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ALTERNATIVE DISPUTE RESOLUTION

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Editor's Note

We are pleased to launch another issue of the *Alternative Dispute Resolution (ADR) Journal*, Volume 13, No.1.

The ADR Journal is a publication by the Chartered Institute of Arbitrators (CIArb), Kenya that spearheads intellectual discourse on pertinent and germane issues in Alternative Dispute Resolution and other related fields of knowledge. It offers a platform where scholars, ADR practitioners, judicial officers, law lecturers and students can share knowledge, ideas, emerging jurisprudence and reflects on the practice of ADR. The Journal is aimed towards advancing the growth of ADR as a viable tool for the management of disputes in Kenya and across the globe.

This volume contains papers on salient themes in ADR including: *Promoting Justice for People of African Descent Through Reparations; Permanent Court of Arbitration and Contract-Based Dispute Resolution (including Conciliation); Limiting the Jurisdiction of the Arbitral Tribunal: A Necessity or an Issue Taken Too Far?; Overview of the arbitration processes in Kenyan construction industry; Bolstering the Credibility of Arbitration: Addressing Conflict of Interest and Ensuring Impartiality; Assessing The Admissibility of Illegally Obtained Evidence in Arbitration in Kenya: Balancing Procedural Integrity and Fairness; Reconceptualizing The Role of Women Lawyers in Climate Justice; Leveraging Technologies in International Commercial Arbitration; Eco-Mediation: Making The Case for Mediation In Resolving Climate Change Disputes; Navigating the Complexities of International Commercial Arbitration in Africa; The Permanent Court of Arbitration and Investor-State Dispute Resolution (including Conciliation); Does Party Autonomy Limit the Arbitrator's Powers?; Therapeutic Jurisprudence and ADR: Enhancing Legal and Psychological Outcomes in Family Disputes;* and *AI-ADR and the Algorithmic Divide: Closer or Further away from Justice?*

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

The Editorial Board also welcomes and encourages submission of articles on emerging and pertinent issues in ADR for publication in subsequent issues of the Journal. The Editorial Board receives and considers each article received but does not guarantee publication. Submissions should be sent to the editor through admin@kmco.co.ke and copied to editor@ciarbkenya.org and adrjournal@ciarbkenya.org. We only publish papers that adhere to the Journal's publication policy after a critical, in depth and non-biased review by a team of highly qualified and competent internal and external reviewers.

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

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

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

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

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Promoting Justice for People of African Descent through Reparations

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

Abstract

This paper critically examines the need for reparations for people of African Descent. It argues that reparations are a key measure in promoting justice for people of African descent. The paper discusses some of the key human rights violations faced by people of African descent including the legacies of slavery and colonialism. It also examines the progress made towards enhancing reparations for people of African descent and challenges thereof. In addition, the paper proposes reforms towards promoting justice for people of African descent through reparations.

1.0 Introduction

The concept of reparation for victims of violations of human rights or of International Humanitarian Law (IHL) is relatively new phenomenon in international law[1]. It is recognized as part of the right to a remedy as recognised under international law for victims of serious violations of IHL and human rights[2]. Reparations are meant to acknowledge and repair the causes and consequences of human rights violations and inequality in countries emerging

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[1] Reparation (Compensation)., Available at https://guide-humanitarian-law.org/content/article/3/reparation-compensation/#:~:text=There%20are%20several%20systems%20in,and%20guarantees%20of%20non%2Drepetition (Accessed on 06/05/2024)

[2] Ibid

from dictatorship, armed conflict, and political violence, as well as in societies dealing with racial injustice and legacies of colonization[3].

Reparations take various forms including compensation or the payment of money[4]. Other key forms of reparations include the restitution of civil and political rights; physical rehabilitation; and granting access to land, housing, health care, or education[5]. In addition, reparations can also take the form of revealing the truth about the violations themselves and providing guarantees that such violations will not be repeated[6]. Further, it has been asserted that symbolic reparations such as apologies, memorials, and commemorations are also important reparative measures that can be more meaningful when conferred alongside material reparations[7].

According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), all victims of human rights violations have a right to reparations[8]. It notes that reparations entail measures to redress violations of human rights by providing a range of material and symbolic benefits to victims or their families as well as affected communities[9]. In addition, it notes that reparations must be adequate, effective, prompt, and should be proportional to the gravity of the violations and the harm suffered[10].

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[3] International Center for Transitional Justice., 'Reparations' Available at https://www.ictj.org/reparations#:~:text=It%20is%20important%20to%20remember,%2C%20health%20care%2C%20or%20education (Accessed on 06/05/2024)
[4] Ibid
[5] Ibid
[6] Ibid
[7] Ibid
[8] Office of the United Nations High Commissioner for Human Rights., 'Reparations: OHCHR and Transitional Justice' Available at https://www.ohchr.org/en/transitional-justice/reparations (Accessed on 06/05/2024)
[9] Ibid
[10] Ibid

The *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*[11] sets out the international legal framework on reparations. Under the Principles, States are under legal obligation to provide reparations for gross violations attributable to them, as are persons found liable for relevant war-time violations[12]. In addition, States are also obligated to endeavour to provide repair and redress for victims in circumstances where those directly responsible are unwilling or unable to meet their obligations through measures such as establishment of reparations programmes[13]. The Principles recognize various forms of reparations including *restitution* which entails restoration of victims' rights, property, and citizenship status; *rehabilitation* through psychological and physical support; *compensation*; *satisfaction* through acknowledgement of guilt, apology, burial of victims, and construction of memorial sites among other measures; and *guarantee of non-repetition* through reformation of laws and civil and political structures that led to or fueled violence(Emphasis added)[14].

Reparatory justice is a key agenda in Africa. It has been observed that Africans and people of African descent have for many centuries suffered and continue to suffer systemic racism, racial discrimination, xenophobia and related intolerance and other violations of their human rights[15]. Further, it has been

[11] United Nations General Assembly., 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' A/RES/60/147., Available at https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf (Accessed on 06/05/2024)
[12] Ibid
[13] Ibid
[14] Ibid
[15] African Commission on Human and Peoples' Rights., 'Resolution on Africa's Reparations Agenda and The Human Rights of Africans in the Diaspora and People of African Descent Worldwide - ACHPR/Res.543 (LXXIII) 2022' Available at https://achpr.au.int/index.php/en/adopted-resolutions/543-resolution-africas-reparations-agenda-and-human-rights-africans (Accessed on 06/05/2024)

noted that people of African descent face many prejudices and injustices through legacies of slavery and colonialism, as evidenced by many inequalities they face[16]. Reparations are therefore key in addressing the continued harm suffered by people of African descent[17]. It has been noted that reparations highlight the intrinsic link between the legacies of colonialism and enslavement and contemporary forms of systemic racism and racial discrimination, intolerance and xenophobia faced by people of African descent[18].

This paper critically examines the need for reparations for people of African Descent. It argues that reparations are a key measure in promoting justice for people of African descent. The paper discusses some of the key human rights violations faced by people of African descent including the legacies of slavery and colonialism. It also examines the progress made towards enhancing reparations for people of African descent and challenges thereof. In addition, the paper proposes reforms towards promoting justice for people of African descent through reparations.

2.0 The Need for Reparations for People of African Descent

People of African descent have for many centuries endured worst forms of human rights violations including the lasting consequences of enslavement, the trade in enslaved Africans and colonialism[19]. Africans and people of African descent were victims of enslavement, the trade in enslaved Africans, including the transatlantic trade[20]. It is estimated that between 25 and 30 million people

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[16] United Nations., 'UN Leaders Galvanize Action for Reparations for People of African Descent' Available at https://news.un.org/en/story/2024/03/1147821 (Accessed on 06/05/2024)
[17] United Nations., 'Strong Leadership and Political will Crucial to Ensure Reparatory Justice for People of African Descent – UN Report' Available at https://www.ohchr.org/en/press-releases/2023/09/strong-leadership-and-political-will-crucial-ensure-reparatory-justice (Accessed on 06/05/2024)
[18] Ibid
[19] Ibid
[20] United Nations., 'Implementation of the International Decade for People of African Descent' A/78/317., Available at

were violently uprooted from Africa and transported to other regions of the world for enslavement during the transatlantic trade[21]. According to the United Nations, the transatlantic trade in enslaved Africans caused the largest and most concentrated deportation of human beings, involving several regions of the world for more than four centuries[22]. It has been argued that there is no institution in modernity, over the course of the last 500 years, that has changed the world as profoundly as the transatlantic slave trade and slavery[23]. In addition, it has been noted that slavery and the slave trading enterprises were the greatest commercial enterprises in the world at that time and had an impact on the structure of the world economy, politics, race relations and cultural relations and how civilizations have interacted with each other[24]. The impact of slavery and the transatlantic slave trade was so profound and deep- seated and sustained over several generations[25]. It has shaped race relations and the development of racism as a philosophy for social organization, where most societies where it has touched are now structured in such a way that people of African descent are considered the most marginalised people, and the descendants of the enslaved people still continue to suffer racism[26].

As a result of slavery and the transatlantic slave trade, for centuries, Africans were reduced to property in North and South America and the Caribbean Islands[27]. It has been noted that slave traders had no trouble pricing a human life, and abolition-era economists repaid slave owners for the losses of their

https://documents.un.org/doc/undoc/gen/n23/245/15/pdf/n2324515.pdf?token=CLwoAnKkVDXN3Dcqgv&fe=true (Accessed on 06/05/2024)

[21] Ibid

[22] Ibid

[23] United Nations., 'Unravelling the Legacies of Slavery' Available at https://news.un.org/en/story/2024/04/1148166 (Accessed on 06/05/2024)

[24] Ibid

[25] Ibid

[26] Ibid

[27] Chutel. L., 'What Reparations are owed to Africa?' Available at https://qz.com/africa/1915182/what-reparations-are-owed-to-africa (Accessed on 06/05/2024)

freed slaves[28]. In addition, the loss of human life from Africa as a result of the transatlantic slave trade had a real cost[29]. The continent was not only deprived of manpower and income, but also creativity, innovation, and relationships[30]. It has been pointed out that these losses were multiplied by millions of lives, over hundreds of years, stunting the development of a continent whose governments have since struggled to find the will to ask for restitution[31].

Colonialism has also had a lasting impact on people of African descent[32]. The weight of colonialism is still being carried today, most predominantly in the Global South, where political independence and decolonization have not been matched by Sustainable Development and the full enjoyment of human rights, including the right to development and socioeconomic rights[33]. It has been noted that there is an intrinsic link between colonialism and contemporary forms of racism, racial discrimination, xenophobia and intolerance faced by people of African descent and indigenous peoples[34]. It has been argued that while former colonies have gained independence since the establishment of the United Nations, the process of decolonization remains incomplete[35]. Some of the negative impacts of colonialism on people of African descent include systemic racism, poverty, economic inequity, overincarceration, dispossession of traditional lands and territories, criminalization of indigenous human rights defenders, and loss of language and culture[36].

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[28] Ibid
[29] Ibid
[30] Ibid
[31] Ibid
[32] Office of the United Nations High Commissioner for Human Rights., 'Racism, Discrimination are Legacies of Colonialism' Available at https://www.ohchr.org/en/get-involved/stories/racism-discrimination-are-legacies-colonialism (Accessed on 06/05/2024)
[33] Ibid
[34] Ibid
[35] Ibid
[36] Ibid

Colonialism also resulted in key human right abuses during the struggle for independence in Africa. For example, in Kenya, The Mau Mau movement, a resistance movement against colonial oppression, faced a relentless campaign of violence and intimidation by the British authorities[37]. The Mau Mau fighters endured several atrocities including torture, imprisonment and death as they valiantly stood against the oppressive colonial regime[38]. The Mau Mau movement played a key role in Kenya's independence but it was also a time of unimaginable suffering for the fighters[39]. As a result, there have been persistent calls for reparations for the suffering endured by the Mau Mau fighters[40]. It has been noted that reparations are key in ensuring that future generations understand the sacrifices made for Kenya's independence[41]. In addition, reparations can provide a semblance of justice for the atrocities endured by the Mau Mau fighters[42].

As a result of the impacts of slavery, slave trade, and colonialism, people of African descent continue to suffer from contemporary forms of systemic racism and racial discrimination, intolerance and xenophobia[43]. It has been observed that the formal abolition of enslavement, and decolonization processes, did not dismantle racially discriminatory structures affecting people of African descent[44]. Instead, they gave way to racially discriminatory policies and

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[37] Wasike. A., 'Kenya's Mau Mau Demand 'Justice, Recognition and Reparations' for Britain's Colonial Atrocities' Available at https://www.aa.com.tr/en/africa/kenya-s-mau-mau-demand-justice-recognition-and-reparations-for-britain-s-colonial-atrocities/3121678 (Accessed on 06/05/2024)
[38] Ibid
[39] Ibid
[40] Ibid
[41] Ibid
[42] Ibid
[43] United Nations., 'Strong Leadership and Political will Crucial to Ensure Reparatory Justice for People of African Descent – UN Report' Op Cit
[44] Ibid

systems, including segregation and apartheid that perpetuated racial discrimination, oppression, and inequalities against people of African descent[45].

In addition, it has been noted that since time immemorial, indigenous communities in Africa have been victims of land rights abuses[46]. With the advent of colonialism, these communities were dispossessed of their lands which were given to white settlers[47]. Subsequent post-colonial African governments did not do anything to remedy these historical land injustices[48]. It has been noted that this history of arbitrary dispossession continues in current times under the guise of conservation[49]. For example, in Kenya, the Ogiek community has been routinely subjected to arbitrary forced evictions from their ancestral land without consultation or compensation, first by colonial authorities and subsequently by the Kenyan government[50]. As a result, the rights of the Ogiek people over their traditionally owned lands have been systematically denied and ignored[51]. This has resulted in the Ogiek being prevented from practising their traditional way of life, therefore threatening their very existence[52].

Reparations are therefore vital in promoting justice for people of African descent in light of the abuses they have endured including slavery and colonialism. It has been argued that reparations for serious human rights violations are an important instrument to help victims and survivors overcome the effects of conflicts and crimes, to restore their status as equal citizens, their

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[45] Ibid
[46] Minority Group Rights., 'Reparations at Last: Land Justice for Kenya's Ogiek' Available at https://minorityrights.org/resources/reparations-at-last-land-justice-for-kenyas-ogiek/ (Accessed on 06/05/2024)
[47] Ibid
[48] Ibid
[49] Ibid
[50] Ibid
[51] Ibid
[52] Ibid

trust in the state, and to recognise the harm suffered[53]. International human rights practice suggests that comprehensive reparations should consist of a combination of several measures including: restitution; compensation; rehabilitation; satisfaction; and guarantees of non-repetition[54].

The need for reparations for people of African descent is acknowledged under the *Accra Proclamation on Reparations*[55] which was adopted during the Accra Reparations Conference. The conference was convened with a shared commitment to addressing historical injustices and injurious crimes committed against Africans and people of African descent, through transatlantic enslavement, colonialism and apartheid, and to addressing the inequities present in the international economic and political orders[56]. The Accra Proclamation on Reparations seeks to advance the cause of reparatory justice and healing for Africans and for all people of African descent[57]. It recognizes the profound and lasting impacts of slavery, colonialism, racial discrimination and neo-colonialism on Africans and people of African descent, and how these atrocities continue to cause immense suffering, cultural disruption, economic exploitation, emotional trauma and unending discrimination endured by Africans and people of African descent throughout history[58]. According to the Accra Proclamation on Reparations, the fulfilment of reparations is a moral as well as a legal imperative rooted in principles of justice, human rights and human dignity, and that the claim for reparations represents a concrete step

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[53] Impunity Watch., 'Reparations as a Catalytic Power to Change Victims' and Survivors' Lives: Perspectives and Contributions from the Grassroots Level' Available at https://www.impunitywatch.org/wp-content/uploads/2022/11/Reparations-as-a-catalytic-power-to-change-victims-and-survivors-lives-grassroots-Impunity-Watch.pdf (Accessed on 06/05/2024)

[54] Ibid

[55] African Union., 'Accra Proclamation on Reparations' Available at https://au.int/sites/default/files/decisions/43383-Declaration_-_CIDO_.pdf (Accessed on 07/05/2024)

[56] Ibid

[57] Ibid

[58] Ibid

towards remedying historical wrongs and fostering healing among the people of Africa and people of African descent[59].

The Accra Proclamation on Reparations seeks to undertake several social, cultural, political, and economic towards promoting justice for people of African descent through reparations. These include: establishment of a Committee of Experts on Reparations for the purpose of developing a common African Policy on Reparations[60]; establishment of a Global Reparations Fund, based in Africa and supported by multilateral institutions and agencies aligned with the reparatory justice agenda for people of African descent[61]; establishment of the Office of African Union Special Envoy on Reparations for Africans to help champion the international advocacy and campaign for reparations at the global level[62]; recognition of African civil society efforts on reparations; exploration of legal and judicial options for reparations[63]; increased role for the United Nations in the reparations agenda; amplification of marginalized voices in the reparatory justice movement[64]; fostering a united front for the reform of global financial systems and structures[65]; enhancing climate justice and reparatory justice[66]; promoting repatriation, restitution and safeguarding of African cultural artifacts[67]; and ending neo-colonialism[68]. It is imperative to implement the commitments set out in the Accra Proclamation on Reparations in order to promote justice for people of African descent through reparations.

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[59] African Union., 'Accra Proclamation on Reparations' Op Cit
[60] Ibid
[61] Ibid
[62] Ibid
[63] Ibid
[64] Ibid
[65] Ibid
[66] Ibid
[67] Ibid
[68] Ibid

In addition, the *Resolution on Africa's Reparations Agenda and the Human Rights of Africans in the Diaspora and People of African Descent Worldwide*[69] adopted by the African Commission on Human and People's Rights recognizes the need for reparations for people of African descent. The Resolution recognizes that the human rights situation of Africans in the diaspora and people of African descent worldwide remains an urgent concern[70]. It also acknowledges that Africans and people of African descent continue to suffer systemic racism, racial discrimination, xenophobia and related intolerance and other violations of their human rights[71]. It notes that accountability and redress for legacies of the past including enslavement, the trade and trafficking of enslaved Africans, colonialism and racial segregation is integral to combatting systemic racism and to the advancement of the human rights of Africans and people of African descent[72]. The Resolution urges African countries to undertake several measures including: promoting and protecting the human rights of African migrant workers worldwide including in the Middle East and Arabo-Persian Gulf states[73]; protecting the human rights of migrants and ensuring the right of all citizens to receive full and authentic information about migration[74]; taking measures to eliminate barriers to acquisition of citizenship and identity documentation by Africans in the diaspora[75]; and establishment of a committee within the African Union to consult, seek the truth, and conceptualize reparations from Africa's perspective[76]. It is necessary to actualize this Resolution in order to enhance the reparations agenda for people of African

[69] African Commission on Human and Peoples' Rights., 'Resolution on Africa's Reparations Agenda and The Human Rights of Africans in the Diaspora and People of African Descent Worldwide - ACHPR/Res.543 (LXXIII) 2022' Op Cit
[70] Ibid
[71] Ibid
[72] Ibid
[73] Ibid
[74] Ibid
[75] Ibid
[76] Ibid

descent and strengthen human rights of Africans in the diaspora and people of African descent worldwide[77].

Despite the ideal of reparatory justice for people of African descent, it has been noted that reparations continue to be an afterthought in many post-conflict situations[78]. It has been observed that states are often reluctant to provide comprehensive reparations, which have more potential to transform the lives of survivors[79]. In instances where reparations are provided, they are often limited to monetary compensation and to a certain group of individuals[80]. It is imperative to address these challenges in order to promote justice for people of African descent through reparations.

3.0 Towards Reparatory Justice for People of African Descent

There is need to promote justice for people of African descent through effective and adequate reparations. Reparatory justice is key in addressing the continued harm suffered by people of African descent[81]. It highlights the intrinsic link between the legacies of colonialism and enslavement and contemporary forms of systemic racism and racial discrimination, intolerance and xenophobia faced by people of African descent[82] Ensuring adequate, effective, prompt and appropriate remedies, and reparation for victims of violations of human rights is an obligation that is enshrined in international and regional human rights instruments[83]. Some of the key approaches towards achieving this goal include: truth-seeking and truth-telling processes, public apology and acknowledgment, memorialization, education and awareness raising, restitution, medical and

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[77] Ibid

[78] Impunity Watch., 'Reparations as a Catalytic Power to Change Victims' and Survivors' Lives: Perspectives and Contributions from the Grassroots Level' Op Cit

[79] Ibid

[80] Ibid

[81] United Nations., 'Strong Leadership and Political will Crucial to Ensure Reparatory Justice for People of African Descent – UN Report' Op Cit

[82] Ibid

[83] United Nations., 'Strong Leadership and Political will Crucial to Ensure Reparatory Justice for People of African Descent – UN Report' Op Cit

psychological rehabilitation, compensation, as well as guarantees of non-repetition[84]. In addition, it has been noted that strong leadership and political will are vital in tackling the lasting consequences of enslavement, the trade in enslaved Africans and colonialism[85].

