division of the High Court at Nairobi in *Petition No. 377 of 2016* and directions were issued that the matter be moved to the Commercial and Admiralty Division of the High Court. The matter was thereafter renamed and renumbered *Civil Suit No. 371 of 2016*.

The matter was heard by Ochieng J, who in determining the issues raised in the Preliminary Objection filed by the 1st and 2nd Respondents on the issue of judicial immunity of Judges and judicial officers, held that the Court lacked the requisite jurisdiction to hear and determine the matter as it sought to have him enquire into decisions of or otherwise supervise the decisions of Judges of equal status and jurisdiction. He therefore upheld the Preliminary Objection and dismissed the Petition.

The Petitioner moved to file an appeal from the Judgment in *Civil Appeal No. 239 of 2017*. The court held that there was absolutely no doubt that the superior Court Judge did not possess supervisory jurisdiction over the 1st and 2nd Respondents under Article 165(6) of the Constitution. On the issue of judicial immunity, it was held that under Article 160(5) of the Constitution, Judges and judicial officers are immunized from any suits arising from their performance or decisions made in good faith and within the law. Consequently, the appeal was unanimously dismissed.

Petitioner's Submissions

The Petitioner contends that the appellate Court interpreted and applied Article 160(5) narrowly and restrictively without reference to the guiding principles set out in Articles 10, 20(1), 20(2), 20(3), 20(4) and 259(1) of the Constitution. It further argued that the learned Judges of the appellate Court failed to appreciate that they were bound by the Constitution to give effect and meaning to the Bill of Rights by elevating and setting apart members of the Judiciary from submission to the Constitution.

The Petitioner also submitted that the superior courts had made a curious finding that the Petitioner had not particularized the elements of bad faith or ill will in the impugned decisions by the 1st and 2nd Respondents and contended that the willful and persistent disregard by the Respondents of the conclusive determination by Odunga J was definitive and a substantial demonstration of the blatant ill will and bad faith contemplated in the Petition.

The Respondent's submissions

The Respondents submitted that the appellate Court properly interpreted and determined that the Petitioner's appeal was devoid of merit, and correctly dismissed the same as it was in violation of Articles 160(5) and 165(6) of the Constitution.

They also submitted that Article 160(5) as read together with Section 6 of the Judicature Act provide that judicial officers enjoy judicial immunity in the exercise of their judicial functions executed lawfully and in good faith, and that judicial immunity as a legal principle, is an important tenet in judicial independence.

On the issue of supervisory powers of the High Court, it was submitted that there are pending execution proceedings in *Civil Suit No. 571 of 2011 (O.S)* and that by filing *Civil Suit No. 371 of 2016*, the Petitioner had sought to invoke the High Court's supervisory powers under Article 165(6) of the Constitution over a court

of concurrent jurisdiction and equal status which is a fundamental error in the law.

The Respondents further argued that the law provides adequate mechanisms and frameworks where judicial errors and mistakes may be rectified and resolved, including judicial review and appeals to appellate Courts. They also submitted that disciplinary mechanisms are also available for aggrieved litigants through Article 168 of the Constitution, as read together with Article 172 thereof as well as the Judicial Service Act in situations where judicial officers act outside the law. It was further submitted that if judicial matters were drawn into question by frivolous and vexatious actions, there would never be an end to litigation causes.

Analysis and Determination

The court found that the main issue arising for determination by the Court revolved around judicial immunity of Judges and judicial officers in the exercise of their judicial functions as the issue of the High Court supervising other Courts of concurrent jurisdiction was no longer contested.

(i) The Tenets of or What Judicial Immunity Entails

The court found that the immunity granted by Article 160(5) of the constitution encapsulates protection from legal proceedings founded on acts committed or omissions made by Judges in the lawful performance of their judicial functions.

(ii) The Objective of the Principle of Judicial Immunity

The court found that Judicial immunity is meant to provide protection to judicial officers from third parties' interference, influence or obstruction. It also found that Judicial immunity is necessary to protect the reputation and perception of the Judiciary, to maintain the trust of the public and ensure transparency and accountability. Furthermore, judicial immunity is necessary to ensure finality in litigation, otherwise, disgruntled litigants would prolong litigation unnecessarily and personalize matters that Judges ought not to have personal interest in.

(iii) Whether or not Judicial Immunity is Absolute

It was found that if a Judge acting in his capacity as a Judge, acts in good faith in the lawful performance of his duties, he has absolute immunity even when he acts in excess of his jurisdiction.