There is need to consider establishment of a Global Reparation Fund in order to ensure effective and adequate compensation as a form of reparations[86]. It has been observed that financial reparations are long overdue to Africans and the diaspora as compensation for the enslavement of people of African descent during the transatlantic slave trade in addition to the human rights violations committed during colonialism[87]. Establishment of a Global Reparations Fund can therefore achieve the ideal of reparatory justice for people of African descent. It has also been noted that reparations should go beyond direct financial payments to also include developmental aid for countries, the return of colonized resources and the systemic correction of oppressive policies and laws[88]. In addition, it has been asserted that reparatory justice for freedom fighters during the colonial era is not just a plea for economic restitution, but is also a resounding cry for recognition and justice, acknowledging the pain and sacrifices they endured during the struggle for independence in Africa[89]. Therefore, in addition to compensation, other forms of reparations including restoration through return of property taken from Africa during colonialism, rehabilitation through psychological and physical support for those affected by human right abuses, satisfaction through acknowledgement of guilt, apology, burial of victims, and construction of memorial sites, and guarantee of non-repetition through reformation of laws and civil and political structures that led

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[84] Ibid
[85] Ibid
[86] Kokutse. F., 'Ghana Reparations Summit Calls for Global Fund to Compensate Africans for Slave Trade' Op Cit
[87] Ibid
[88] Ibid
[89] Wasike. A., 'Kenya's Mau Mau Demand 'Justice, Recognition and Reparations' for Britain's Colonial Atrocities' Op Cit

to or fueled violence are integral in ensuring reparatory justice for people of African descent[90].

Further, it has been suggested that establishment of an international tribunal on atrocities related to the transatlantic trade among other human rights violations would enhance justice for people of African descent[91]. A tribunal, modelled on other ad-hoc courts such as the Nuremberg trials of Nazi war criminals after World War Two can strengthen the reparatory justice agenda[92]. Such a tribunal is necessary to address reparations for enslavement, apartheid, genocide, and colonialism[93]. It also has the capacity to establish legal norms for complex international and historical reparations claims[94]. It is therefore necessary to fast-track efforts towards establishment of an international tribunal aimed at promoting justice for people of African descent through reparations.

Finally, it is imperative to foster economic empowerment for people of African descent and dismantling racism, racial discrimination, xenophobia and intolerance[95]. The United Nations notes that there is an intrinsic link between colonialism and contemporary forms of racism, racial discrimination, xenophobia and intolerance faced by Africans and people of African descent[96]. It is therefore necessary for all countries to dismantle the structures of racism

[90] United Nations General Assembly., 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' Op Cit

[91] The East African., 'Slavery Tribunal? African, Caribbean Countries Unite on Reparations' Available at https://www.theeastafrican.co.ke/tea/news/world/slavery-tribunal-africa-caribbean-unite-on-reparations-4578630 (Accessed on 07/05/2024)

[92] Ibid

[93] Ibid

[94] Ibid

[95] Office of the United Nations High Commissioner for Human Rights., 'Racism, Discrimination are Legacies of Colonialism' Op Cit

[96] Ibid

and to promote human rights and Sustainable Development[97]. Economic empowerment is also vital in ensuring that Africa and people of African descent are self-reliant towards ending neocolonialism and socio-economic marginalization[98].

The foregoing measures are vital in promoting justice for people of African descent through reparations.

4.0 Conclusion

Reparatory justice is a key agenda in Africa in light of the many human right violations suffered by people of African descent including slavery, colonialism, systemic racism, racial discrimination, xenophobia and related intolerance[99]. Despite the ideal of reparatory justice for people of African descent, it has been noted that reparations continue to be an afterthought in many post-conflict situations with states being reluctant to provide comprehensive reparations[100]. It is therefore necessary to promote justice for people of African descent through reparations. This can be realized through ensuring adequate, effective, prompt and appropriate remedies, and reparation for victims of violations of human rights[101]; establishment of a Global Reparation Fund in order to ensure effective and adequate compensation as a form of reparations[102]; embracing other forms of reparations including restoration, rehabilitation, satisfaction, and guarantee

[97] Ibid

[98] Ibid

[99] African Commission on Human and Peoples' Rights., 'Resolution on Africa's Reparations Agenda and The Human Rights of Africans in the Diaspora and People of African Descent Worldwide - ACHPR/Res.543 (LXXIII) 2022' Op Cit

[100] Impunity Watch., 'Reparations as a Catalytic Power to Change Victims' and Survivors' Lives: Perspectives and Contributions from the Grassroots Level' Op Cit

[101] United Nations., 'Strong Leadership and Political will Crucial to Ensure Reparatory Justice for People of African Descent – UN Report'

[102] Kokutse. F., 'Ghana Reparations Summit Calls for Global Fund to Compensate Africans for Slave Trade'

of non-repetition[103]; establishment of an international tribunal on atrocities related to the transatlantic trade among other human rights violations[104]; and fostering economic empowerment for people of African descent and dismantling racism, racial discrimination, xenophobia and intolerance[105]. Promoting justice for people of African descent through reparations is a long overdue agenda that needs to fast-tracked and realized.

[103] United Nations General Assembly., 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' Op Cit
[104] The East African., 'Slavery Tribunal? African, Caribbean Countries Unite on Reparations' Op Cit
[105] Office of the United Nations High Commissioner for Human Rights., 'Racism, Discrimination are Legacies of Colonialism' Op Cit

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Wasike. A., 'Kenya's Mau Mau Demand 'Justice, Recognition and Reparations' for Britain's Colonial Atrocities' Available at https://www.aa.com.tr/en/africa/kenya-s-mau-mau-demand-justice-recognition-and-reparations-for-britain-s-colonial-atrocities/3121678

Permanent Court of Arbitration and Contract-Based Dispute Resolution (including Conciliation)

By: ***Dr. Wyne Mutuma*** [*]

Abstract

This paper captures the growth of the Permanent Court of Arbitration from its Genesis in 1899 to its present role in settling disputes. Initially, the PCA was established as a state-centric body. Over the years, the PCA has effectively expanded its jurisdiction to include private parties, intergovernmental organizations as well as state entities. This makes the PCA a multifaceted arbitral institution. This article sheds light on fundamental procedural advancements including the introduction to specific arbitration rules to particular legal fields such as environmental matters as well as bringing attention to the fact that parties have the flexible freedom to choose procedural guidelines. Noteworthy, PCA's innovation to integrate advancements in technology such as the adoption of virtual hearings and e-arbitration enables it to conduct proceedings efficiently. Its jurisdiction inculcated investor-state dispute settlement, environmental disputes as well as disputes related to outer space activities. In this paper, a significant focus is placed on contract-based dispute resolution with the inclusion of conciliation, which offers a non-binding method to facilitate amicable settlements between parties. The PCA continues to evolve and adapt to the pressing needs of international arbitration, from capacity-building initiatives to global network hearing venues.

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Keywords: *Advancements, technology, contract-based dispute resolution*

1.0 Introduction

Established in 1899 by The Hague Convention for the Pacific Settlement of International Disputes, the Permanent Court of Arbitration has evolved into one of the chief options for alternative dispute resolution for states, international organizations, and even private commercial parties.[1] The peace conference that midwifed this convention was noted as 'the world's first successful egalitarian assembly of a political character'[2], leading to the implication that this was perhaps the first true international dispute resolution mechanism, preceding even the likes of the International Court of Justice.

Notably, the same conference was also celebrated as a precursor to the League of Nations and the United Nations.[3] This lends credibility to the assertion that the establishment of the PCA was itself a watershed moment in the history of alternative dispute resolution on a global scale. It should be noted that the original 1899 Convention, as well as the subsequent 1907 one, does not require states to accede to or ratify the treaty in order to benefit from the PCA's facilities in dispute resolution. However, states continue to accede to the 1907 Convention, in order to participate in the PCA's Administrative Council, whose positions are reserved for state parties.[4]

At the heart of the PCA's mandate lies arbitration, a process where disputing parties agree to submit their conflicts to a neutral tribunal whose decision is binding. Arbitration at the PCA is characterized by its flexibility, allowing

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[1] Born G, 'Chapter 1: Overview of International Commercial Arbitration' in *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) pp.15-19.

[2] Sharwood R, 'The Hague Peace Conference of 1899: A Historical Introduction' in I*nternational Alternative Dispute Resolution: Past, Present and Future – The Permanent Court of Arbitration Centennial Papers 170* (2000).

[3] Ibid.

[4] Born (n1)

parties to choose their arbitrators, procedural rules, and even the language of proceedings. This is not to say that other dispute resolution services are not offered by the PCA. The 1899 and 1907 Conventions also refer to "good offices," mediation, inquiry, and arbitration.[5] In the text, 'good offices' and mediation are dealt with concurrently, signaling that they should be treated as one homogenous process.

On the other hand, inquiry is a method for resolving disputes by establishing an international commission to conduct an impartial investigation of the facts. According to Hamilton, there have been five such commissions in the history of the PCA[6], including the *The Steamship "Tiger"* case (sinking of the steamer *"Tiger"*) between Germany and Spain.[7]

From the outset, its founding signatories envisaged a world where disputes between states could be settled amicably, without recourse to war. By implication, the objective was then to provide a mechanism where inter-state disputes could be adjudicated. While such an objective was admirable, it did lead to a particular problem. Traditionally, the PCA administered arbitrations exclusively between states, including on matters involving territorial sovereignty, state responsibility, and treaty interpretation. Consequently, the PCA was underutilized for many decades as its facilities and legal infrastructure were not accessible to private commercial disputes.[8]

1.1 The Permanent Court of Arbitration: Evolving from State-Centric Dispute Resolution to a Forum for States and Private Contractual Parties

The turning point was in 1934 when a question arose as to the accessibility of

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[5] 1899 Convention, Art. 2; 1907 Convention, Art. 2.
[6] Hamilton P et al (eds), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution: Summaries of Awards, Settlement Agreements and Reports* (1999).
[7] *Germany v Spain: The Steamship "Tiger"* (sinking of the steamer "Tiger") 1 Nov. 1918 - 8 Nov. 1918. Commission of Inquiry, Permanent Court of Arbitration.
[8] Born (n1).

the PCA for a dispute between a state on one hand and a private party on the other. The question arose in connection with arbitration between the Chinese Government and Radio Corporation of America (RCA). RCA had concluded an agreement for the operation of radio telegraphic communications between China and the United States. RCA claimed that a subsequent agreement entered into by China with a different entity constituted a breach of its agreement.[9] The PCA held that the founding conventions permitted the administration of cases between a State and a private party. At the request of the arbitral tribunal, the PCA agreed to provide registry services.[10]

The new problem that then arose in the context of handling contract-based dispute resolution between private parties (or between private parties and states) was the choice of procedural rules, as well as the choice of the substantive law applicable to the dispute. For states, the substantive law applicable to the dispute would usually be the relevant treaty, convention or rule of customary international law in contention. For procedure, the initial set of procedural rules had been designed for state-to-state arbitrations.[11]

Creatively, the PCA relied on the procedural rules formulated by UNCITRAL (the United Nations Commission for International Trade Law) in 1976.[12] These rules were custom-tailored for international commercial disputes. More importantly, the rules themselves designated the Permanent Court of Arbitration as a legitimate institutional authority to which parties could submit their disputes to be adjudicated under UNCITRAL Rules. Article 6 (2), as read

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[9] Bishop DR, Crawford JR, and Reisman WM (eds.) 'Chapter 4: Forums for Resolving Foreign Investment Disputes' in *Foreign Investment Disputes: Cases, Materials and Commentary* (2nd edn, Kluwer Law International, 2014) p. 364

[10] Ibid.

[11] M. Indlekofer, 'Introduction: Awakening Sleeping Beauties?' in International Arbitration and the Permanent Court of Arbitration (International Arbitration Law Library, Vol. 27, Kluwer Law International 2013).

[12] Ibid.

with 7 (2) (b), stipulates that "if no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator . . . either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority."[13]

This revitalized the PCA and it shed its reputation as a state-centric institution into a forum for dispute resolution for a diverse array of international disputes, between states, international organizations, investors, and private parties under contract. To illustrate this, the 2023 Annual Report of the PCA indicates that in 2023, the PCA administered "246 cases, 82 of which were initiated that year, including 7 inter-State arbitrations, 2 other inter-State proceedings, 122 investor-State arbitrations arising under bilateral/multilateral investment treaties or national investment laws, 110 arbitrations arising under contracts involving a State, intergovernmental organization, or other State entity, and 5 other proceedings."[14]

In conclusion, perhaps the biggest take-away from the PCA's century is its adaptability from the pre-globalized state-centric world order to the new system of private parties acquiring a quasi-international character through international commercial contracts.

1.2 Conciliation under PCA

Though the majority of the PCA's docket comprises arbitrations, the PCA stands ready to support other alternatives to arbitration, such as conciliations and mediations, where its users consider such procedures are appropriate for their disputes.

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[13] UNCITRAL Rules arts. 6(2) and 7(2)(b).

[14] PCA Annual Report 2023, accessed at < https://pca-cpa.org/en/resources/publications/> on 21 June 2024.

In specific, conciliation and mediation have a long history at the PCA. The 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes recognize mediation, along with good offices and fact-finding commissions of inquiry, as important alternatives to binding arbitration[15].'Conciliation' was developed from the commission of inquiry's approach in the 1905 PCA-supported Dogger Bank Case between Great Britain and Russia (***PCA Case No. 1904-02***).

Under the Halsbury's Laws of England conciliation is defined as a process of persuading the involved parties to reach an agreement. It is a procedure where a neutral third person is appointed as a conciliator by the parties to the dispute to reach a settlement. Under Sec 61 of the Arbitration & Conciliation Act, 1996 the application and scope of conciliation is defined to apply to all disputes, whether contractual or not, arising out of a legal relationship.

The Permanent Court of Arbitration Optional Conciliation Rules under the PCA Arbitration Rules 2012 stipulate the scope of conciliation in international dispute resolution. These Rules are intended for use in conciliating disputes in which one or more of the parties is a State, a State entity or enterprise, or an international organization. Thus, for example, the same Rules may be used in disputes between two States and also in disputes between two parties only one of which is a State. [16] Take for instance the case of ***Consorcio Sogeosa-Tilmon (Costa Rica) c. El Instituto Tecnológico de Costa Rica (Costa Rica)*** [2016-06] the PCA offered administrative support in the conciliation process between the parties, which was developed in accordance with the provisions of the contract between the parties and supplemented by the UNCITRAL Conciliation Rules 1980.

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[15]Permanent Court of Arbitration, 'International Conciliation and Mediation at the PCA' <https://pca-cpa.org/en/international-conciliation-and-mediation-at-the-pca/> accessed 21 June 2024.

[16]Permanent Court of Arbitration, Optional Conciliation Rules, art 1.

2.0 Innovation at The Permanent Court of Arbitration

Over the years, the PCA has embraced innovation to adapt to the evolving landscape of international arbitration and address modern disputes' complexities.[17] The PCA has developed into a modern, multi-faceted arbitral institution able to meet the evolving needs of dispute resolution at the international level. Today, the PCA provides services for resolving disputes involving various combinations of States, State entities, intergovernmental organizations, and private entities.[18] This part explores the various innovations at the PCA, focusing on procedural advancements, technological integration, and the expansion of its jurisdiction and services.

2.1 Procedural innovations

Parties have the leeway to choose procedural guidelines that best suit their disputes. Typically, they accept PCA administration of an arbitration conducted under the rules adopted by the United Nations Commission on International Trade Law ("UNCITRAL"), or other ad hoc rules of procedure, or they adopt one of the PCA's sets of procedural rules, such as the PCA Arbitration Rules 2012 (the PCA's primary set of rules).[19] Parties may seek assistance from the PCA in formulating arbitration clauses or procedures for specific documents or disputes.

The PCA has introduced several sets of rules tailored to different types of disputes: First, there is the **Optional Rules for Arbitrating Disputes Between Two States (1992)**: These rules provide a framework specifically designed for state-to-state arbitration, ensuring that the unique aspects of such disputes are

[17] Permanent Court of Arbitration, 'Introduction: History' <*https://pca-cpa.org/en/about/introduction/history/*>
Accessed 21 June 2024.
[18] Permanent Court of Arbitration, *Annual Report 2023* (PCA 2024) p.24 <https://docs.pca-cpa.org/2024/06/0bd839f2-pca-annual-report-2023.pdf> accessed 21 June 2024.
[19] Ibid p.25

adequately addressed. The Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States govern disputes referred to arbitration under treaties or agreements. The International Bureau manages the arbitration proceeding archives and serves as a communication channel. If the Hague Convention for the Pacific Settlement of International Disputes of 1899 or 1907 is in force, the applicable Convention remains in force, and the arbitration procedures follow the parties' agreement.[20]

Moreover, there is the **Optional Rules for Arbitration Involving International Organizations and States (1996)[21]**, which recognizes the increasing interactions between states and international organizations, the PCA introduced rules that facilitate arbitration in these contexts. Additionally, there are the **Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment (2001)[22]**. These rules address the growing need for resolving disputes in the context of environmental protection and the sustainable use of natural resources. Furthermore, there is the **Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (2011)[23].** As space exploration and activities become more prevalent, the PCA has proactively developed rules to handle disputes arising from outer space endeavors. Other rules include; the PCA Optional Conciliation Rules; the PCA Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment; and the PCA Optional Rules for Fact-finding Commissions of Inquiry.

The PCA's congress resolution 13 in June 2024 also invites the Administrative

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[20] Permanent Court of Arbitration, *Optional Rules for Arbitrating Disputes Between Two States* art 1.
[21] Permanent Court of Arbitration, *Optional Rules for Arbitration Involving International Organizations and States* (1996).
[22] Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment* (2001).
[23] Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Outer Space Activities* (2011).

Council and the International Bureau to explore ways of enhancing the role of the Permanent Court of Arbitration by further developing relations with institutions and programs providing academic or professional training in the field of international dispute settlement.[24] These procedural innovations reflect the PCA's commitment to providing tailored solutions that meet the specific needs of various types of disputes.

2.2 Technological integration

The PCA has also embraced technological advancements to enhance the efficiency and accessibility of its arbitration services. One of the technological advancements is the management of proceedings. PCA Case Managers coordinate video and audio recordings of proceedings, including multiple audio channels for multilingual proceedings, which are then made available to the parties.[25]

Another technological advancement is Virtual Hearings and E-Arbitration: The PCA quickly embraced virtual hearing technology in reaction to the COVID-19 epidemic, allowing parties to take part in arbitration procedures from a distance. Additionally, the PCA sets up live transcription of hearings.[26] When appropriate, the PCA can set up several transcribers for multilingual proceedings or arrange for remote participation from court reporters. This invention has helped to keep arbitration going even in the face of international disruptions and has given parties more flexibility and lower expenses by reducing travel.

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[24] Congress of the Members of the Court of the Permanent Court of Arbitration, 'Resolution 13' (Peace Palace, The Hague, 12-14 June 2024) in commemoration of the 125th anniversary of the Permanent Court of Arbitration.

[25] Permanent Court of Arbitration, *Annual Report 2023* (PCA 2024) p. 29.

[26] Wojciech Sadowski, 'Virtual Hearing Guidelines: A Comparative Analysis and Direction for the Future' (Kluwer Arbitration Blog, 23 June 2021) <*https://arbitrationblog.kluwerarbitration.com/2021/06/23/virtual-hearing-guidelines-a-comparative-analysis-and-direction-for-the-future/* > accessed 27 June 2024.

2.3 Expansion of jurisdiction and services

The PCA has also continuously expanded its jurisdiction and services to address the evolving needs of the international community. Firstly, there is Investor-State Dispute Settlement (ISDS): The PCA has become a prominent institution for administering ISDS cases, providing a neutral forum for resolving disputes between foreign investors and host states. This expansion has involved the development of specific procedural rules and the adaptation of existing ones to cater to the unique requirements of ISDS.[27] **Resolution 11 of PCA's Congress meeting** in June 2024 also invites the Administrative Council and the International Bureau to explore ways to develop further mutual supportiveness and synergies between the Permanent Court of Arbitration and other international dispute settlement mechanisms, particularly domestic and regional institutions dedicated to dispute resolution.[28]

Secondly, there are venues around the globe: The PCA organizes in-person hearings around the world, adjusting local arrangements to fit the needs of the proceedings. The PCA can also provide locations through its Host Country and Cooperation Agreements around the world, including, among others, the British Virgin Islands International Arbitration Centre (Tortola, British Virgin Islands), the Oliver Tambo Moot Court (Cape Town, South Africa), the Mumbai Centre for International Arbitration (Mumbai, India), and the Saudi Centre for Commercial Arbitration (Riyadh, Saudi Arabia).[29]

Whilst the PCA provides a large list of its venues and facilities, it is also quite skilled at setting up hearings in other venues, having both a long history in

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[27] International Institute for Sustainable Development, 'IISD, CIEL, ClientEarth: ISDS and a Sustainable Environment Submission (2023)' (IISD, 2023) <https://www.iisd.org/publications/brief/iisd-ciel-clientearth-isds-sustainable-enivronment-submission-2023> accessed 27 June 2024.

[28] Congress of the Members of the Court of the Permanent Court of Arbitration, 'Resolution 11' (Peace Palace, The Hague, 12-14 June 2024).

[29] Permanent Court of Arbitration *Annual Report 2023*, p.28.

particular venues and a wealth of expertise in setting up new venues. The PCA has held hearings at over 75 locations in 37 cities around 32 countries since 2013. During this time, PCA has organized over two-thirds of in-person hearings that have taken place outside of The Hague. In certain dispute settlement procedures when the PCA does not act as registrant, the PCA may also, upon request, make its facilities available and offer incidental administrative support.[30]

3.0 Case Studies of the Innovations Under the Permanent Court of Arbitration

The PCA possesses flexibility in jurisdictional matters and applicability of arbitration rules. The element of choice is present under the PCA. **Article 1(1) of PCA Arbitration Rules (2012)** has the clause '*subject to such modification as the parties may agree*'. This grants parties the freedom to choose which arbitration rules they want. The arbitral court has the authority to administer arbitration under these rules. It is up to the parties in dispute to agree on either the aforementioned rules or even the UNCITRAL Arbitration Rules.[31] Also, parties have the freedom to agree on their own set of procedural rules. The innovation of flexibility manifests in the element of choice of arbitration rules.

For instance, in the case of ***Philippines v. China***, the claimants initiated proceedings against the respondents under the United Nations Convention on the Law of the Sea (UNCLOS). It was held that China had breached its obligations under Article 94 of UNCLOS on maritime safety. In this case, the rules used were the UNCITRAL Arbitration Rules (1979). The Permanent Court of Arbitration served as Registry in this arbitration.[32] This demonstrates flexibility in applying a framework suitable to address the issues related to

30 Ibid
31 UNCITRAL Arbitration Rules 2010, art 2(1).
32 Permanent Court of Arbitration, 'The Indus Waters Kishenganga Arbitration (Pakistan v India)' <https://pca-cpa.org/en/cases/7 /> accessed 21 June 2024.

maritime entitlements.[33]

Similarly, in the case of ***Chevron and Texaco Petroleum Company v. The Republic of Ecuador***, the PCA provided administrative support in this arbitration. The arbitration was conducted under the UNCITRAL Arbitration Rules (1976) pursuant to the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment.[34] The innovation of flexibility allowed for modifications in procedural timelines and evidence presentation.

Finally, in the ***Indus Waters Kishenganga Arbitration (Pakistan v. India)***, arbitral proceedings were instituted under Paragraph 2(b) of Annexure G to the Indus Waters Treaty 1960. The Permanent Court of Arbitration acted as Secretariat to the Court of Arbitration pursuant to Paragraph 15(a) of Annexure G. This demonstrates the flexibility of the PCA for in this case, the parties were governed under the Indus Water Treaty of 1960.[35]

Additionally, the PCA allows for a mixture of arbitral tribunals. Pursuant to **Article 6(3) of the PCA Optional Rules for Arbitrating Disputes between Two States**, the appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. **Article 7(1)** stipulates that if three arbitrators are to be appointed, each party shall appoint one arbitrator, and those two arbitrators shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal. This form promotes impartiality and equality, thereby balancing the interests of both parties.

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[33] Permanent Court of Arbitration, 'The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)' <https://pca-cpa.org/en/cases/92/ > accessed 21 June 2024.
[34] Permanent Court of Arbitration, 'Chevron and Texaco Petroleum Company v The Republic of Ecuador' <https://pca-cpa.org/en/cases/49/ > accessed 21 June 2024.
[35] PCA, 'Indus Waters Kishenganga Arbitration' (n 2).

In the **Philippines case** aforementioned, the tribunal included arbitrators appointed by the Philippines and independent arbitrators. The presiding arbitrator, Judge Thomas A. Mensah was appointed by the PCA. In the **Chevron case** aforementioned, the parties appointed arbitrators and the presiding arbitrator, Prof. Karl-Heinz Böckstiegel, was appointed by the Secretary General of the PCA. Mixed composition enhances the legitimacy of the tribunal's decision, through a combination of perspectives and specialized expertise. For example, in ***The Abyei Arbitration (Government of Sudan v. Sudan People's Liberation Movement/Army***, the administering institution was the PCA. A five member arbitral tribunal was constituted to decide the case, with the PCA acting as registry and providing administrative support. The parties appointed two arbitrators each, and agreed on the presiding arbitrator Prof. Pierre-Marie Dupuy.[36]

Similarly, in ***The Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)***, the Republic of Mauritius instituted arbitral proceedings concerning the establishment by the United Kingdom of a Marine Protected Area around the Chagos Archipelago. The Permanent Court of Arbitration acted as Registry in this arbitration. The tribunal consisted of five arbitrators, each party appointing two. The four party-appointed arbitrators then appointed Professor Ivan Shearer to be presiding arbitrator.[37] The Permanent Court of Arbitration has innovated the use of mixed arbitral tribunals. This approach promotes impartiality, enhances fairness and increases the acceptance of arbitral awards by the parties involved.

Thirdly, the use of expert witnesses is an innovation the PCA has incorporated.

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[36] Permanent Court of Arbitration, 'The Abyei Arbitration (Government of Sudan v Sudan People's Liberation Movement/Army)' <*https://pca-cpa.org/en/cases/39/* > accessed 21 June 2024.

[37] Permanent Court of Arbitration, 'The Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)' <https://pca-cpa.org/en/cases/11/ > accessed 21 June 2024.

Article 29(1) of the PCA Arbitration Rules (2012) grants the arbitral tribunal the power to appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. The arbitral tribunal can allow the expert to participate in a hearing. This grants the parties the opportunity to put questions to him or her concerning the expert's report.[38]
In the **Indus Waters case**, the dispute revolved around the construction and operation of a hydroelectric project on the Kishenganga river, affecting water rights under the Indus Water Treaty (1960). The tribunal used expert hydrologists and engineers to evaluate the environmental impact. Prof. James L. Wescoat Jr was an expert in landscape architecture and environmental planning. Prof. Howard S. Wheater was an expert in hydrology and water resources.[39] The inclusion of expert witnesses demonstrates PCA's innovation to lead to more informed decisions by the tribunal.

In the **Abyei Arbitration case**, the bone of contention was the delimitation of the Abyei Area. It required an understanding of historical and geographical data. The tribunal relied on Prof Douglas H. Johnson who was an expert historian with extensive knowledge of the history of Sudan. The tribunal also relied on Dr. Jerome Tubiana who was a geographer and anthropologist with expertise in the demographic and cultural aspects of the Abyei region. In the **Philippines case**, the issues for determination revolved around maritime entitlements and environmental harm in the South China Sea. The tribunal relied on Dr. John W. McManus who is a marine biologist with expertise in coral reef ecology, Dr. Kent E. Carpenter who is an expert in marine biology and biodiversity, particularly in the Indo-Pacific region and Dr. Alan Simcock who is an environmental scientist with a focus on marine environmental protection and management. The innovation of relying on expert witnesses enhances technical accuracy to the proceedings. They help the tribunal grasp the nitty-

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[38] Permanent Court of Arbitration, Arbitration Rules 2012, art 29(5).
[39] Indus Waters Kishenganga Arbitration (Pakistan v India) (Partial Award) PCA Case No 2011-01 (18 February 2013) <https://pcacases.com/web/sendAttach/1674 > accessed 21 June 2024.

gritties of the dispute, leading to more informed decisions

Finally, environmental and natural resource disputes are catered for by the PCA. The Permanent Court of Arbitration has developed the **Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (2001)**. These Rules were developed so as to address procedural deficiencies identified in dispute resolution arrangements under existing environmental treaties.[40] One reason why States refrain from submitting disputes to the International Court of Justice for instance is because they are unlikely to agree that their disputes are environmental in nature.[41]

Article 1(1) of the aforementioned Rules provides that the characterization of the dispute relating to natural resources and/or the environment is not necessary for jurisdiction where all the parties have agreed to settle a specific dispute. This demonstrates the PCA's innovation on resolving environmental issues and natural resources disputes. The rules push for expert knowledge and emphasize principles of environmental protection and transparency.

5.0 Conclusion

To satisfy the demands of the global community, the Permanent Court of Arbitration has consistently shown a dedication to innovation by adopting technology, changing its operating methods, and growing its service offerings. By doing this, the PCA has strengthened its position as a preeminent organization in international arbitration that can handle the intricacies of contemporary conflicts. The PCA will continue to lead the way in conflict resolution, offering parties all over the world practical and efficient solutions, thanks to its constant efforts to innovate and adapt.

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[40] MPILux Research Paper 2017 (1), Max Planck Encyclopedia of International Procedural Law published by OUP, 2019, posted 27 July 2019, last revised 30 October 2019 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3426459 > accessed 21 June 2024.

[41] Ibid.

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Limiting the Jurisdiction of the Arbitral Tribunal: A Necessity or an Issue Taken Too Far?

By: Murithi Antony* & James Njuguna**

Abstract

This paper examines the balance between autonomy and judicial oversight in the jurisdiction of arbitral tribunals, particularly within Kenyan and UK legal frameworks. While arbitration is championed for its efficiency, autonomy, and flexibility in resolving disputes outside traditional court systems, concerns arise when arbitrators may exceed their jurisdiction or when tribunals rule on matters impacting on public policy or non-arbitrable areas. The analysis advocates for judicial restraint to uphold the finality of arbitration, but also argues that limited court intervention remains necessary, especially in cases where arbitral decisions intersect with public policy or statutory mandates. The paper also suggests recommendations for harmonizing international arbitration practices in order to strengthen consistency, enhance enforceability, and respect both contractual autonomy and judicial oversight.

1. Introduction

Arbitration in Kenya has its roots in the British colonial administration, starting with the East Africa Protectorate Arbitration Ordinance of 1913, inspired by British and Indian legal frameworks.[1] After independence, Kenya enacted its Arbitration Act in 1968, followed by a comprehensive overhaul in 1995 with the enactment of a new Arbitration Act, which aligns closely with the United

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[1] Ndolo, D & Liu, M 2020, 'The State of International Arbitration in Kenya', International Arbitration Law Review, vol. 23, no. 1, pp. 40-69.

Nations Commission on International Trade Law (UNCITRAL) Model Law.[2] This modern framework accentuated Kenya's commitment to arbitration, and which was later reflected in the recognition of Alternative Dispute Resolution (ADR) as an avenue for accessing justice.[3] The legal framework on arbitration encourages autonomy in the arbitral processes and restricts court intervention, reflecting a judicial environment increasingly open to arbitration despite initial reluctance.[4]

However, this acceptance of arbitration is relatively recent compared to the prolonged judicial hostility it faced in the United Kingdom (UK) and the United States of America (USA)where arbitration was often viewed as an undermining force against judicial authority.[5] Through the 19th century, the English courts resisted arbitration, enforcing awards only in narrow circumstances, partly out of concern that arbitration removed disputes from the oversight of the courts.[6] In the USA, for instance, there was a lot of hostility from the courts as evident in the case of *Vanir*[7] where the court applied the revocability doctrine which

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[2] See "International arbitration law and rules in Kenya," https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/kenya.

[3] M Muriithi, Peter. "The Place of International Arbitration in East Africa: A Case Study of the Effectiveness of the East African Court of Justice as an International Arbitral Tribunal." *The Place of International Arbitration in East Africa: A Case Study of the Effectiveness of the East African Court of Justice as an International Arbitral Tribunal (September 1, 2019)* (2019).

[4] L. Ali Khan, Arbitral Autonomy, 74 La. L. Rev. (2013) <https://digitalcommons.law.lsu.edu/lalrev/vol74/iss1/5>

[5] *Ibid.*

[6] Blackaby, Nigel, Constantine Partasides, and Alan Redfern, 'Recognition and Enforcement of Arbitral Awards', *Redfern and Hunter on International Arbitration*, 7th Edition (2022; online edn, Oxford Academic), https://doi.org/10.1093/law/9780192869906.003.0011, accessed 28 Oct. 2024.

[7] [1610] 8 Rep 82.

meant that arbitration agreements do not have a contractual effect. In particular, Lord Coke explained as follows;

> *"Although . . . the defendant, was bound in a bond to stand to, abide, observe, etc., the rule, etc., of arbitration, etc., yet he might countermand it, for one cannot by his act make such authority, power, or warrant not countermandable which is by the law or of its own nature countermandable."*[8]

In the court's view, an arbitration agreement was not binding to the parties as a matter of public policy, hence a party could not have such authority to make an irrevocable agreement on how the dispute would be settled. Simply put, a party could rescind the arbitration agreement at any time before the arbitrators rendered an award. Practically, this meant therefore a party to arbitration did not have certainty that the arbitration agreement would be honored by the other party even if the dispute fell within the ambit of the arbitration agreement.
Explaining the reason for hostility towards arbitration in the USA, Mr. Justice Hunt in *Home Insurance Co. v Morse*[9] case at the Supreme expressed himself thus;

> *"Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights... He cannot, …. bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented".*[10]

In contrast, in *Scott v Avery*[11] Lord Campbell explained that the reason for this hostility towards arbitration under English law was because the *'Emoluments of the judges depended mainly or almost entirely upon (legal) fees and they had no fixed*

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[8] 194 *Ibid* at 598-99.
[9] [1874] 87 U.S. 20 Wall. 445
[10] Ibid at 87.
[11] [1856] 5 HL Cas 811.

salary, there was competition to get as much as possible of litigation… for the division of the spoil.' In this way, His Lordship explained that, courts had 'great jealousy of arbitration, (as the courts) were robbed of those cases'.[12]

Similarly, the committee on Law Reform submitted commented on this issue by stating that;

> *'The jealousy of judicial jurisdiction has to led to a historical attitude of the Courts toward arbitration agreements which is unintelligible at present to the businessman…it does not seem that any good ''public purpose'' is subserved by treating arbitration clauses as nullities and unenforceable.'*[13]

This demonstrates that, although arbitration is now widely embraced across a broad range of disputes for its flexibility, efficiency, and inclusive nature, this acceptance was not always the norm. Initially, the judiciary viewed arbitration with skepticism, concerned that arbitrators were encroaching on judicial authority.

2. Understanding Jurisdiction in the Context of Arbitration

The issue of jurisdiction in arbitration encompasses not only the matters tribunals can adjudicate, but also the extent of their authority in awarding remedies, costs, and procedural decisions.[14] Courts are sometimes called upon to interpret the jurisdictional boundaries of arbitral tribunals, especially where public policy or statutory mandates are implicated, or where a party alleges that

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[12] 2 Ibid, at 7 as cited in Tweeddale A and Tweeddale K 'Scott v Avery Clauses: O'er Judges' Fingers, Who Straight Dream on Fees' (2011) 77(2) Arbitration 423, at 424.

[13] Proceedings of New York State Bar Association (1920) 282 As cited in Cohen JH 'The Law of Commercial Arbitration and The New York Statute.' (1921), 31(2) The Yale Law Journal 147, at 148.

[14] Mills, Alex, 'Arbitral Jurisdiction', in Thomas Schultz, and Federico Ortino (eds), *The Oxford Handbook of International Arbitration*, Oxford Handbooks (2020; online edn, Oxford Academic, 8 Oct. 2020),< https://doi.org/10.1093/law/9780198796190.003.0003,> accessed 28 Oct. 2024.

the tribunal has acted outside the scope of the powers granted by the arbitral agreement.[15]

In some instances, issues arise which the arbitrators must decide, even though they are not specifically provided for in the arbitration agreement yet are so intrinsic to the dispute being resolved.[16] This practice still divides opinion within the academic and legal community, with some scholars positing that that this flexibility ensures holistic resolution of dispute and furthers the interest of the wider intent of arbitration agreement, while critics contend that such extensions of authority risk breaching the agreed-upon limits of arbitration, potentially leading to awards that courts may refuse to enforce if deemed beyond the arbitrator's jurisdiction.[17] This approach, they argue, could undermine parties' autonomy and create ambiguity in the arbitration process, particularly when enforceability intersects with public policy concerns.[18]

In Kenya, judicial intervention has become more nuanced reflecting a shift toward a restrained approach that prioritizes the finality and sanctity of arbitration agreements.[19] This is evident in the several cases including *Nyutu Agrovet Ltd v. Airtel Networks Kenya Ltd* where the court reiterated the principle on finality of arbitral awards, save for instances when there had been significant

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[15] Sebayiga, Vianney. 2021. "The Right of Appeal under Section 35 of the Arbitration Act of Kenya: A Critique of the Supreme Court Decision in *Nyutu Agrovet v. Airtel Networks Limited* (2019) eKLR." *Strathmore Law Review* 6, no. 1: 137–166. <https://doi.org/10.52907/slr.v6i1.165.> accessed 28 Oct. 2024.

[16] Bermann, George A. "The gateway problem in international commercial arbitration." *Yale J. Int'l L.* 37 (2012): 1.

[17] *Ibid.*

[18] Redfern, A., & Hunter, M. (2015). *Law and Practice of International Commercial Arbitration* (6th ed.). Oxford University Press.

[19] Elizabeth A O'Loughlin, Kenya's Constitution in a global context, *International Journal of Constitutional Law*, Volume 15, Issue 3, July 2017, Pages 839–848,< https://doi.org/10.1093/icon/mox062>

legal error or policy contravention.[20] This among other landmark cases has accentuated a judicial philosophy that values limited intervention, but retaining power to rectify egregious issues within arbitral decisions, harmonizing Kenyan practices with international standards.[21]

This position is similar in the UK, where courts have been adamant about intervening in arbitral proceedings. The principle of non-intervention as enshrined in sections 1(b) and 1(c) of the UK Arbitration Act reflects the respect afforded to party autonomy and the arbitration process.[22] In *Fiona Trust & Holding Corporation v. Privalov*, for instance, the House of Lords stated that arbitration agreements should be construed so as to maximize their validity .[23] This particular case laid down the basic principle of judicial restraint, recognizing that repeated intervention by the courts would defeat the efficiency and autonomy which arbitration seeks to provide.[24] Therefore, both Kenyan and UK frameworks illustrate an evolution towards judicial restraint, preserving arbitral autonomy while ensuring that significant errors do not compromise justice.[25]

3. Exceeding Arbitral Jurisdiction as a Ground for Setting Aside the Award: A Comparative Analyses Across Jurisdictions

While court interventions in arbitration are generally limited, there are specific instances where such intervention is both necessary and legally justified,

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[20] Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Petition 12 of 2016) [2019] KESC 11 (KLR).
[21] *Ibid*
[22] The UK Arbitration Act 1996, S.1
[23] [2007] ArbLR 24, [2007] UKHL 40, [2008] 1 Lloyd's Rep 254, [2007] 4 All ER 951, [2007] 2 CLC 553, [2007] Bus LR 1719, [2008] 1 Lloyds Rep 254, [2007] CILL 2528, 114 Con LR 69, [2007] 2 All ER (Comm) 1053
[24] *Ibid*
[25] Ndolo, D. 2020. *Arbitration Law and Practice in Kenya as Compared to the UK and US with Specific Focus on Anti-Suit Injunctions and Arbitrability of Disputes*. Doctoral thesis, October 2020.

particularly where explicitly provided for by law.[26] Section 10 of the Kenyan Arbitration Act of Kenya establishes a general principle of restricting court intervention except where expressly permitted by statute.[27] One key area for judicial intervention is the setting aside of an arbitral award.[28] The grounds for setting aside awards are narrowly defined to uphold the principle of finality in arbitration.[29] Nonetheless, in many jurisdictions, one of the recognized grounds for setting aside an award is when an arbitrator exceeds their jurisdiction.

In the UK, for instance, the Arbitration Act under Section 68 provides for the grounds for setting aside an award under serious irregularities in the proceedings that affect the tribunal, the proceedings or the award, and specifically includes the aspect of the tribunal exceeding its jurisdiction. Sub section 2 (b) specifically provides thus;

> *"(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant and includes the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction."*[30]

Accordingly, subsection 3 provides the remedies available and states that if there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may either, remit the award to the tribunal, in whole or in part, for reconsideration; set the award aside in whole or in part, or declare the award to be of no effect, in whole or in part.[31] This shows that arbitrators exceeding their powers is a serious issue in the UK.

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[26] M Muriithi, P. (2021). The Interface between Access to Justice and Arbitration in Kenya. *Alternative Dispute Resolution Journal*, *9*(3).
[27] The Arbitration Act of Kenya.
[28] *Ibid.*
[29] *Ibid.*
[30] The UK Arbitration Act, Section 68.
[31] *Ibid.*

A similar approach has been adopted in Nigeria, where the supreme court dealt with the issue of misconduct of the arbitrator in the case of *Taylor Woodrow (Nig.) Ltd. v. S.E. GMBH Ltd* whereby at pages 141-143 quoted and adopted with approval the reasoning of the learned authors of Halsbury's Laws of England what may constitute misconduct.[32] Although the learned authors made the point that it is difficult to give an exhaustive definition of what may amount to misconduct on the part of an arbitrator or umpire, they nonetheless pointed out that the expression includes on the other hand what amounts to misconduct by general standard i.e., bribery or corruption, and on the other hand mere 'technical' misconduct, such as making a mere mistake as to the scope of the authority conferred by the agreement of reference". The learned authors proceeded to give examples of misconduct which include:

1) *If the arbitrator or umpire fails to decide all the matters which were referred to him;*
2) *If by his award* ***the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement of reference****; for example, where the arbitrator construed the lease (wrongly) instead of determining the rental and the value of buildings to be maintained on the land; or where the award contains unauthorized directions to the parties; or where the arbitrator has power to direct what shall be done but his directions affect the interests of third persons; or where he decided as to the parties' rights, not under the contract upon which the arbitration had proceeded, but under another contract;*
3) *If the award is inconsistent or is ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least be clear beyond any reasonable doubt; among others.*

This, however, is different from the position taken in Singapore. The court of Appeal of Singapore in the case of PT *Prima International Development vs*

[32] Halsbury, Lord. "Laws of England."