(iv) Recourse for a party aggrieved by an Unlawful Act or Omission of a Judicial Officer

The court found that the remedy for a litigant making allegations of fraud, dishonesty and/or perversity lies, not in a suit against such a Judge but in a petition to the Judicial Service Commission for removal from office under Article 168 of the Constitution thus bringing forth the need for extreme care in the enjoyment of this immunity by judicial officers. The court went on to state that the duty imposed on a Judge, is only to recognize that his own decisions may sometimes be in error and to ensure that orders affecting important Constitutional rights can be reviewed or appealed in another Court.

(v) The Petitioner's Appeal in context

The court found that the Petitioner was not denied an opportunity to seek appellate or alternative relief from what it considered an affront to its Constitutional right to fair hearing under Article 50. Other than legal proceedings against the two Judges, various avenues were available to it, and it was up to it to decide which avenue best suited its interests.

The court further found that even if the judges lacked judicial immunity, the Petitioner did not provide proof of its allegations that the two Judges acted in bad faith and without jurisdiction thus violating its rights to a fair trial. In the same light, the court found that a mere statement by the petitioner that the 1st and 2nd Respondents acted with impunity did not suffice.

(vi) Determination

The petition was dismissed and costs in the matter and in those of the superior courts awarded to the Respondents.

Call for Submissions

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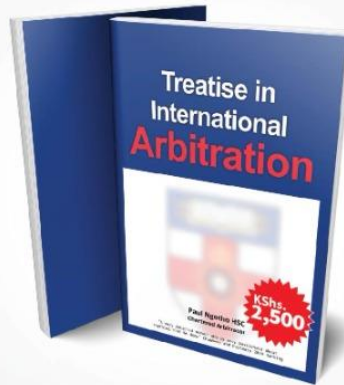
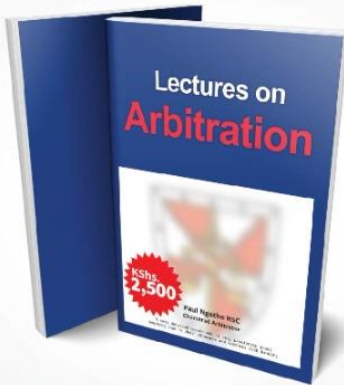
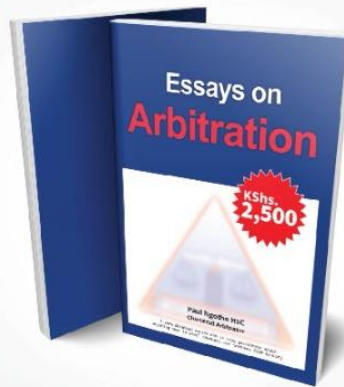
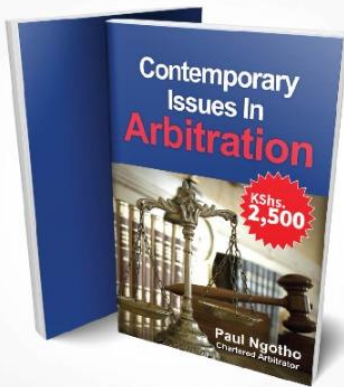
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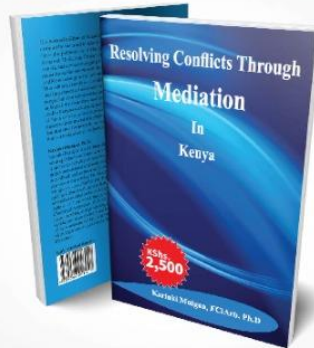
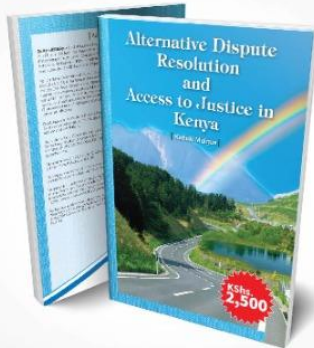
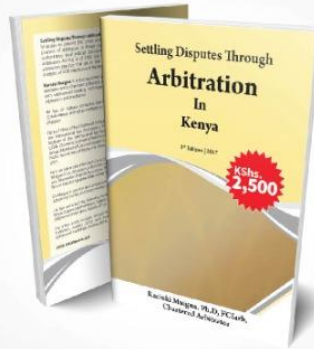
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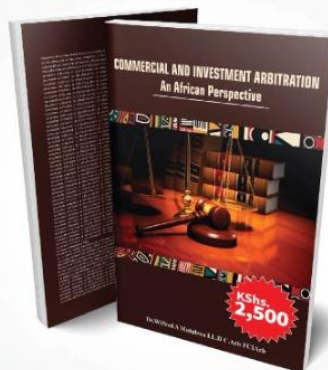
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