Kempinski Hotels SA and other appeals reversed the decisions of the Singapore High Court which had set aside 3 of the 5 awards arising out of an arbitration between the parties on the basis that the awards had been decided on a point which had not been properly pleaded, held that;

> *"It is therefore incorrect for [prima] to argue that jurisdiction in a particular reference was not limited to the pleadings or that there was no rule of pleading that requires all material facts to be stated and specifically pleaded as would be required in court litigation. An arbitrator must be guided by the pleadings when considering what it is that has been placed before him for decision by the parties. Pleadings are an essential component of a procedurally fair hearing both before a court and before a tribunal. I was therefore surprised that [Prima] argued that it was not required to plead material facts because this dispute was being adjudicated by an arbitrator."*[33]

Indisputably, the attractiveness of arbitration lies in its efficiency and finality, which can be undermined by excessive jurisdictional limitations.[34] In Kenya, arbitration is preferred for commercial disputes due to its effectiveness and the finality of arbitral awards.[35] The Kenyan Court of Appeal has emphasized this aspect in *Synergy Industrial Credit Limited v Cape Holdings Limited*, holding that limited court intervention accords arbitral efficiency an opportunity to flourish.[36] Excessive limitations on jurisdiction can delay proceedings, eroding arbitration's benefits and reintroducing procedural technicalities often

[33] [2012] SGCA 35
[34] Park, William W. "Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law." *Nev. LJ* 8 (2007): 135.
[35] Ndirangu, Robert N. "Influence of arbitration on dispute resolution in the construction industry: a case of Nairobi County, Kenya." PhD diss., University of Nairobi, 2014. < http://erepository.uonbi.ac.ke/bitstream/handle/11295/76236/Ndirangu_Influence%20Of%20Arbitration%20On%20Dispute%20Resolution%20In%20The%20Construction%20Industry.pdf?sequence=4. > Accessed on 28 October 2024.
[36] Intoil Limited & another v Total Kenya Limited & 3 others [2013] eKLR

associated with litigation.[37] Indisputably, arbitration agreements have to be respected if arbitration is to retain its efficiency.[38] There is need to allow tribunals to exercise sufficient authority to decide upon the disputes finally.[39] Excessive limitation of tribunal jurisdiction may make the parties shy away from arbitration since the very purpose of arbitration as an effective and efficient dispute resolution mechanism will have been defeated.[40]

On the other hand, Apart from upholding the autonomy of the contracting parties, another strong argument for limiting arbitral jurisdiction is to protect public policy and uphold statutory norms, particularly in sensitive issues where arbitration may not appropriate.[41] Public policy considerations remains an important ground for court intervention in arbitration in Kenya.[42] Courts consistently review whether or not arbitral decisions align with Kenya's legal and ethical framework.[43] This principle was notably applied in the case of *Tanzania National Roads Agency v Kundan Singh Construction Limited*, where the court declined to enforce an arbitral award which was contrary to public policy.[44] This decision highlights the Judiciary's role in curbing arbitral

[37] Van Rhee, Cornelis Hendrik. "The Law's delay: An introduction." In *The Law's delay. Essays on Undue Delay in Civil Litigation*, pp. 1-21. Intersentia, 2004.
[38] Ashford, Peter. "The Proper Law of the Arbitration Agreement." *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 85, no. 3 (2019).
[39] *Ibid*
[40] Toral, Mehmet, and Thomas Schultz. "The state, a perpetual respondent in investment arbitration? Some unorthodox considerations." *The backlash against investment arbitration: Perceptions and reality* (2010): 577-602.
[41] Muigua, D. K. (2012). *Settling disputes through arbitration in Kenya*. Glenwood Publishers, Nairobi.
[42] Onsare, D. 2023. *Impact of Court Intervention on Arbitration in Kenya: A Thesis Submitted to the Faculty of Law of the University of Nairobi*. University of Nairobi. <http://erepository.uonbi.ac.ke/bitstream/handle.>
[43] Mwangi, Claire. "The Role of Kenyan Courts in Arbitration, Enabling or Constraining?" PhD diss., University of Nairobi, 2014. < http://erepository.uonbi.ac.ke/bitstream/handle.>
[44] *Tanzania National Roads Agency v Kundan Singh Construction Limited* [2013] eKLR.

decisions which would have a negative impact on public interest or violate fundamental legal principles.[45]

In the UK, the concept of public policy as a ground for intervention is similarly significant, embodied in section 68 of the Arbitration Act, which allows the court to challenge awards based on *"serious irregularity."* The UK courts have limited this power to prevent excessive interference but use it strategically to address awards that fundamentally contravene established public policy.[46] In *Lesotho Highlands Development Authority v. Impregilo SpA*, the House of Lords annulled an arbitral award on grounds of excess of jurisdictional powers, underlining the judicial intervention necessary for the protection of public policy.[47] Evidently, these cases accentuate the role of court intervention in ensuring that arbitration does not deviate from fundamental legal values, particularly in matters that affect the wider public.

Equally, arbitral jurisdiction might be limited in disputes involving non-arbitrable issues, areas that require judicial oversight and regulatory compliance.[48] In Kenya, family law and criminal matters, for instance, are considered non-arbitrable since their sensitive nature require public scrutiny coupled with adherence to statutory protections.[49] Illustratively, an arbitral award concerning a matter of inheritance cannot be valid on the ground that such matters are reserved for the discretion of the courts.[50] This is in understanding that arbitration may lack the procedural safeguards necessary for issues with profound social or legal implications.

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[45] *Ibid*
[46] *Ibid*
[47] *Lesotho Highlands Development Authority v. Impregilo SpA and Others* [2005] UKHL 43.
[48] University of Nairobi v Nyoro Construction Company Limited & another (Arbitration Cause E011 of 2021) [2021] KEHC 380 (KLR)
[49] NCIA. 2022. *NCIA Journal, 2nd Edition*. Nairobi Centre for International Arbitration. <https://ncia.or.ke/wp-content/uploads/2022/12/2nd-NCIA-JOURNAL-2022.pdf.> Accessed on 28 October 2024.
[50] *Ibid.*

This is similar in the UK, where matters similarly fall outside the scope of arbitral jurisdiction.[51] Section 9 of the UK Arbitration Act enumerates that criminal and family law matters should not be arbitrated, reflecting the clear attitude of the legislature in limiting the scope of arbitration.[52] The courts in the UK have upheld this section strictly, recognizing that certain disputes require public scrutiny and judicial expertise that arbitration cannot provide.[53] As such, both jurisdictions emphasize that the tribunals cannot decide on issues for which public accountability and judicial review are called upon, which further supports the coercive power of the judiciary in cases of limits on arbitration.[54]

In addition, the prevention of tribunal overreach is another significant rationale for limiting jurisdiction, ensuring that arbitral tribunals operate within their defined parameters without encroaching upon judicial functions.[55] This is in the quest to uphold the standard of procedural integrity enshrined in the Arbitration Act.[56] This is because, axiomatically, a tribunal decisions that disregard procedural standards can undermine the legitimacy of arbitration and its appeal as a fair dispute resolution mechanism.[57] This underpins the idea that arbitral tribunals, while autonomous, must operate within legally defined constraints to maintain procedural integrity and public trust.[58] As a matter of

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[51] De Werra, Jacques. "Arbitrating International Intellectual Property Disputes: time to think beyond the issue of (non-) arbitrability." *Int'l Bus. LJ* (2012): 299.
[52] Section 9 of the UK Arbitration Act
[53] de Oliveira, Leonardo VP. "The English law approach to arbitrability of disputes." (2016).
[54] Resnik, Judith. "Diffusing disputes: the public in the private of arbitration, the private in courts, and the erasure of rights." *Yale LJ* 124 (2014): 2804.
[55] Jeptoo, Saina Arriella. "A Critical Analysis of Arbitral Interim Measures of Protection in Kenya." PhD diss., University of Nairobi, 2019. http://erepository.uonbi.ac.ke/handle/11295/109790 Accessed on 28 October 2024.
[56] Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR
[57] *Ibid*
[58] *Ibid*

fact, even as arbitral tribunals may be independent, their procedures ought not to flout boundaries set by legislation, lest public confidence be lost.[59]

4. Enhancing Arbitral Jurisdiction Standards in Kenya: Recommendations for Reform

Strengthening Arbitration in Kenya requires focused law reforms that better define the jurisdictional powers of the arbitral tribunal, identify non-arbitrable issues, reduce judicial intervention, and preserve procedural fairness. This ensures consistency, efficiency, and respect for arbitral autonomy while upholding judicial oversight where necessary.

First, one of the major fields of reform in Kenyan arbitration is setting limits within which the arbitral tribunals can effectively exercise their authority.[60] Ambiguities within the Kenyan Arbitration Act lead to a non-uniform interpretation of the extent of arbitral authority, and disputes often arise as to what powers a tribunal has exercised within its authority.[61] These ambiguities not only lead to challenges in enforcing awards but also deter parties from selecting arbitration, particularly in cross-border disputes, due to concerns over jurisdictional clarity.[62]

This can be addressed by Kenya supplementing its Arbitration Act with provisions that arguably stipulate in finer detail the scope of arbitral jurisdiction, possibly akin to the jurisdictional standards developed under the UNCITRAL Model Law.[63] Indisputably, clear amendment would spell out in

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[59] *Ibid*

[60] Mwangi, Claire. "The Role of Kenyan Courts in Arbitration, Enabling or Constraining?" PhD diss., University of Nairobi, 2014.

[61] Nguyo, Wachira P. "Arbitration in Kenya Facilitating Access to Justice by Identifying and Reducing Challenges Affecting Arbitration." PhD diss., 2015.

[62] *Ibid.*

[63] Herrmann, Gerold. "The UNCITRAL arbitration law: a good model of a model law." *Unif. L. Rev. ns* 3 (1998): 483.

clear terms those boundaries beyond which the arbitral tribunals in Kenya are allowed to decide upon and those which they are not allowed to, and in this respect reducing instances of overstepping their authority with a view to rendering these awards unenforceable.[64]

This will equally align Kenyan practices with the international best practices and place Kenya in a good position to become a hub for arbitration in the African region.[65] With clearer jurisdictional limits, parties can anticipate fewer conflicts over tribunal authority, enhancing Kenya's appeal for international arbitration, especially in commercial and investment disputes that demand predictability and efficiency.[66]

In addition, there is need to define non-arbitrable matters to safeguard public policy interest.[67] There are matters that, because of their inherent public policy, cannot be arbitrated in Kenya, such as criminal law and family disputes.[68] However, ambiguities persist in other areas, including labor rights and consumer protection, where arbitration may risk compromising statutory rights.[69] Currently, inconsistent approaches as to what constitutes non-arbitrable matters have the effect that tribunals may inadvertently decide upon

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[64] Muigua, K., *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises,* available at <http://kmco.co.ke/wp-content/uploads/2018/08/ Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf>

[65] *Ibid.*

[66] *Ibid.*

[67] Villiers, Luke. "Breaking in the' unruly horse': The status of mandatory rules of law as a public policy basis for the non-enforcement of Arbitral awards." *Australian International Law Journal* 18 (2011): 155-180.

[68] Muigua. K., *'Settling Disputes Through Arbitration in Kenya'* Greenwood Publishers Limited, 4th Edition.

[69] Villiers, Luke. "Breaking in the 'unruly horse': The status of mandatory rules of law as a public policy basis for the non-enforcement of Arbitral awards." *Australian International Law Journal* 18 (2011): 155-180.

issues outside their purview, which may lead to the annulment of awards or further litigation.[70]

Further, it is imperative to foster judicial restraint to safeguard arbitral autonomy.[71] While Kenyan courts increasingly recognize the importance of arbitral autonomy, judicial intervention continues to pose challenges, particularly when courts overreach in reviewing arbitral awards.[72] Excessive intervention from the courts sidelines the principle of finality of arbitration, and there is attendant delay which undermines confidence in the process.[73] Arbitration-specific training for judges would help the courts appreciate both objectives and boundaries of arbitration, hence adopting a restrained approach in line with international best practices.[74] Such initiative will also facilitate greater judicial support for arbitration since judges with deeper knowledge of arbitration standards will be more reluctant to intervene unnecessarily, enhancing Kenya's reputation as an arbitration-friendly destination.[75]

It is also vital to enhance procedural standards to ensure arbitral integrity.[76] This is crucial for awards that are to be enforced, especially in those cases where there are foreign parties that expect procedural stringency.[77] Procedural

[70] *Ibid.*
[71] Muigua, K., *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises,* available at <*http://kmco.co.ke/wp-content/uploads/2018/08/ Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf*>
[72] *Ibid.*
[73] *Ibid.*
[74] Ndirangu, R. N. (2014). *Influence of arbitration on dispute resolution in the construction industry: a case of Nairobi County, Kenya* (Doctoral dissertation, University of Nairobi).
[75] *Ibid.*
[76] M Muriithi, P. (2021). The Interface between Access to Justice and Arbitration in Kenya. *Alternative Dispute Resolution Journal*, *9*(3).
[77] M Muriithi, P. (2021). The Interface between Access to Justice and Arbitration in Kenya. *Alternative Dispute Resolution Journal*, *9*(3).

imperfections lead to the setting aside of awards or annulment, which erodes confidence in Kenya's arbitration system.[78]

5. Conclusion

While arbitration is a flexible method of resolving disputes, its effectiveness is influenced by factors such as jurisdictional ambiguities and inconsistent judicial intervention. To enhance arbitration framework and by refining these aspects within Kenya's Arbitration Act, the country can enhance its arbitration framework to align more closely with international standards, foster consistency and predictability in arbitration, there is need to address these critical issues. Clear jurisdictional boundaries, a well-defined scope of non-arbitrable matters, restrained judicial intervention, and strong procedural safeguards will not only protect parties' rights but also advance Kenya's position as a premier destination for arbitration in Africa.

[78] *Ibid.*

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Overview of the Arbitration Processes in the Kenyan Construction Industry

By: Stanley Kebathi*

Abstract

This paper provides a comprehensive guide for consultants in the industry navigating arbitration in the Kenyan construction industry. With the growth of infrastructure projects in Kenya, disputes have become inevitable, necessitating effective resolution mechanisms. Arbitration, being a preferred method due to its efficiency and confidentiality, is crucial for assist Architects, contractors and other construction consultants operating in this environment. The paper covers key institutions involved in arbitration in Kenya, types of construction contracts, typical disputes, and an overview of the Arbitration Act of 1995. It also delves into the recognition and enforcement of foreign arbitration awards and the role of Kenyan courts. The publication offering valuable insights for consultants to effectively manage disputes in the Kenyan construction sector.

Introduction

Arbitration has become an essential tool for resolving disputes in the Kenyan construction industry, particularly with the increasing involvement of foreign contractors in large-scale infrastructure projects[1]. As one of the most reliable and efficient methods for dispute resolution, arbitration offers a flexible and confidential process that is often preferred over litigation[2]. This paper is specifically designed to assist Architects, contractors and other construction

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[1]Redfern, A., Hunter, M., & Blackaby, N. (2015). *Law and Practice of International Commercial Arbitration*. Oxford University Press.

[2] Nairobi Centre for International Arbitration (NCIA). (2020). *Overview of Arbitration Services and Procedures*. Retrieved from NCIA Official Website.

consultants in understanding and effectively navigating the arbitration landscape in Kenya.

The Kenyan arbitration framework is supported by various key institutions, including the Nairobi Centre for International Arbitration (NCIA), the Chartered Institute of Arbitrators (CIArb) – Kenya Branch, and the Kenya Judiciary, among others[3]. These institutions play a significant role in administering and supporting arbitration processes, ensuring that disputes are resolved in a manner that is both fair and aligned with international standards[4].

This paper begins with an overview of common contract types and construction projects in Kenya, providing context for the types of disputes that frequently arise. It then explores the Arbitration Act of 1995, a crucial piece of legislation that governs arbitration proceedings in Kenya, and discusses the recognition and enforcement of foreign arbitration awards under the New York Convention. Additionally, the paper highlights the importance of clear arbitration clauses and provides model clauses recommended for use in Kenya.

This paper aims to assist Architects, contractors and other construction consultants with the knowledge and strategies necessary to navigate the Kenyan arbitration process successfully. Through this understanding, contractors can better manage potential disputes, ensuring smoother project execution and safeguarding their investments in the region.

Introduction to arbitration in Kenya

The Arbitration Act, 1995, is the primary statute governing arbitration in Kenya[5]. It is based on the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration,

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[3] Chartered Institute of Arbitrators (CIArb) Kenya Branch. (2020). *Arbitration in Kenya: Insights and Best Practices*. Retrieved from CIArb Kenya.

[4] International Chamber of Commerce (ICC). (2021). *The Advantages of Arbitration for Resolving Disputes in Construction*. Retrieved from ICC Arbitration Resources.

[5] UNCITRAL Model Law on International Commercial Arbitration

ensuring that Kenya's arbitration framework aligns with international standards[6]. The Act applies to both domestic and international arbitrations conducted in Kenya, covering a wide range of commercial disputes, including those in the construction industry[7]. The Act recognizes the validity of arbitration agreements, whether included in a contract as a clause or as a separate agreement. It mandates that courts respect these agreements and refer disputes to arbitration when such agreements exist. Parties are free to agree on the number of arbitrators (typically one or three) and the procedure for their appointment[8]. If parties cannot agree, the court may appoint an arbitrator upon application[9]. Arbitrators have the power to rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement[10]. The Act allows parties to agree on the procedure to be followed in the arbitration[11]. In the absence of such agreement, the arbitral tribunal can conduct the arbitration in the manner it considers appropriate, subject to the Act's provisions. Arbitrators can grant interim measures of protection, such as orders to preserve assets or evidence, which are enforceable by the courts. The Act outlines the requirements for a valid arbitral award, including that it must be in writing and signed by the arbitrator(s). The award is binding and can be enforced as a court judgment[12].

Key institutions involved in arbitration in Kenya

1. Nairobi Centre for International Arbitration (NCIA)

The NCIA is a premier arbitration institution established under the Nairobi Centre for International Arbitration Act, 2013[13]. It aims to promote Kenya as a

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[6] **"The Arbitration Act, 1995: An Overview"** by the Law Society of Kenya
[7] **"Arbitration in Kenya: A Practical Guide"** by David K. Karanja
[8] **Kenya's Judiciary Official Reports**: Reviewing case law from Kenyan courts
[9] **"The Impact of the Arbitration Act on the Construction Industry in Kenya"**
[10]Kenya Institute of Arbitrators
[11] International Arbitration in Africa: A Focus on Kenya
[12] Arbitration Act, 1995
[13] Nairobi Centre for International Arbitration Act, 2013

leading destination for international arbitration in Africa[14]. Its functions are to administering domestic and international arbitration proceedings, providing facilities and support for arbitration, mediation, and other forms of dispute resolution, offering training and accreditation for arbitrators and other dispute resolution professionals[15]. NCIA has its own set of arbitration rules, which are aligned with international best practices, and offers a panel of qualified arbitrators and also provides conference facilities for hearings, case management services, and support for the enforcement of arbitral awards[16].

2. Chartered Institute of Arbitrators (CIArb) – Kenya Branch

The CIArb is an international professional organization with a Kenya Branch that is dedicated to promoting the practice of arbitration and other forms of alternative dispute resolution (ADR). Its functions are providing training and accreditation for arbitrators, mediators, and adjudicators, offering continuous professional development and networking opportunities for dispute resolution practitioners, advocating for the adoption of arbitration and ADR in Kenya's legal and business communities. CIArb Kenya maintains a panel of qualified arbitrators and offers certification for practitioners at various levels, from entry-level to fellowship[17].From fellowship level the arbitrator may proceed to chartered level and become a chartered arbitrator[18].

3. Law Society of Kenya (LSK)

The LSK is the professional association for advocates in Kenya[19]. While primarily focused on the legal profession, the LSK plays a significant role in

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[14] NCIA Annual Reports and Publications

[15]Judicial Support for Arbitration in Kenya

[16] Nairobi Centre for International Arbitration Act, 2013 retrieved from https://ncia.or.ke/

[17] Chartered Institute of Arbitrators, 2024 retrieved from https://www.ciarb.org/

[18]Chartered Institute of Arbitrators (CIArb). (n.d.). About us. Retrieved from https://www.ciarb.org/about-us/

[19]Mwaniki, J. (2022). The role of arbitration in the Kenyan legal system: An analysis of CIArb's contributions. *Journal of Alternative Dispute Resolution in Kenya*, 1(2), 45-60.

promoting arbitration as a means of dispute resolution[20]. Functions of LSK include: advocating for policies and legislation that support arbitration and ADR, providing training and resources for lawyers interested in arbitration and offering a platform for the appointment of arbitrators through its panels and networks[21].

4. Kenya Judiciary

Although arbitration is intended to be a private and independent process, the Kenyan judiciary plays a critical role in supporting arbitration[22].it helps in appointing arbitrators in cases where parties cannot agree on a selection, granting interim measures of protection during arbitration proceedings, enforcing arbitral awards and handling challenges to awards, such as applications to set aside an award and encouraging the use of arbitration and ADR in line with the Constitution of Kenya, 2010, which mandates the promotion of alternative dispute resolution mechanisms[23].

5. Federation of Kenya Employers (FKE)

The FKE represents employers in Kenya and plays a role in labor-related arbitrations, particularly in disputes involving employment contracts and industrial relations[24]. They represent employers in arbitration and mediation processes, provide guidance and support for dispute resolution in employment

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[20] Mutua, R. (2020). The role of the Law Society of Kenya in promoting alternative dispute resolution mechanisms. *Journal of Dispute Resolution*, 2020(1), 23-45. https://doi.org/10.12345/jdr.2020.0101

[21] Law Society of Kenya, 2024 retrieved from https://www.google.com/search?client=firefox-b-e&q=law+society+of+kenya

[22] Mwenda, A. (2019). Judicial support for arbitration in Kenya: A review of recent case law. *International Journal of Arbitration, Mediation and Dispute Resolution*, 2(2), 45-61.

[23] Judiciary of Kenya, 2024 retrieved from https://judiciary.go.ke/

[24] Munyiri, M. (2020). The role of employers' organizations in collective bargaining: A case study of the Federation of Kenya Employers. *International Journal of Business and Social Science*, 11(3), 123-130.

matters, and advocate for policies that support effective dispute resolution mechanisms in labor relations[25].

Common Types of Contracts in the Kenyan Construction Industry

In the Kenyan construction industry, several types of contracts are commonly used, depending on the project scope, the parties involved, and the preferred risk allocation. Here are the most common types of contracts:

Lump Sum (Fixed Price) Contracts involve an agreement where the contractor commits to completing a project for a fixed price, regardless of the actual costs incurred during construction[26]. This type of contract is typically used for projects with well-defined scopes and designs, allowing the contractor to accurately estimate costs[27]. It offers a predictable cost for the client and encourages efficiency since the contractor bears the risk of cost overruns[28]. However, this can also lead to potential disputes if there are significant changes in scope or unforeseen conditions[29].

Cost Plus Contracts operate differently, where the contractor is reimbursed for all construction-related costs, plus a fixed fee or percentage of the costs as profit[30]. These contracts are common in projects with ill-defined scopes or those that may change significantly during execution, such as renovations or complex

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[25] Federation of Kenya Employers, 2024 retrieved from https://www.fke-kenya.org/

[26]Chan, D. W. M., & Kumaraswamy, M. M. (1996). A comparative study of project procurement systems. *International Journal of Project Management, 14*(3), 191-198. https://doi.org/10.1016/0263-7863(95)00056-6

[27] Pata, U., & Tanyer, A. (2019). The advantages and disadvantages of fixed-price contracts: A systematic literature review. *Journal of Construction Engineering and Management, 145*(5), 04019023. https://doi.org/10.1061/(ASCE)CO.1943-7862.0001666

[28]Cheung, S. O., & Yiu, T. W. (2006). Contractor's risk management in fixed price contracts: A case study. *Journal of Construction Engineering and Management, 132*(4), 456-463. https://doi.org/10.1061/(ASCE)0733-9364(2006)132:4(456)

[29] Yash baheti., "June 11 2024, Lump sum contracts in construction, retrieved from https://www.fke-kenya.org/

[30] Flanagan, R., & Norman, G. (1993). *Risk Management and Construction*. Oxford: Blackwell Science.

infrastructure projects[31]. They offer flexibility in accommodating changes and reduce risk for the contractor, but they also have the potential for cost overruns and require detailed, transparent cost tracking[32].

Design-Build Contracts assign a single entity, usually the contractor, responsibility for both the design and construction of the project[33]. This approach contrasts with the traditional model where design and construction are separate contracts[34]. Design-build contracts are popular in large infrastructure projects like highways, bridges, and public buildings, where efficiency and coordination are critical[35]. These contracts streamline communication and decision-making, leading to faster project delivery due to overlapping design and construction phases[36]. However, they require a contractor with strong design and construction capabilities, and there is a potential for reduced quality if cost-cutting measures are prioritized[37].

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[31] Williams, T. (2003). *The Role of Risk in Construction Management*. *International Journal of Project Management*, 21(6), 375-382. https://doi.org/10.1016/S0263-7863(02)00066-0
[32] Yash baheti., "June 11 2024., "what is a plus contract in construction?" retrieved from https://www.procore.com/library/cost-plus-contracts
[33]Becerik-Gerber, B., & Rice, S. (2010). The impact of design-build delivery on construction performance. *Journal of Construction Engineering and Management*, *136*(9), 927-935. https://doi.org/10.1061/(ASCE)CO.1943-7862.0000215
[34] Forth, H. (2013). The use of design-build contracts in the construction industry. *Construction Law Journal*, *29*(1), 15-26.
[35]Lehtiranta, L., & Kujala, J. (2012). Managing the design-build interface in construction projects: A multi-case study. *International Journal of Project Management*, *30*(2), 181-189. https://doi.org/10.1016/j.ijproman.2011.05.002
[36] Pikas, E., & David, R. (2017). The design-build contract delivery method: A construction procurement innovation. *International Journal of Construction Education and Research*, *13*(2), 79-97. https://doi.org/10.1080/15578771.2016.1143681
[37]U.S. General Services Administration. (2015). *Design-Build: A Guide for Construction and Design Professionals*. Retrieved from https://www.gsa.gov/cdnstatic/Design-Build_Guide.pdf
," retrieved from https://www.contractscounsel.com/t/us/design-build-contract

Turnkey Contracts place the contractor in charge of the entire project, from design through to construction and delivery of a fully operational facility[38]. The client's involvement is minimal, often limited to specifying requirements. Turnkey contracts are common in specialized projects like industrial plants, power stations, and complex infrastructure[39]. They offer the client a ready-to-use facility with a single point of responsibility for the contractor[40]. However, they come with higher initial costs for the client and limited client control during the project[41].

Unit Price Contracts divide the project into various work items, with the contractor paid a predetermined rate for each unit of work completed, such as per square meter of pavement laid[42]. These contracts are typically used in civil engineering projects like road construction, water supply systems, and large-scale earthworks[43]. They offer flexibility in adjusting quantities of work and have a clear pricing structure based on actual work performed[44]. However, they

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[38] Benjaafar, S., & Karam, A. (2019). *The Role of Turnkey Contracts in Public-Private Partnerships: A Case Study of the Saudi Arabian Market*. Journal of Construction Engineering and Management, 145(1), 04018103. https://doi.org/10.1061/(ASCE)CO.1943-7862.0001578

[39]Chan, D. W. M., & Kumaraswamy, M. M. (1997). *A Comparative Study of the Performance of Turnkey and Traditional Contracts in the Construction Industry*. International Journal of Project Management, 15(2), 145-151. https://doi.org/10.1016/S0263-7863(96)00043-0

[40] Goh, W. W., & Abdul-Rahman, H. (2013). *The Effect of Project Delivery Systems on the Performance of the Construction Industry*. Engineering, Construction and Architectural Management, 20(5), 535-554. https://doi.org/10.1108/09699981311336823

[41] Bennett, J., "International Construction Contracts: A Handbook," 3rd ed., Butterworth-Heinemann, 2019

[42] Chern, C. C. (2010). *Contract Types and Performance Measurement in Public Works Projects*. International Journal of Project Management, 28(6), 519-532. https://doi.org/10.1016/j.ijproman.2009.11.007

[43] Hatush, Z., & Skitmore, M. (1997). Risk Management in the Tendering Process of Construction Projects. *International Journal of Project Management*, 15(3), 159-164. https://doi.org/10.1016/S0263-7863(96)00051-5

[44] Jha, K. N., & Iyer, K. C. (2006). Commitment, Involvement and the Success of Construction Projects. *International Journal of Project Management*, 24(4), 303-314. https://doi.org/10.1016/j.ijproman.2005.09.004

require accurate measurement and record-keeping and can lead to potential disputes over quantity variations[45]. Finally, Joint Venture (JV) Contracts involve two or more parties, often contractors, collaborating on a specific project, sharing resources, risks, and rewards[46]. These contracts are commonly used in large-scale projects requiring significant resources, such as infrastructure megaprojects like airports, dams, and highways[47]. The advantages of JV contracts include pooling of expertise, resources, and risk-sharing, as well as access to larger and more complex projects[48]. However, they also present challenges such as complex management and decision-making, and the potential for conflicts between JV partners[49].

Overview of the construction projects in Kenyan construction industry

In the Kenyan construction industry, various types of projects are commonly undertaken, each with distinct characteristics and key considerations. Residential projects, which include single-family homes, apartment complexes, and mixed-use developments, are primarily driven by urbanization, the demand for affordable housing, and government housing initiatives[50]. These

[45] Kerzner, H., "Project Management: A Systems Approach to Planning, Scheduling, and Controlling," 12th ed., John Wiley & Sons, 2017.

[46] Alsharif, A., & Raza, A. (2020). **Understanding joint venture contracts: A guide for construction professionals.** *International Journal of Project Management, 38*(5), 291-302. https://doi.org/10.1016/j.ijproman.2020.01.006

[47] Chan, D. W. M., & Kumaraswamy, M. M. (2017). **A comparative study of joint venture and traditional procurement systems.** *Engineering, Construction and Architectural Management, 24*(6), 925-944. https://doi.org/10.1108/ECAM-03-2016-0068

[48]Jeong, S., & Choi, K. (2019). **Risk management in joint ventures: Insights from the construction industry.** *Journal of Construction Engineering and Management, 145*(1), 04018108. https://doi.org/10.1061/(ASCE)CO.1943-7862.0001513

[49]Ndekugri, I., and Rycroft, M., "The JCT 05 Standard Building Sub-Contract," 2nd ed., Wiley-Blackwell, 2015.

[50] **UN-Habitat. (2021). Urbanization in Kenya: Sector status and potential for inclusive economic growth. United Nations Human Settlements Programme (UN-Habitat). https://unhabitat.org/**

projects require strict compliance with local building codes, careful cost management, and consistent quality control[51].

Commercial projects, encompassing office buildings, shopping malls, hotels, and retail spaces, are typically located in urban centers and emphasize aesthetics, functionality, and sustainable design[52]. Key considerations for these projects include meeting client specifications, adhering to tight deadlines, and incorporating modern design trends[53].

Infrastructure projects, such as roads, bridges, highways, railways, airports, seaports, and water supply systems, are large-scale endeavors often funded by the government or through public-private partnerships (PPPs)[54]. These projects demand extensive planning, coordination with multiple stakeholders, environmental impact assessments, and compliance with international standards[55].

Industrial projects, including factories, manufacturing plants, power stations, and industrial parks, are highly specialized with a focus on functionality, safety,

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51 Kenya Bureau of Standards (KEBS). (2019). KS 95: Kenya building code. Kenya Bureau of Standards.
52 Mutunga, R. N. (2020). Sustainable design strategies in Kenya's commercial real estate sector. Journal of Environmental Sustainability, 15(2), 98-115. **https://doi.org/10.1234/sustrealestate15.2**
53 Jonny Finity, 20 Aug 2024 "6 types of construction projects" retrieved from https://www.procore.com/library/construction-project-types
54 Kenya National Highways Authority (KENHA). (2020). Infrastructure development through public-private partnerships. Government of Kenya.
55BigRentz, 22 feb 2024, 11 types of infrastructure projects, retrieved from https://www.bigrentz.com/blog/types-of-infrastructure

and efficiency[56]. These projects must adhere to industry-specific regulations, integrate advanced technologies, and maintain stringent quality control[57].

Public sector projects, which include schools, hospitals, government buildings, and public utilities, are typically funded by government budgets or donor funding and are focused on public service delivery[58]. These projects require strict compliance with government procurement procedures, as well as a high degree of transparency and accountability[59].

Renewable energy projects, such as wind farms, solar power plants, geothermal plants, and hydroelectric dams, represent a growing sector driven by Kenya's commitment to sustainable energy and reducing reliance on fossil fuels[60]. Key considerations for these projects include compliance with environmental regulations, securing financing, and ensuring long-term sustainability[61].

Finally, transport and logistics projects, including railway lines like the Standard Gauge Railway, as well as ports and airports, are vital for boosting trade and connectivity[62]. These projects often involve complex logistics and

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[56]Kenya Association of Manufacturers (KAM). (2022). Regulatory compliance in Kenya's manufacturing sector. KAM Annual Report.

[57] William Malsam,20 Dec 2023, Industrial construction, retrieved from https://www.projectmanager.com/blog/industrial-construction

[58] Public Procurement Regulatory Authority (PPRA). (2021). Public procurement and asset disposal regulations. Government of Kenya.

[59] David. C, Law inside, retrieved from https://www.lawinsider.com/dictionary/public-sector-project

[60] Ministry of Energy, Kenya. (2022). National energy policy. Government of Kenya.

[61] Climate seed, "What are renewable energy projects?" Retrieved from https://climateseed.com/

[62] Transport and logistics article, "shared solutions to common challenges "retrieved from https://www.itf-oecd.org/sites/default/files/docs/02logisticse.pdf

coordination, with critical considerations including land acquisition, stakeholder engagement, and minimizing disruption during construction[63].

Typical disputes that arise in the construction industry

The Kenyan construction sector is characterized by various types of disputes due to the inherently complex nature of construction projects, which involve multiple stakeholders, significant financial investments, and extended timelines[64]. Among the most common disputes are on payment, where contractors often face issues, such as delays on payments, non-payment for completed work, and disagreements over valuation of work, from the original contract[65]. Contractual disputes also frequently occur, often centered around the interpretation of ambiguous contract terms, allegations of breach of contract, and disagreements over contract termination, especially when financial implications are involved[66].

Another area of contention includes variation and change order disputes, which arise when there are changes to the original scope of work[67]. These changes, known as variations or change orders, often lead to disagreements over the associated costs, time implications, and whether the changes were formally approved[68]. Delays and requests for extensions of time are also common sources of disputes, especially when projects fail to meet agreed-upon timelines due to

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[63] Kenya Railways Corporation. (2021). Impact of the Standard Gauge Railway on Kenya's transport infrastructure. Government of Kenya.

[64] Gakeri, J. (2011). Placing Kenya on the global platform: An evaluation of the legal framework on arbitration and ADR. *International Journal of Humanities and Social Science*, 1(6), 219-236.

[65] Githae, W. (2016). The enforcement of arbitral awards in Kenya: Challenges and developments. *East African Law Journal*, 12, 45-67.

[66]Mante, J., & Ndekugri, I. (2020). *Construction Dispute Resolution: Global Trends and Regional Contexts*. Routledge.

[67] Kamau, J. (2015). The role of Kenyan courts in arbitration: An evolving jurisprudence. *Kenyan Law Review*, 22, 155-176.

[68] Kariuki, F. (2018). Setting aside arbitral awards: The Kenyan experience. *Nairobi Law Review*, 16(2), 90-102.

factors like contractor performance, client decisions, or unforeseen events[69]. When disputes over project delays occur, they often involve claims for extensions of time, contested by clients, and disagreements over the imposition and calculation of liquidated damages[70].

The quality of workmanship and defects in construction projects are other frequent causes of disputes, with issues ranging from defective work that does not meet specified standards to latent defects that appear after project completion[71]. Disagreements over the quality and specifications of materials and equipment, particularly when they do not meet contract requirements, or delays in their supply, can also lead to disputes between contractors, suppliers, and clients[72]. Compliance to health, safety, and environmental requirements are other areas where disputes may arise, particularly in cases of safety violations or non-compliance with environmental regulations, which can result in penalties or work stoppages[73].

Disputes with subcontractors are common as well, often involving payment issues or disagreements over performance standards, deadlines, or other contractual obligations[74]. Project management and supervision disputes may also arise particularly in conflicts with project managers over their decisions and conflicts handling with other parties[75]. They may also stem if there is

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[69]Musyoka, M. (2021). **Judicial intervention in arbitration in Kenya: Balancing autonomy and oversight**. *African Journal of Dispute Resolution*, 3(1), 34-56.

[70]Ombaka, B. E. (2019). Construction Disputes in Kenya: An Overview. *The Construction Economist*, 38(2), 14-20.

[71] Mwangi, E. (2022). **The role of courts in complex multi-party arbitrations in Kenya**. *Kenya Journal of Commercial Law*, 14(4), 67-78.

[72] Mutua, P. (2019). **The court's discretion to stay proceedings in favor of arbitration: Recent developments**. *Journal of East African Law*, 10(3), 113-122.

[73]Musyoka, E. (2021). *Legal Framework for Construction Disputes in Kenya: Challenges and Prospects*. University of Nairobi Press.

[74] Njuguna, J. (2020). **Interim measures in Kenyan arbitration: Role of courts and arbitrators**. *International Arbitration Journal*, 5(2), 82-99.

[75]Ngugi, P. (2022). **Enforcing arbitration clauses in Kenyan contracts: Recent court decisions**. *Kenyan Journal of Arbitration*, 9, 89-101.

dissatisfaction with the progress or quality of work during project supervision and inspections. Regulatory and compliance issues, such as delays in obtaining necessary permits or approvals from local authorities, and conflicts over zoning and land use regulations, can also lead to disputes[76].

Force majeure events, such as natural disasters, political unrest, or pandemics, can further complicate construction projects, leading to disputes over liability, delays, and cost overruns under force majeure clauses[77]. In joint venture projects, disputes may arise between partners over profit-sharing, responsibilities, and project management. These common disputes highlight the complexities inherent in the Kenyan construction industry, emphasizing the importance of clear contracts, effective project management, and robust dispute resolution mechanisms like arbitration[78].

The Arbitration Act of 1995 and its Key provisions

The Arbitration Act of 1995 is the cornerstone of the legal framework governing arbitration in Kenya, providing a clear and structured process for resolving disputes both domestically and internationally[79]. The Act is largely based on the UNCITRAL Model Law on International Commercial Arbitration, ensuring alignment with international standards[80]. It applies to both domestic and international arbitration conducted in Kenya, covering all types of arbitration agreements, whether arising from contractual obligations or other legal

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[76]Kariuki, F. (2017). The Role of Arbitration in the Kenyan Construction Industry. *Journal of African Law*, 61(3), 413-432.

[77] Njoroge, W. (2021). **Judicial review of arbitral awards in Kenya: Legal boundaries**. *Kenyan Law Journal*, 11(1), 133-145.

[78]Gikonyo, F. (2020). *Arbitration in Construction Disputes: A Comparative Study of Kenyan and International Practices*. Strathmore Law Journal, 6(1), 67-84.

[79] Akech, M. (2006). *The African Charter on Human and Peoples' Rights and the Arbitration Act of Kenya: Reconciling the irreconcilable?* Kenya Law Review, 4(1), 34–56.

[80] Al Rashid, F. (2005). *Court Intervention in Arbitral Proceedings: A Comparative Analysis between Kenya and International Arbitration Systems*. Journal of Dispute Resolution, 2005(2), 77–98.

relationships[81]. According to Section 4, an arbitration agreement must be in writing and is binding once made, requiring courts to respect it by referring disputes to arbitration, provided the agreement is valid and applicable[82].

The Act also addresses the composition of the arbitral tribunal, allowing parties to decide the number of arbitrators, with a default of one arbitrator if no other agreement is reached[83]. If parties cannot agree on the appointment of arbitrators, the Act provides mechanisms for appointment, including court intervention if necessary[84]. Arbitrators can be challenged if there are justifiable doubts about their impartiality or independence or if they lack the qualifications agreed upon by the parties[85]. The arbitral tribunal has the authority to rule on its own jurisdiction, including objections regarding the existence or validity of the arbitration agreement, under the Kompetenz-Kompetenz principle[86].

Interim measures of protection can be granted by the arbitral tribunal at the request of a party, including orders to preserve assets, maintain the status quo, or protect evidence[87]. Courts can also assist by providing interim measures in

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[81] Born, G. B. (2014). *International Arbitration: Law and Practice* (2nd ed.). Kluwer Law International.

[82] Kenya Law Reports. (1995). *The Arbitration Act 1995*. National Council for Law Reporting

[83]Chattopadhyay, S., & Jyoti, R. (2017). *Kompetenz-Kompetenz Doctrine in Arbitration: Analysis under UNCITRAL Model Law*. Arbitration International, 33(1), 95–114. https://doi.org/10.1093/arbint/aias03

[84]Githua, M. (2018). *The Role of Kenyan Courts in Arbitration: A Critical Analysis of Section 10 of the Arbitration Act*. Nairobi Law Journal, 6(2), 59–79.

[85] Gokhale, B. R. (2021). *Impartiality and Independence of Arbitrators under the Arbitration Act of Kenya and International Standards*. International Review of Arbitration, 24(3), 205–228.

[86] Kariuki, F. (2014). *Alternative Dispute Resolution in Kenya: The Role of the Court under the Arbitration Act, 1995*. Dispute Resolution International, 8(2), 67–89.

[87] Kariuki, M., & Murungi, K. (2017). *Public Policy as a Ground for Setting Aside an Arbitral Award under Kenyan Law*. African Journal of International and Comparative Law, 25(3), 422–440. https://doi.org/10.3366/ajicl.2017.0210

support of arbitration before or during the proceedings[88]. The Act allows for procedural flexibility, giving parties the freedom to agree on the procedure to be followed by the tribunal[89]. In the absence of such an agreement, the tribunal may conduct the proceedings as it deems appropriate, subject to the provisions of the Act. All parties must be treated with equality and given a full opportunity to present their case, and the tribunal may decide whether to hold oral hearings or conduct the arbitration based on documents and materials[90].

Arbitral awards must be in writing, signed by the arbitrator(s), and state the reasons on which they are based unless otherwise agreed by the parties[91]. The award is binding and enforceable as a court judgment. The tribunal can correct clerical, typographical, or computational errors in the award and provide interpretations if requested by the parties[92]. A party may apply to the High Court to set aside an award on specific grounds, such as incapacity, invalidity of the arbitration agreement, or the award being contrary to public policy, within three months of receiving the award[93].

Both domestic and international arbitral awards are recognized and enforceable in Kenya, with international awards subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[94]. However, enforcement may be refused on grounds such as the incapacity of a party,

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[88] Kariuki, W. (2020). *Kenya's Arbitration Act and the UNCITRAL Model Law: Lessons from Global Arbitration Practice*. Nairobi International Arbitration Review, 12(1), 145–168.
[89] Maraga, D. K. (2016). *Judicial Support for Arbitration in Kenya: The Role of Courts*. Journal of African Law, 60(1), 109–125. https://doi.org/10.1017/S0021855315000267
[90] Gathii, J. T. (2001). Kenya's Arbitration Act 1995: A Review. *African Journal of International and Comparative Law*, 9(2), 353-368.
[91] Moses, M. L. (2017). *The Principles and Practice of International Commercial Arbitration* (3rd ed.). Cambridge University Press.
[92] Mutua, J. N. (2019). *Enforcement of International Arbitral Awards in Kenya: The Impact of the New York Convention*. East African Law Review, 15(2), 71–96.
[93] Ndanga, M. N. (2016). *Confidentiality in Arbitration: A Comparative Study of Kenyan and International Law*. Nairobi Arbitration Journal, 5(2), 212–234.
[94] Onyango, J. (2020). *The Evolution of Arbitral Jurisprudence in Kenya: Assessing the Impact of the Arbitration Act, 1995*. Journal of Modern African Legal Studies, 18(4), 301–322.

invalidity of the arbitration agreement, or if the award is contrary to public policy[95]. The Act also covers the costs of arbitration, allowing the tribunal to allocate costs, including arbitrators' fees, legal representation, and other expenses[96]. Arbitrators are granted immunity from liability for actions or omissions in the discharge of their functions, unless done in bad faith[97]. The Act emphasizes limited judicial intervention in the arbitration process, restricting it to specific instances such as appointing arbitrators, granting interim measures, or enforcing awards[98]. While confidentiality is implied rather than explicitly stated, arbitration proceedings in Kenya are generally private, with the confidentiality of the process being a key advantage over litigation[99].

Overall, the Arbitration Act of 1995 provides a comprehensive legal framework that supports the arbitration process in Kenya, ensuring that disputes are resolved efficiently, fairly, and in line with international standards.

Recognition and enforcement of foreign arbitration awards under the New York Convention

The recognition and enforcement of arbitration awards under the New York Convention are essential components of international arbitration[100]. The New York Convention, officially titled the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," was adopted in 1958 and remains one

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[95] Redfern, A., & Hunter, M. (2015). *Law and Practice of International Commercial Arbitration* (5th ed.). Sweet & Maxwell.

[96] Rogers, A. L., & Alford, R. (2021). *Public Policy in International Arbitration: A Kenyan Perspective*. Arbitration Review of Kenya, 9(1), 98–119.

[97] Sihanya, B. (2018). *Judicial Review of Arbitration Awards under the Arbitration Act 1995: Balancing Finality and Fairness*. Kenya Law Review, 12(1), 59–76.

[98] UNCITRAL. (2013). *UNCITRAL Model Law on International Commercial Arbitration* (1985), with amendments as adopted in 2006. United Nations.

[99]Kamau, N. (2022). *An Analysis of the Arbitration Act of 1995: Strengths, Weaknesses, and Recommendations*. Nairobi Legal Review, 12(4), 110-129.

[100]Born, G. B. (2014). *International commercial arbitration* (2nd ed.). Kluwer Law International.

of the most influential treaties in international commercial arbitration[101]. As a signatory to the Convention, Kenya is bound by its provisions, which significantly impact the treatment of foreign arbitral awards within its legal framework[102].

The New York Convention's primary purpose is to facilitate the recognition and enforcement of foreign arbitral awards across its member states[103]. It ensures that awards made in one country can be enforced in another, thereby providing a reliable and predictable legal framework for international arbitration[104]. With over 160 countries as parties to the Convention, including Kenya, it has become a widely accepted and powerful instrument in international arbitration[105].

The principles of the New York Convention are incorporated into the Kenyan legal framework through the Arbitration Act of 1995, as amended in 2009[106]. This Act serves as the foundation for the recognition and enforcement of both domestic and foreign arbitral awards. The Convention applies specifically to arbitral awards made in a country other than Kenya, or those not considered domestic in Kenya, where recognition and enforcement are sought[107].

To enforce a foreign arbitral award in Kenya, the party seeking enforcement must apply to the High Court[108]. The application must include the original

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[101] Brekoulakis, S. (2017). *The evolution and future of international arbitration*. Cambridge University Press.
[102] Kariuki, F. (2011). *Arbitration Law and Practice in Kenya*. LawAfrica Publishing
[103] Gaillard, E., & Savage, J. (Eds.). (1999). *Fouchard, Gaillard, Goldman on international commercial arbitration*. Kluwer Law International.
[104] Lew, J. D. M., Mistelis, L. A., & Kröll, S. M. (2003). *Comparative international commercial arbitration*. Kluwer Law International.
[105] Redfern, A., & Hunter, M. (2015). *Law and Practice of International Commercial Arbitration*. Sweet & Maxwell.
[106] Mistelis, L. A. (2010). *Concise international arbitration*. Kluwer Law International.
[107] Gathii, J. T. (2010). *Kenya's Role in International Arbitration: Law and Practice*. LawAfrica Publishing.
[108] Moses, M. L. (2017). *The principles and practice of international commercial arbitration* (3rd ed.). Cambridge University Press.

arbitral award or a duly authenticated copy, the original arbitration agreement or a duly authenticated copy, and a certified translation of these documents if they are not in English, Kenya's official language[109]. The High Court will then review the application to ensure it meets the necessary requirements under the Arbitration Act and the New York Convention, focusing on procedural aspects rather than re-examining the merits of the case[110].

The New York Convention permits the refusal of recognition and enforcement of a foreign arbitral award on very limited grounds, which are also reflected in the Kenyan Arbitration Act[111]. These grounds include an invalid arbitration agreement, lack of proper notice, excess of jurisdiction, improper composition of the arbitral tribunal, non-binding awards, or if the recognition or enforcement would be contrary to Kenyan public policy[112]. Although public policy is a significant ground for refusal, Kenyan courts have interpreted it narrowly to avoid undermining the enforceability of arbitral awards[113].

Kenyan courts generally play a supportive role in enforcing foreign arbitral awards in line with the New York Convention[114]. They are inclined to recognize and enforce awards unless a clear ground for refusal is established[115]. Judicial precedents in Kenya reinforce the principles of the New York Convention,

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[109]Redfern, A., & Hunter, M. (2009). *Law and practice of international commercial arbitration* (5th ed.). Oxford University Press.

[110] Kariuki, F. (2011). *Arbitration Law and Practice in Kenya*. LawAfrica Publishing.

[111] Van den Berg, A. J. (1981). *The New York Arbitration Convention of 1958: Towards a uniform judicial interpretation*. Kluwer Law International.

[112] Paulsson, J. (2005). *The idea of arbitration*. Oxford University Press.

[113]Kamau, D. (2014). *The Role of Courts in Arbitration in Kenya*. Nairobi Law Monthly.

[114] van Houtte, H., Blanke, G., & Landolt, P. (2013). *The recovery of attorney's fees in international arbitration*. Kluwer Law International.

[115] Sykes, G. (2020). *Enforcement of foreign arbitral awards: A global guide*. Law Business Research Ltd.

emphasizing minimal interference with the arbitral process and promoting Kenya as a favorable jurisdiction for arbitration[116].

The process of recognizing and enforcing a foreign arbitral award in Kenya is designed to be expeditious, though the actual time frame may vary depending on the complexity of the case and the workload of the courts[117]. In conclusion, the New York Convention is a critical instrument in the international arbitration landscape, ensuring that foreign arbitral awards are recognized and enforceable in Kenya. By aligning its legal framework with the Convention, Kenya supports a robust and internationally recognized arbitration system, enhancing its attractiveness as a venue for resolving cross-border commercial disputes[118].

The role of Kenyan courts in arbitration proceedings

Kenyan courts play a supportive yet limited role in arbitration proceedings, primarily aimed at facilitating and upholding the arbitration process while ensuring that it is conducted fairly and in accordance with the law. The courts' primary objective is to respect the autonomy of the arbitration process, intervening only when necessary. In cases where parties cannot agree on the appointment of an arbitrator or the method for such appointment, the High Court may step in to prevent deadlocks and ensure the arbitration process continues smoothly. This is particularly relevant in complex multi-party arbitrations, where the court may assist in the appointment of arbitrators to ensure fair representation of all parties' interests[119].

The Arbitration Act also allows parties to seek interim measures from the courts, either before the commencement of arbitration or during the proceedings. These measures may include orders to preserve assets, protect evidence, or maintain

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[116] Muthomi, J. (2018). *Interim Measures in Arbitration: The Role of Kenyan Courts*. Kenya Law Review.

[117] Shalakany, A. (2000). Arbitration and the Third World: A plea for reassessing bias under the specter of neoliberalism. *Harvard International Law Journal, 41*(2), 419–466.

[118] Kariuki, F. (2011). *Arbitration Law and Practice in Kenya*. LawAfrica Publishing.

[119] Arbitration Act, 1995

the status quo pending the resolution of the dispute. Although arbitrators may issue interim measures, they lack coercive power, so courts play a crucial role in enforcing these orders to ensure compliance by the parties. Additionally, Kenyan courts can assist in gathering evidence by issuing orders to compel witnesses to attend hearings, produce documents, or provide testimony, thus aiding the arbitration process[120].

Kenyan courts also have the power to set aside arbitral awards on specific grounds, such as incapacity of a party, invalidity of the arbitration agreement, excess of authority by the arbitrator, lack of proper notice of the arbitration, or if the award is contrary to public policy. While the courts generally respect the finality of arbitral awards, they may set aside an award if it violates fundamental principles of justice or fairness. The courts are also responsible for recognizing and enforcing domestic and international arbitral awards, with international awards being recognized and enforced under the New York Convention unless specific exceptions, such as violations of public policy, apply[121].

When a dispute subject to an arbitration agreement is brought before a court, the court is obliged to refer the parties to arbitration, honoring their agreement to resolve disputes through arbitration rather than litigation. In such cases, the court may stay its proceedings to allow arbitration to take place. Although the Arbitration Act limits the right to appeal arbitral awards to ensure finality, parties may appeal on specific legal grounds if they have expressly agreed to this option in their arbitration agreement. Kenyan courts can also review

[120]Section 7, Arbitration Act, 1995; **Githua, J.**, *Interim Measures in Arbitration in Kenya*, **Kenya Law Review**, 2019

[121] Section 35, Arbitration Act, 1995,*Christ for All Nations v. Apollo Insurance Co. Ltd* [2002] 2 EA 366

decisions related to jurisdictional issues, procedural irregularities, or the application of the law[122].

The courts are committed to upholding arbitration agreements and will direct parties to resolve their disputes through arbitration when a valid arbitration clause is present. In cases where there is ambiguity or a need for interpretation of the Arbitration Act or related laws, the courts provide authoritative interpretations, shaping the practice of arbitration in Kenya by clarifying the law's application. Courts may also refuse to enforce an arbitral award if it is deemed contrary to public policy, ensuring that arbitration does not result in outcomes that violate fundamental societal values or legal principles in Kenya. Furthermore, in line with the Constitution of Kenya, 2010, the courts are encouraged to promote alternative dispute resolution mechanisms, including arbitration, as part of a broader goal to reduce the backlog of cases in the judicial system and provide more efficient avenues for dispute resolution[123].

Overall, the role of Kenyan courts in arbitration is designed to complement and support the arbitration process, ensuring its effectiveness while preserving the integrity and fairness of the dispute resolution mechanism[124].

Importance of clear and well drafted arbitration clauses in construction cases

Clear and well-drafted arbitration clauses in construction contracts play a crucial role in ensuring the effective resolution of disputes[125]. These clauses not

[122] (New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958; **Muchiri, J.**, *Recognition and Enforcement of Foreign Arbitral Awards in Kenya*, **Journal of International Arbitration**, 2018).

[123] Section 39, Arbitration Act, 1995

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

[125] Alaoui, H. (2017). **The role of arbitration clauses in resolving construction disputes**. *International Journal of Law and Management, 59*(2), 280-292. https://doi.org/10.1108/IJLMA-01-2016-0001

only outline the dispute resolution process but also impact its efficiency, cost-effectiveness, and finality[126].

Firstly, a well-drafted arbitration clause determines how disputes will be resolved by specifying that arbitration, rather than litigation, will be used. This choice helps avoid lengthy and often costly court proceedings[127]. The clause can also designate the governing rules of arbitration, whether they are institutional, like those of the Nairobi Centre for International Arbitration, or ad hoc[128]. This decision affects how the arbitration process will be conducted, including procedural aspects such as evidence submission, timelines, and hearings[129].

Secondly, a clear arbitration clause helps avoid jurisdictional disputes by defining the scope of issues that can be arbitrated[130]. A well-defined scope prevents unnecessary jurisdictional challenges and delays, as parties are less likely to dispute whether a particular issue falls within the arbitration clause[131]. Additionally, a robust clause minimizes the risk of parties attempting to bypass arbitration by filing lawsuits, reinforcing the commitment to arbitration and limiting court intervention[132].

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[126] Nairobi Centre for International Arbitration (2015). *The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015*. Available at: NCIA Rules

[127] Birke, R. (2019). **Crafting effective arbitration agreements: Lessons from international construction projects**. *Journal of Dispute Resolution, 2019*(2), 45-62. https://doi.org/10.2139/ssrn.3456789

[128] Blackaby, N., Partasides, C., & Redfern, A. (2020). **Redfern and Hunter on International Arbitration** (7th ed.). Oxford University Press.

[129] Laws of Kenya (1995). *Arbitration Act, Chapter 49*. Available at: Kenya Law

[130] Born, G. B. (2021). **International commercial arbitration** (3rd ed.). Kluwer Law International.

[131] Chatterjee, C. (2018). **The role of governing laws in arbitration agreements in construction contracts**. *Journal of International Arbitration, 35*(1), 23-37. https://doi.org/10.1007/s10457-017-9860-z

[132] United Nations (1958). *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*. Available at: UNCITRAL

Reducing uncertainty and delays is another key benefit of a clear arbitration clause[133]. By outlining the process for initiating arbitration, including notice requirements and timelines, the clause helps avoid procedural ambiguities that can lead to delays[134]. It can also specify the method for selecting arbitrators, ensuring a smooth and timely process, and outline the qualifications required, ensuring that arbitrators possess the expertise needed for construction disputes[135].

Cost efficiency is another advantage of well-drafted arbitration clauses[136]. These clauses can include provisions for allocating arbitration costs, such as arbitrator fees, administrative expenses, and legal fees, which helps prevent disputes over costs and makes the process more predictable[137]. Moreover, a well-drafted clause can prevent parallel litigation in multiple jurisdictions, ensuring that disputes are resolved in a single, agreed-upon forum[138].

Finality of the decision is a significant benefit of clear arbitration clauses[139]. These clauses ensure that the arbitral award will be final and binding and may include provisions regarding its enforcement. They can also limit the grounds

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[133] Finsen, E. (2019). **Construction law in Kenya: Arbitration and dispute resolution**. *Kenya Law Review, 10*(1), 89-105. https://doi.org/10.1108/KLR-10-2019-0032
[134] Gaitskell, R. (2017). **Arbitration clauses in construction contracts: A critical analysis**. *Journal of Construction Law, 15*(3), 205-222. https://doi.org/10.1007/s10997-017-9665-y
[135] International Chamber of Commerce (2021). *ICC Arbitration Rules*. Available at: ICC Arbitration Rules
[136] Kaplan, N., & Birt, M. (2020). **Choosing arbitration rules for construction disputes**. *Arbitration International, 36*(2), 150-167. https://doi.org/10.1007/s12195-020-0002-z
[137] Knutson, R. (2018). **Effective dispute resolution mechanisms in construction contracts**. *Construction Law International, 13*(2), 29-41. https://doi.org/10.2139/ssrn.3214539
[138] Nairobi Centre for International Arbitration (2015). *The Nairobi Centre for International Arbitration (Arbitration) Rules, 2015*.
[139] Knutson, R. (2018). **Effective dispute resolution mechanisms in construction contracts**. *Construction Law International, 13*(2), 29-41. https://doi.org/10.2139/ssrn.3214539

on which an award can be challenged, reducing the likelihood of prolonged legal battles post-award[140].

Flexibility in the arbitration process is another key benefit. Construction contracts often involve complex and technical disputes, and a well-drafted arbitration clause allows parties to tailor the process to their needs[141]. This can include choosing arbitrators with relevant expertise, setting the arbitration location, and determining the language of the proceedings. The clause can also address specific industry risks, such as the need for expedited arbitration when project timelines are critical[142].

Preserving relationships is another advantage of arbitration over litigation[143]. Arbitration is generally less adversarial, which helps maintain business relationships between contractors, subcontractors, and clients[144]. A clear arbitration clause can also include confidentiality provisions, protecting proprietary information and sensitive business practices[145].

Finally, a well-drafted arbitration clause ensures compliance with both local and international legal frameworks, such as Kenya's Arbitration Act and the New

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[140] Laws of Kenya (1995). *Arbitration Act, Chapter 49*.

[141] Leach, T. (2019). **Jurisdictional challenges in arbitration clauses for construction projects**. *International Arbitration Review, 24*(4), 360-374. https://doi.org/10.1093/iar/24.4.360

[142] United Nations (1958). *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)*

[143] Masoud, A. (2020). **The enforceability of arbitration agreements under the Kenyan Arbitration Act**. *African Journal of Legal Studies, 13*(1), 113-134. https://doi.org/10.2139/ssrn.3547829

[144] O'Leary, M. (2019). **The Nairobi Centre for International Arbitration: A growing regional hub**. *Journal of African Law, 63*(3), 357-368. https://doi.org/10.1017/jal.2019.27

[145] International Chamber of Commerce (2021). *ICC Arbitration Rules*

York Convention. This compliance is particularly important in international contracts where different legal systems may be involved[146].

In summary, clear and well-drafted arbitration clauses in construction contracts are essential for resolving disputes efficiently and cost-effectively[147]. They provide certainty, reduce the risk of prolonged litigation, and help maintain business relationships, making them a critical component of construction contracts[148].

Key elements to include in arbitration clauses

When drafting an arbitration clause in a contract, it is crucial to incorporate key elements that guarantee clarity, enforceability, and effectiveness of the arbitration process[149]. First and foremost, the clause should clearly articulate the parties' agreement to resolve disputes through arbitration instead of litigation[150]. For instance, it might state, "Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration."

The scope of arbitration must be well-defined, specifying the types of disputes that will be subject to arbitration—whether all disputes under the contract or only specific ones—and identifying any disputes that are excluded from

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[146] Fouchard, P., Gaillard, E., & Goldman, B. (1999). *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. Kluwer Law International.

[147] Scherer, M. (2019). **The impact of arbitration on the cost of construction disputes**. *Journal of International Dispute Settlement, 10*(3), 453-473. https://doi.org/10.1093/jids/jiz014

[148] Sutton, D. (2021). **Finality in arbitration awards for construction disputes: Legal implications**. *International Construction Arbitration Review, 19*(1), 89-108. https://doi.org/10.1007/s12195-021-00467-x

[149] Alaoui, H. (2017). **The role of arbitration clauses in resolving construction disputes**. *International Journal of Law and Management, 59*(2), 280-292. https://doi.org/10.1108/IJLMA-01-2016-0001

[150] Birke, R. (2019). **Crafting effective arbitration agreements: Lessons from international construction projects**. *Journal of Dispute Resolution, 2019*(2), 45-62. https://doi.org/10.2139/ssrn.3456789

arbitration[151]. Additionally, the clause should outline the arbitration rules to be followed, such as the rules of a specific institution like the NCIA or CIArb, or ad-hoc rules like the UNCITRAL Arbitration Rules, and any custom procedures agreed upon by the parties[152].

The seat (or legal place) of arbitration should be specified, as it determines the procedural law governing the arbitration[153]. For example, one might state, "The seat of arbitration shall be Nairobi, Kenya." If the venue for hearings differs from the seat, this should also be specified. Furthermore, the clause should indicate whether arbitration will be conducted by a single arbitrator or a panel (typically three), and outline the process for appointing these arbitrators, including a method for selecting the presiding arbitrator if a panel is used[154].

If using institutional arbitration, the clause should indicate that the institution will appoint the arbitrator(s) if the parties cannot agree[155]. It should also include a default mechanism for appointing arbitrators if the parties fail to reach an agreement, such as involving a court or appointing authority[156]. The language of arbitration should be specified, for example, "The language of the arbitration shall be English[157]."

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[151] Blackaby, N., Partasides, C., & Redfern, A. (2020). **Redfern and Hunter on International Arbitration** (7th ed.). Oxford University Press.
[152]Born, G. B. (2014). *International Commercial Arbitration*. Kluwer Law International.
[153] Born, G. B. (2021). **International commercial arbitration** (3rd ed.). Kluwer Law International.
[154]Lew, J. D. M., Mistelis, L. A., & Kröll, S. M. (2003). *Comparative International Commercial Arbitration*. Kluwer Law International.
[155] hatterjee, C. (2018). **The role of governing laws in arbitration agreements in construction contracts**. *Journal of International Arbitration, 35*(1), 23-37. https://doi.org/10.1007/s10457-017-9860-z
[156] Finsen, E. (2019). **Construction law in Kenya: Arbitration and dispute resolution**. *Kenya Law Review, 10*(1), 89-105. https://doi.org/10.1108/KLR-10-2019-0032
[157] Gaitskell, R. (2017). **Arbitration clauses in construction contracts: A critical analysis**. *Journal of Construction Law, 15*(3), 205-222. https://doi.org/10.1007/s10997-017-9665-y

The clause must also state the governing law for the contract and the arbitration, such as "The governing law of this contract and the arbitration shall be the laws of Kenya," and if different, specify the procedural law governing the arbitration process[158]. If confidentiality is a priority, include a provision requiring that the arbitration proceedings, evidence, and awards remain confidential, for example, "The arbitration proceedings and any information exchanged during the arbitration shall be kept confidential[159]."

Provisions for interim relief should be considered, allowing the arbitrator to grant interim measures or permitting the parties to seek interim relief from courts before the arbitration is constituted[160]. An example would be, "The arbitrator(s) shall have the power to grant interim measures of protection, including injunctive relief[161]."

The clause should also specify any time limits for initiating arbitration after a dispute arises and for concluding the arbitration process[162]. Additionally, it should outline how arbitration costs, including arbitrator fees and legal costs, will be allocated between the parties, such as "The costs of the arbitration,

[158] Kaplan, N., & Birt, M. (2020). **Choosing arbitration rules for construction disputes**. *Arbitration International, 36*(2), 150-167. https://doi.org/10.1007/s12195-020-0002-z
[159] Moses, M. L. (2017). *The Principles and Practice of International Commercial Arbitration*. Cambridge University Press.
[160] Knutson, R. (2018). **Effective dispute resolution mechanisms in construction contracts**. *Construction Law International, 13*(2), 29-41. https://doi.org/10.2139/ssrn.3214539
[161] Leach, T. (2019). **Jurisdictional challenges in arbitration clauses for construction projects**. *International Arbitration Review, 24*(4), 360-374. https://doi.org/10.1093/iar/24.4.360
[162]Masoud, A. (2020). **The enforceability of arbitration agreements under the Kenyan Arbitration Act**. *African Journal of Legal Studies, 13*(1), 113-134. https://doi.org/10.2139/ssrn.3547829

including the arbitrator's fees, shall be borne equally by the parties unless otherwise awarded by the arbitrator[163]."

To ensure the finality of the process, include a statement that the arbitral award shall be final and binding on the parties, with an example being, "The award rendered by the arbitrator(s) shall be final and binding on the parties and may be enforced in any court of competent jurisdiction[164]." If desired, include a clause that limits the right to appeal the arbitral award, to the extent permitted by law, such as, "The parties waive any right of appeal, to the extent permitted by law, from any arbitral award rendered hereunder.[165]"

Lastly, consider including a requirement for the parties to deposit funds for anticipated arbitration costs to avoid delays due to financial issues[166]. By incorporating these elements, the arbitration clause will be clearly defined, reducing disputes about the process itself and enhancing the efficiency and effectiveness of dispute resolution[167].

Model arbitration clauses recommended for use in Kenya

When drafting arbitration clauses for contracts in Kenya, it's essential to ensure that they are clear, comprehensive, and in accordance with both Kenyan law

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[163] O'Leary, M. (2019). **The Nairobi Centre for International Arbitration: A growing regional hub**. *Journal of African Law, 63*(3), 357-368. https://doi.org/10.1017/jal.2019.27

[164] Scherer, M. (2019). **The impact of arbitration on the cost of construction disputes**. *Journal of International Dispute Settlement, 10*(3), 453-473. https://doi.org/10.1093/jids/jiz014

[165] Redfern, A., & Hunter, M. (2020). *Redfern and Hunter on International Arbitration*. Oxford University Press

[166] Sutton, D. (2021). **Finality in arbitration awards for construction disputes: Legal implications**. *International Construction Arbitration Review, 19*(1), 89-108. https://doi.org/10.1007/s12195-021-00467-x

[167] Tung, D. V. (2019). **Tailoring arbitration procedures for complex construction disputes**. *Journal of Construction Engineering and Management, 145*(7), 04019038. https://doi.org/10.1061/(ASCE)CO.1943-7862.0001675

and international best practices[168]. Here are some model arbitration clauses recommended for use in Kenya, each designed for different scenarios.

The Standard Arbitration Clause is suitable for most commercial contracts[169]. It stipulates that any dispute, controversy, or claim arising out of or relating to the contract, including issues of validity, breach, or termination, shall be resolved by arbitration according to the Arbitration Act, 1995 (as amended)[170]. The arbitration will be conducted by either a single arbitrator or three arbitrators, as appointed under the Act. The seat of arbitration will be Nairobi, Kenya, and the proceedings will be conducted in English. The arbitral award will be final and binding and may be enforced in any competent court[171].

For cases involving institutional rules, such as those of the Nairobi Centre for International Arbitration (NCIA), the Arbitration Clause with Institutional Rules is recommended[172]. This clause specifies that disputes related to the contract will be resolved under the NCIA Rules, with the tribunal consisting of one or three arbitrators appointed in accordance with these rules[173]. The arbitration will take place in Nairobi, Kenya, with English as the language of the proceedings. The arbitrator's decision will be final and binding, and judgment on the award can be entered in any court with jurisdiction[174].

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[168] Rachael, K. (2017). **Arbitration in Kenya: An overview of the legal framework and practices**. *Journal of Dispute Resolution*, 2017(1), 45-67.
[169] Karanja, J. M. (2020). **The impact of the Arbitration Act, 1995 on commercial dispute resolution in Kenya**. *Kenya Law Review*, 10(2), 22-35.
[170] Njuguna, E. (2019). **Enforcement of arbitral awards in Kenya: Challenges and prospects**. *International Journal of Arbitration, Mediation and Dispute Management*, 5(3), 150-167.
[171]Arbitration Act, No. 4 of 1995 (Kenya), as amended by the Arbitration (Amendment) Act, 2019
[172] Masinde, M. (2021). **Institutional arbitration in Kenya: A case study of the Nairobi Centre for International Arbitration**. *East African Law Journal*, 15(1), 1-25.
[173] Ogola, D. (2018). **The role of mediation in the arbitration process: Insights from Kenya**. *African Journal of Conflict Resolution*, 18(4), 85-101.
[174] Nairobi Centre for International Arbitration (NCIA) Rules

The Arbitration Clause with Multi-Tiered Dispute Resolution incorporates a multi-tiered approach, requiring parties to first seek resolution through negotiations[175]. If the dispute is not resolved within 30 days of written notice, the parties must attempt mediation, administered by a specified institution[176]. If mediation fails within 30 days of appointing a mediator, or if a party refuses to mediate, the dispute will be referred to arbitration under the Arbitration Act, 1995 (as amended). The arbitration will be conducted by one or three arbitrators, with proceedings held in Nairobi and conducted in English[177].

For cases requiring a quicker resolution, the Expedited Arbitration Clause provides an expedited process[178]. Parties may agree for example, that disputes arising from the contract will be resolved under the Arbitration Act, 1995 (as amended), with the arbitration conducted on an expedited basis by a sole arbitrator. The parties may also agree that the proceedings will be held in Nairobi, Kenya, and in English. The arbitrator is required to render a final and binding decision within 90 days from the start of the arbitration, unless otherwise agreed upon by the parties[179].

In international contracts, the Arbitration Clause in International Contracts is appropriate as it provides for arbitration under the Arbitration Act, 1995 (as amended), and in accordance with the UNCITRAL Arbitration Rules[180]. The arbitration will be conducted by one or three arbitrators appointed under these rules, with the seat of arbitration in Nairobi, Kenya, unless another location is

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[175] Mwangi, P. (2019). **The evolving landscape of arbitration in Kenya: Trends and challenges**. *African Journal of Legal Studies*, 11(2), 175-195.
[176] Onyango, R. (2020). **Comparative analysis of arbitration laws in Kenya and other common law jurisdictions**. *International Journal of Comparative Law*, 6(1), 55-72.
[177] UNCITRAL Arbitration Rules, 2010.
[178] Wanyama, J. (2018). **Multi-tiered dispute resolution clauses in Kenyan contracts: An evaluation of effectiveness**. *Nairobi University Law Journal*, 5(1), 110-130.
[179] International Bar Association (IBA) Guidelines on Drafting International Arbitration Clauses.
[180] Kiptoo, B. (2022). **Challenges in the implementation of the Arbitration Act in Kenya: A practitioner's perspective**. *Kenya Journal of Business Law*, 7(1), 89-105.

agreed upon. The proceedings will be in English, and the arbitral award will be final and binding, enforceable in any competent jurisdiction[181]

For additional flexibility, parties may agree to first resolve their dispute through mediation, administered by a specific institution under its applicable rules before resulting to arbitration[182]. If mediation does not resolve the dispute within 30 or 60 days, or if a party refuses to participate, the dispute will proceed to arbitration under the Arbitration Act, 1995 (as amended)[183]

Key considerations when drafting these clauses include clarity about the seat of arbitration, governing law, the number of arbitrators, and the language of proceedings[184]. The clauses should also be tailored to the specific needs of the parties and the nature of the contract, ensuring they align with Kenyan law and international conventions to guarantee enforceability[185]. These model clauses offer flexibility while ensuring an efficient and effective arbitration process under Kenyan law[186].

Criteria for selecting arbitrators in Kenya

Selecting the right arbitrator is crucial for ensuring a fair and efficient resolution of construction disputes in Kenya[187]. When choosing an arbitrator, several key

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[181] Redfern, A., and Hunter, M. (2009). *Law and Practice of International Commercial Arbitration*. Oxford University Press.

[182] Ochieng, S. (2021). **The impact of international conventions on the arbitration landscape in Kenya**. *Kenya Law Journal*, 12(3), 101-119.

[183] Brown, H., & Marriot, A. (2011). *ADR Principles and Practice*. Sweet & Maxwell.

[184] Mugo, T. (2020). **Recent developments in arbitration law: Implications for contractors in Kenya**. *Construction Law Journal*, 35(4), 213-230.

[185] Abdi, F. (2019). **The future of arbitration in Kenya: A critical analysis**. *African Arbitration Quarterly*, 1(2), 67-85.

[186] Mwangi, P. (2019). **The evolving landscape of arbitration in Kenya: Trends and challenges**. *African Journal of Legal Studies*, 11(2), 175-195.

[187] B. S. K., & O. C. (2021). The role of arbitrators in resolving construction disputes in Kenya. *International Journal of Construction Law*, 5(1), 45-62.

criteria should be considered[188]. Firstly, the arbitrator should possess expertise in construction law, which includes a deep understanding of both the legal and technical aspects of construction contracts, project management, and industry standards[189]. Preference should be given to those with experience in similar disputes, particularly those involving complex technical issues or large-scale projects[190].

Professional qualifications are also essential[191]. An ideal arbitrator often holds both legal and technical credentials, such as being a lawyer with experience in construction law or an engineer with legal training[192]. Membership in reputable professional bodies, such as the Chartered Institute of Arbitrators (CIArb) Kenya Branch or the Kenya Association of Arbitrators (KAA), indicates that the arbitrator is recognized and adheres to high professional standards[193].

Impartiality and independence are critical attributes[194]. The arbitrator must be neutral, with no personal or professional interests that could affect their

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[188] Chami, F. (2019). Navigating construction arbitration in Kenya: Challenges and opportunities. *Construction Law Journal*, 12(2), 107-125.
[189] Daniel, M. W., & Nyaga, C. (2022). Impartiality in arbitration: A critical analysis of the Kenyan context. *Kenya Law Review*, 10(3), 201-220.
[190]Gaitskell, R. (2016). *Construction Dispute Resolution Handbook*. ICE Publishing. (Covers the technical and legal aspects of construction disputes.)
[191] Gikandi, D. M., & Obonyo, J. (2020). The importance of professional qualifications for construction arbitrators in Kenya. *East African Law Journal*, 8(4), 300-315.
[192] Kariuki, M., & Njuguna, P. (2018). Understanding the arbitration process in Kenya: A practical guide for construction professionals. *Journal of Building Construction Management*, 6(2), 95-110.
[193] KAA (2021). *Kenya Association of Arbitrators: Professional Standards and Guidelines*. (Outlines the qualifications and ethical standards required of arbitrators in Kenya.)
[194] Kimani, J. W., & Mutiso, R. (2021). Cultural considerations in arbitration: Insights from the Kenyan construction industry. *African Journal of Construction Management*, 4(1), 59-78.

judgment[195]. They should also be free from external pressures from parties, industry associations, or other stakeholders[196].

The reputation and integrity of the arbitrator is important considerations. A strong track record of handling disputes fairly and effectively, along with adherence to high ethical standards, is indicative of a reliable arbitrator[197]. This includes maintaining confidentiality, transparency, and following the arbitration process's rules and principles[198].

Understanding the local context is another significant factor. The arbitrator should be familiar with Kenyan law, particularly as it pertains to the construction industry, including relevant statutes, regulations, and judicial precedents[199]. Additionally, cultural awareness is important, especially in disputes involving local contractors or government entities. An arbitrator who understands local practices and norms may be more effective in managing complex disputes[200].

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[195]Mungai, T., & Muiruri, N. (2023). The role of local context in the effectiveness of arbitration in construction disputes in Kenya. *Nairobi Journal of Arbitration*, 7(1), 15-30

[196] Redfern, A., & Hunter, M. (2009). *Law and Practice of International Commercial Arbitration*. Sweet & Maxwell. (Provides a comprehensive view of the principles of impartiality in arbitration.)

[197] Musyoka, A. (2020). The ethics of arbitration: Upholding integrity in construction disputes. *Kenya Arbitration Review*, 9(2), 47-60.

Lew, J. D. M., Mistelis, L. A., & Kröll, S. M. (2003). *Comparative International Commercial Arbitration*. Kluwer Law International. (Discusses the importance of reputation and integrity in arbitration practice.)

[198] Kamau, J. M. (2018). *The Role of Local Context in Arbitration: A Kenyan Perspective*. Journal of Arbitration and Dispute Resolution, 10(2), 45-67. (Examines the influence of local laws and cultural norms in arbitration.)

[199] Ndung'u, P. (2019). Communication skills and their impact on arbitration outcomes: Evidence from Kenyan construction projects. *Construction and Arbitration Studies*, 4(1), 33-48.

[200]Moses, M. L. (2017). *The Principles and Practice of International Commercial Arbitration*. Cambridge University Press. (Covers the experience required for conducting arbitration proceedings.)

Experience in arbitration is also crucial[201]. The arbitrator should have substantial experience conducting arbitration proceedings, managing processes, handling procedural issues, and drafting well-reasoned awards. Familiarity with institutional rules, such as those of the Nairobi Centre for International Arbitration (NCIA), is beneficial if the arbitration is administered by such an institution[202].

Availability and commitment are necessary to ensure the arbitration proceeds without unnecessary delays. The arbitrator should be able to devote sufficient time and attention to the dispute and manage the process efficiently[203].

Interpersonal and communication skills play a vital role in the arbitration process. The arbitrator should be adept at clearly articulating decisions, engaging with parties, and managing hearings. Good interpersonal skills are also important for handling the dynamics between parties and maintaining a professional and respectful environment[204].

Language proficiency is another consideration. The arbitrator should be proficient in the language used in the proceedings, typically English in Kenya,

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[201] Njuguna, J. (2021). Cost management in arbitration: Balancing quality and affordability in Kenyan construction disputes. *Journal of Financial Management in Construction*, 8(2), 122-138.

[202] Born, G. B. (2014). *International Commercial Arbitration*. Kluwer Law International. (Discusses the importance of arbitrator availability and commitment to the process.)

[203] Greenberg, S., Kee, C., & Weeramantry, J. (2011). *International Commercial Arbitration: An Asia-Pacific Perspective*. Cambridge University Press. (Discusses the role of communication skills in arbitration.)

[204] Matanda, P. (2020). *Language Considerations in East African Arbitration*. East African Journal of Law. (Discusses language proficiency in arbitration within the East African context.)

but familiarity with other languages, such as Chinese or Swahili, might be advantageous if the parties have different native languages[205].

Finally, cost considerations are important. The arbitrator's fees should be reasonable and reflect their experience and the complexity of the dispute. Effective cost management by the arbitrator can help avoid unnecessary expenses[206].

By carefully evaluating these criteria, parties involved in a construction dispute in Kenya can select an arbitrator who is well-suited to resolve their dispute fairly and efficiently.

Local Arbitrators vs International Arbitrators

In arbitration, the decision between choosing local or international arbitrators can profoundly affect the proceedings, particularly in cross-border disputes such as those involving Chinese contractors in the Kenyan construction industry. Each type of arbitrator offers distinct advantages and challenges.

Local arbitrators are typically well-versed in Kenyan law, including the Arbitration Act of 1995 and other relevant regulations, which is crucial for ensuring compliance with local legal requirements[207]. They also possess deep knowledge of the Kenyan construction industry, encompassing local practices, standards, and regulatory frameworks, which is advantageous in resolving disputes tied to local industry norms[208]. Additionally, local arbitrators are more attuned to Kenya's cultural and social context, aiding in the interpretation of the

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[205]Smith, R., & Martinez, S. (2015). *Cost Management in Arbitration: Best Practices*. Journal of International Arbitration, 32(3), 235-256. (Discusses the importance of cost management in arbitration.)

[206]CIArb (2017). *Guidelines on Fees in Arbitration*. (Outlines guidelines for arbitrator fees and cost considerations.)

[207] Akinyemi, B. O., & Abiola, O. (2020). Arbitration in Nigeria: The impact of local law and practice. *Journal of International Arbitration*, 37(3), 379-400.

[208] Behn, A., & Rahman, F. (2021). Cultural aspects of international arbitration: Navigating the crossroads. *International Arbitration Law Review*, 24(4), 115-130.

parties' behavior and expectations[209]. Their proficiency in local languages and dialects can be beneficial when dealing with documents or testimonies in these languages[210]. Furthermore, engaging local arbitrators can be more cost-effective, as it eliminates expenses related to travel, accommodation, and international fees[211]. Their accessibility also often results in quicker scheduling of hearings and meetings[212]. Local arbitrators have better access to local resources, including experts and witnesses, and benefit from established relationships with local institutions, such as courts and arbitration centers, facilitating smoother proceedings[213].

On the other hand, international arbitrators bring a global perspective, which is particularly valuable in cases involving international contracts or parties from different jurisdictions[214]. They are generally experienced in handling cross-border disputes and are familiar with international arbitration rules and practices[215]. Their perceived neutrality can be advantageous, especially in disputes involving foreign parties who might be concerned about potential bias from a local tribunal[216]. International arbitrators are skilled in interpreting and applying laws from multiple jurisdictions, which is beneficial in complex cases

[209] Brown, D. J., & Rouse, R. A. (2019). The role of expert witnesses in construction arbitration. *Construction Law Journal*, 35(2), 76-89.
[210] Chern, J. Y., & Mardini, A. (2018). Local versus international arbitrators: A comparative analysis. *International Dispute Resolution*, 10(1), 45-63.
[211] Cohen, L. S. (2020). An overview of the Arbitration Act 1995: A Kenyan perspective. *East African Law Journal*, 4(1), 23-40.
[212] Fawcett, J. J., & Torremans, P. (2018). The effectiveness of international arbitration: Trends and challenges. *Journal of Dispute Resolution*, 2018(2), 105-127.
[213] González, M. (2020). The rise of arbitration in Africa: Opportunities and challenges. *African Journal of International and Comparative Law*, 28(3), 371-387.
[214] Hansard, J., & Roberts, A. (2019). Arbitration in construction disputes: A global perspective. *International Journal of Construction Management*, 19(4), 346-358.
[215] Hosseini, M. R., & Ebrahimi, S. (2021). The impact of cultural differences on arbitration outcomes. *International Arbitration Review*, 10(2), 87-102.
[216] Kiarie, J. M. (2020). The enforcement of arbitral awards in Kenya: Challenges and prospects. *Nairobi Law Journal*, 12(1), 56-73.

that span various legal systems[217]. They also manage cultural differences effectively, helping bridge gaps between parties from different countries[218]. Arbitral awards rendered by international arbitrators may carry more weight and be more easily enforceable in foreign jurisdictions due to their global recognition[219]. Their extensive global networks can be useful for gathering evidence, expert testimony, or accessing international resources[220]. However, hiring international arbitrators can be more expensive due to additional costs related to travel, accommodation, and potentially higher fees[221]. The complexity of coordinating across different time zones, languages, and legal systems can also add to the process's logistical challenges[222].

When deciding between local and international arbitrators, several factors should be considered. The nature of the dispute plays a significant role; disputes primarily governed by Kenyan law or involving local issues may be better suited for local arbitrators, while disputes with substantial international elements might benefit from the expertise of international arbitrators. Concerns about perceived bias can be addressed by opting for international arbitrators to ensure neutrality[223]. Budget considerations also come into play, as local arbitrators may offer sufficient expertise at a lower cost compared to their

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[217] Kilonzo, M., & Oketch, A. (2021). Local vs. international arbitrators in the construction industry: A Kenyan perspective. *Construction Dispute Resolution Review*, 16(3), 215-229.
[218] Kohn, J. (2019). The role of language in arbitration: Challenges and solutions. *International Arbitration Quarterly*, 5(1), 34-50.
[219] Lee, Y. J. (2020). Hybrid arbitration: Benefits and drawbacks. *Dispute Resolution International*, 14(2), 25-42.
[220] Mburu, N. (2021). Understanding the Arbitration Act in Kenya: Implications for practitioners. *Kenya Law Review*, 13(2), 141-157.
[221] Melaku, G., & Bimrew, T. (2020). The advantages of local arbitrators in African construction disputes. *African Journal of Arbitration*, 2(1), 1-18.
[222] Ndung'u, M. (2019). Cultural sensitivity in arbitration: Bridging the divide. *East African Journal of Business and Law*, 2(1), 45-62.
[223] Omondi, J. (2020). The influence of local customs on arbitration outcomes in Kenya. *Kenya Law Journal*, 12(3), 75-90.

international counterparts[224]. Additionally, if the arbitral award needs to be enforced across multiple jurisdictions, an internationally recognized arbitrator might facilitate smoother enforcement[225].

In some cases, parties may choose a hybrid approach, employing a mixed arbitration panel that includes both local and international arbitrators[226]. This method combines the advantages of local knowledge with international expertise, providing a balanced and well-rounded tribunal[227]. Overall, selecting between local and international arbitrators requires careful evaluation of the dispute's specific circumstances, including legal, cultural, financial, and practical considerations, as the choice can significantly impact the fairness, efficiency, and effectiveness of the arbitration process[228].

Conclusion

In conclusion, arbitration has become an increasingly vital mechanism for resolving disputes within the Kenyan construction industry[229]. The process, supported by well-established institutions like the Nairobi Centre for International Arbitration (NCIA), the Chartered Institute of Arbitrators (CIArb), and the Kenyan Judiciary, provides an effective alternative to traditional

[224] Roberts, L. (2018). The significance of local knowledge in construction arbitration. *International Journal of Law and Construction*, 11(4), 324-337.

[225] Thuo, J. (2021). Navigating the complexities of international arbitration in Africa. *Journal of African Law*, 65(2), 189-203.

[226] Van der Merwe, M., & Moeketsi, P. (2020). Arbitration and the construction industry: An African perspective. *Construction Management and Economics*, 38(5), 467-483.

[227] Wamathai, G. (2019). The future of arbitration in Kenya: Trends and prospects. *Kenya Journal of International Law*, 5(1), 101-117.

[228] Zhang, L., & Liu, Y. (2021). The impact of international arbitration on local construction practices: A case study from Kenya. *Journal of International Construction Law*, 6(2), 202-218.

[229] Arbitration Act, No. 4 of 1995. (1995). Kenya Law. Retrieved from https://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ArbitrationActNo4of1995.pdf

litigation[230]. These institutions ensure that arbitration proceedings are conducted efficiently, with adherence to international standards, thereby bolstering Kenya's reputation as a hub for arbitration in Africa[231].

The importance of incorporating clear and well-drafted arbitration clauses in construction contracts cannot be overstated, as they lay the foundation for a smooth dispute resolution process[232]. The Arbitration Act of 1995, along with Kenya's commitment to international conventions like the New York Convention, ensures that arbitration awards are recognized and enforceable both locally and internationally.

Furthermore, the choice between local and international arbitrators, guided by the criteria discussed, plays a crucial role in the outcome of arbitration[233]. With the Kenyan courts playing a supportive role in arbitration, particularly in the enforcement of awards, the arbitration process is poised to continue growing as the preferred method of dispute resolution in Kenya's construction industry[234].

This paper has provided an in-depth overview of the arbitration landscape in Kenya, highlighting key institutions, legal frameworks, and practical considerations for contractors.

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[230] Nairobi Centre for International Arbitration (NCIA). (2021). Annual Report. Retrieved from https://www.ncia.or.ke/publications/annual-report

[231] Chartered Institute of Arbitrators (CIArb). (2018). CIArb Kenya Branch: A guide to arbitration. Retrieved from https://ciarbkenya.org/

[232] Waweru, W. (2019). The role of the judiciary in the promotion of arbitration in Kenya. *East African Law Journal*, 10(2), 45-61.

[233] Njuguna, C. (2020). Contractual dispute resolution in the Kenyan construction sector: Challenges and opportunities. *Journal of Construction Management*, 12(3), 123-135.

[234] Omanga, J. (2021). International arbitration in Africa: The Kenyan perspective. *African Journal of International Arbitration*, 2(1), 34-50.

Bolstering the Credibility of Arbitration: Addressing Conflict of Interest and Ensuring Impartiality

By: Murithi Antony*

Abstract
This article examines the ethical considerations surrounding conflicts of interest and the promotion of impartiality in arbitration proceedings. It explores the nature of conflicts of interest and the framework provided by the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration. Through the lens of landmark cases including ***Halliburton Co v Chubb Bermuda Insurance Ltd*** *the article highlights the critical importance of transparency and the duty of arbitrators to disclose potential conflicts. It further discusses mechanisms to ensure impartiality including disclosure and challenge procedures institutional oversight and the role of ethical guidelines and continuous training. The argument put forth is that by adhering to these robust standards and fostering a culture of ethical vigilance, the arbitration community can maintain trust in arbitral proceedings and uphold its integrity as a dispute resolution mechanism.*

1. Introduction

Arbitration has emerged as a prominent method for resolving disputes, particularly in international commercial transactions.[1] Arbitration as an Alternative form of Dispute Resolution (ADR) is favored for its flexibility, confidentiality and efficiency.[2] The ability of arbitration to counter systemic challenges faced in traditional litigation have led to its widespread adoption across various sectors including construction, finance, corporate sector,

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[1] Muigua. K., *'Settling Disputes Through Arbitration in Kenya'* Greenwood Publishers Limited, 4th Edition, 2022, Pg 1.
[2] *Ibid.*

international trade, among others.[3] However, the integrity of arbitration hinges on the impartiality and independence of arbitrators, which is critical in ensuring that parties to arbitral proceedings have faith in the process and its outcomes.[4] The principles of impartiality and independence are not mere formalities but the foundation upon which the legitimacy of the arbitration process stands.[5] Indisputably, lack of impartiality and confidentiality in arbitral proceedings undermine the party's confidence in the award of the tribunal.[6] The growing complexity of commercial transactions and the globalization of trade have intensified scrutiny over the ethical conduct of arbitrators.[7] It is upon this contextual background that this article examines the ethical considerations surrounding conflicts of interest in arbitral proceedings and explores measures to promote impartiality.

The discussion begins by exploring the nature and identification of conflicts of interest in arbitration. It then delves into case law both in the UK and in Kenya which provides critical insights into the judiciary's perspective on arbitrator bias and disclosure. The article further discusses various mechanisms to promote impartiality including disclosure requirements, challenge procedures institutional oversight and ethical guidelines and training.

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[3] Muigua, K., *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises,* available at <http://kmco.co.ke/wp-content/uploads/2018/08/ Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf>

[4] J.C. Fernández Rozas, 'Clearer Ethics Guidelines and Comparative Standards for Arbitrators' in M.A. Fernández-Ballesteros and D. Arias (eds), Liber Amicorum Bernardo Cremades (2010) 414.

[5] Kariuki, M. (2016). Constitutional supremacy over arbitration in Kenya.

[6] Ndirangu, R. N. (2014). *Influence of arbitration on dispute resolution in the construction industry: a case of Nairobi County, Kenya* (Doctoral dissertation, University of Nairobi).

[7] *See,* Elisa, Nufaris. "The Resolution of International Trade Disputes through Arbitration." *Britain International of Humanities and Social Sciences (BIoHS) Journal* 2.1 (2020): 296-301.

2. Conflicts of Interest in Arbitration

Simply defined, conflict of interest in arbitration refer to situations where an arbitrator's personal or professional relationships could reasonably be perceived to affect their impartiality in determining the suit.[8] Such conflicts can arise through various ways including *inter alia;* prior relationships with either of the disputing parties', financial interests in the outcome of the dispute or concurrent appointments in related arbitrations.[9] The basis of any arbitral proceeding is the parties' trust in the arbitrator's independence and neutrality, without which the legitimacy of the arbitral award is undermined.[10]

Arbitrators are typically required to disclose any potential conflicts as soon as they are identified, allowing parties to raise objections before proceedings advance.[11] This transparency helps mitigate the risk of bias and reinforces the confidence that arbitration will be conducted fairly. Notably, arbitral institutions often have strict guidelines and codes of conduct to address conflicts of interest, ensuring that arbitrators adhere to high ethical standards throughout the process.[12]

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[8] Lal, Hamish, Brendan Casey, and Lea Defranchi. "Rethinking Issue Conflicts in International Commercial Arbitration." *Disp. Resol. Int'l* 14 (2020): 3.

[9] Mugo, P. (2021). *The Influence of Conflict Resolution Mechanism in the Natural Resource Management in East Africa Region; a Case Study of Mwea Settlement Scheme in Kenya* (Doctoral dissertation, University of Nairobi).

[10] Lal, Hamish, Brendan Casey, and Lea Defranchi. "Rethinking Issue Conflicts in International Commercial Arbitration." *Disp. Resol. Int'l* 14 (2020): 3.

[11] Muigua, K., *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises,* available at <http://kmco.co.ke/wp-content/uploads/2018/08/ Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf.>

[12] Bello, A. T., *'Arbitration as An Alternative to Litigation Malady: The Frontiers of How Arbitrators Saves Time'* Arabian Journal of Business and Management Review (Nigerian Chapter) Vol. 2, No. 8, 2014.

The management of conflicts of interest extends beyond initial disclosures and requires ongoing vigilance throughout the arbitration process.[13] Changes in an arbitrator's circumstances, such as new relationships or financial interests that could influence their impartiality, must be promptly reported.[14] Arbitration panels should be equipped to handle such updates through established procedures, ensuring that any emerging issues are addressed promptly.[15] By maintaining rigorous conflict-of-interest protocols, arbitration aims to safeguard the fairness of the proceedings and uphold the confidence of all parties involved in the dispute resolution process.[16]

3. Identifying Conflicts of Interest

The task of identifying conflicts of interest is a complex one that involves a nuanced understanding of relationships and their potential impact on impartiality.[17] The IBA Guidelines on Conflicts of Interest in International Arbitration provide a structured approach to this challenge.[18]

The guidelines provide a three-tire approach in classifying various aspects of conflict of interests, which are classified as red list, orange list and green list.[19] To start with, the **Red List** highlights serious conflicts that either disqualify an

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[13] Muigua, K., '*Alternative Dispute Resolution; Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya,'* 2013, Vol. 4, Glenwood Publishers.

[14] Fung, Jorge López. "Is the problem the lack of solution or that the arbitrators are reluctant to apply it? Towards a correct use of document production in international commercial arbitration." *Iurgium [previously Spain Arbitration Review]* 2021.41 (2021).

[15] *Ibid.*

[16] *Ibid.*

[17] Trusz, Jennifer A. "Full Disclosure: Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration." *Geo. LJ* 101 (2012): 1649.

[18] Marrow, Paul Bennett, Mansi Karol, and Steven Kuyan. "Artificial Intelligence and Arbitration: The Computer as an Arbitrator—Are We There Yet?." (2020).

[19] IBA Guidelines on Conflicts of Interest in International Arbitration (2024), available at < https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024> accessed on 19th July 2024.

arbitrator outright or require explicit waiver from the parties.[20] This may include situations where the arbitrator has a significant financial interest in the outcome of the case or has served as legal counsel for one of the parties in the past three years. The list is, however, inexhaustible. These circumstances pose a high risk to the perceived impartiality of the arbitrator and therefore warrant strict scrutiny.[21]

Secondly, the **Orange List** addresses fewer clear-cut situations that require disclosure but do not automatically disqualify the arbitrator.[22] These might include instances where the arbitrator has a professional relationship with one of the parties' counsel or where they have been appointed in multiple arbitrations involving the same parties.[23] While these scenarios do not inherently compromise impartiality, they necessitate transparency and allow parties to make informed decisions about whether to proceed with the arbitrator.[24] This middle ground fosters trust while allowing flexibility in the arbitration process.

The **Green List**, on the other hand, includes circumstances deemed not to pose any conflict of interest.[25] This category covers trivial relationships or past engagements that are unlikely to affect the arbitrator's impartiality. By explicitly identifying these scenarios the guidelines help prevent unnecessary challenges

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[20] *Ibid.*
[21] *Ibid.*
[22] IBA Guidelines on Conflicts of Interest in International Arbitration (2024), available at <*https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024*> accessed on 19th July 2024.
[23] *Ibid.*
[24] *Ibid.*
[25] IBA Guidelines on Conflicts of Interest in International Arbitration (2024), available at < *https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024*> accessed on 19th July 2024.

and promote efficient arbitration proceedings.[26] However, arbitrators should remain mindful that even Green List situations can evolve necessitating periodic reassessment of their circumstances to maintain the highest standards of impartiality.[27]

Importantly, the guidelines clearly state that disclosure does not necessarily indicate a conflict of interest, nor should it automatically lead to the disqualification of the arbitrator or create an assumption of such.[28] The intent behind disclosure is to inform the parties of a situation that they may want to investigate further.[29] This allows them to assess, from the perspective of a reasonable third party aware of all relevant facts and circumstances, whether there are legitimate concerns regarding the arbitrator's impartiality or independence. If it is determined that no justifiable doubts exist, the arbitrator may proceed.[30]

4. Case Law and Best Practices

4.1 The UK: Halliburton Co v Chubb Bermuda Insurance Ltd.

In **Halliburton Co v Chubb Bermuda Insurance Ltd,** the UK Supreme Court addressed issues of arbitrator bias and disclosure providing a landmark decision on the duties of arbitrators. **[31]** The Court established that an arbitrator has a duty of disclosure, and that breach of this duty could be evidence that he or she was not acting fairly and impartially, justifying removal under the

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[26] IBA Guidelines on Conflicts of Interest in International Arbitration (2024), available at < https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024> accessed on 19th July 2024.
[27] *Ibid.*
[28] IBA Guidelines on Conflicts of Interest in International Arbitration (2024), available at < https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024> accessed on 19th July 2024.
[29] *Ibid.*
[30] *Ibid.*
[31] Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48.

English Arbitration Act 1996.[32] The recognition of a legal duty of disclosure has been welcomed by arbitral institutions and organisations which made submissions to the Supreme Court in favor of it.[33]

The case arose from disputes related to insurance claims by Halliburton against its insurer Chubb, following the Deepwater Horizon oil spill.[34] Halliburton challenged the appointment of an arbitrator, Kenneth Rokinson QC, who had accepted multiple appointments in related arbitrations without disclosing them.[35] In emphasizing the importance of transparency and the duty to disclose circumstances that might give rise to justifiable doubts about an arbitrator's impartiality, the Court held that an arbitrator's failure to disclose appointments in multiple related arbitrations could lead to their removal even if no actual bias was demonstrated.[36]

The judgment also clarified that the mere fact of multiple appointments does not inherently indicate bias but the failure to disclose such appointments is a serious matter that undermines trust in the arbitral process, hence showing the need for balance between procedural fairness and practical realities in commercial arbitrations.[37]

In their decision, the learned judges consistently stressed the importance of impartiality. For instance, Lord Hodge began his judgment by stating, **'[i]t is axiomatic that a judge or an arbitrator must be impartial,'** highlighting it as a

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[32] Ibid.
[33] See, The IBA, 'Halliburton Co v Chubb Bermuda Insurance Ltd: Does English law offer sufficient protection against arbitrator bias?" Available at < https://www.ibanet.org/article/1aa974da-932c-4e3e-a1bb-34f22357e6ec> accessed on 19th July 2024.
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*

'cardinal duty' and ***'core principle.'***[38] Lady Arden described it as a ***'key principle of our arbitration law'*** and emphasized that English law is **'rigorous in its approach to arbitrator bias and conflicts of interest.'**[39]

Notably, however, the English law has historically adopted a narrow perspective on the issue of unconscious bias. In ***Locabail (UK) Ltd v Bayfield Properties***, the Court of Appeal stated, **'the law does not countenance the questioning of a judge about extraneous influences affecting his [or her] mind.'**[40] This same issue arose in Halliburton's appeal, where they argued that the potential for unconscious bias should be considered when assessing whether the tribunal was biased. Although the Court of Appeal acknowledged that a fair-minded and informed observer might consider the risk of unconscious bias, it downplayed this possibility. Citing Dyson LJ's remarks in **AMEC Capital Projects**, the Court noted that 'arbitrators are assumed to be trustworthy and to understand that they should approach every case with an open mind.'[41] The Court also deemed it improbable that Rokinson was unconsciously biased, given his reputation as a **'well-known and highly respected international arbitrator with very extensive experience.'**[42]

It was the court's opinion that **unconscious bias** could be included in the **objective assessment** of impartiality and that undisclosed overlapping references might theoretically result in a finding of bias. However, the Supreme Court also recognized the challenge of proving unconscious bias where it was stated thus.

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[38] [2020] UKSC 48, at paras 1, 49, 151.
[39] [2020] UKSC 48, at para 163.
[40] *Locabail v Bayfield Properties* [2000] QB 451, at 471.
[41] *Halliburton Company v Chubb Bermuda Insurance Ltd* [2017] EWHC 137 (Comm), at para 51.
[42] *Ibid,* at para 98.

> ***'[t]he possibility of unconscious bias on the part of the decision-maker is known, but its occurrence in a particular case is not. The allegation, which is advanced in this case, of apparent unconscious bias is difficult to establish and to refute.'***[43]

The court further warned;

> ***'we are [not] required to "make windows into men's souls" in search of an animus against a party or any other actual bias, whether conscious or unconscious… we are only concerned with how things appear objectively.'***[44]

The implications of the **Halliburton** decision are far-reaching. It highlights the judiciary's active role in reinforcing **ethical standards in arbitration** and sets a precedent for future cases involving arbitrator disclosure and bias. The judgment also serves as a reminder to arbitrators of the importance of continuous disclosure and the potential consequences of the failure to do so. For parties involved in arbitration the decision provides reassurance that the courts will uphold rigorous standards to ensure impartial and fair proceedings.

4.2 The Kenyan Courts' Approach to Arbitrator Bias and Impartiality

Kenyan courts have addressed the issue of arbitrator impartiality in several cases, demonstrating a consistent stance on the importance of maintaining arbitral neutrality. Although their approach differs from that observed in the Halliburton case, they have firmly upheld the principle of impartiality in arbitration, though cautiously, so as not to entertain frivolous claims that could obstruct the administration of justice. In the case of ***Mumias Sugar Company Limited v Mumias Outgrowers Co. (1998) Limited [2012] eKLR,*** the learned

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[43] [2020] UKSC 48, at para 70.
[44] [2020] UKSC 48, at para 52.

judge considered the principles as regards an application made on account of allegations of bias and expressed himself thus;

> *'While I appreciate the substratum or the persuasive intent of these cases, I must distinguish the same from what is commonly called 'judicial bias'.* ***A Judge or an Arbitrator is not expected to demonstrate at all times that he is not biased. The judicial function by its very nature allows and intends an element of elementary bias which enables a judicial officer to give direction to his thoughts.*** *This elementary bias is controlled by the Judge throughout the proceedings. It allows the Judge to prod into the issues before the court in order to prevent any miscarriage of justice. It allows the Judge to comment on the matters before him and give particular directions in the interest of justice.* ***This kind of bias does not go into the decision of the Judge.'***[45]

The learned judge was keen to note that when parties to arbitral proceedings have deep seated issues amongst themselves, they cannot be allowed to drag the tribunal in their issues as an escape goat, where he *commented as follows;*

> *'In relation to the matter before the court I am not satisfied that bias has been proved. What is clear to me is that* ***the parties themselves have deep seated prejudices against each other and have taken and entrenched certain positions and beliefs****. The applicant now, in my view,* ***intends to make the sole Arbitrator part of those prejudices, systems and beliefs.*** *To expect the sole Arbitrator not to make passing comments on some rather obvious aspects of the matter before him is to gag the Arbitrator. A gagged Judge or Arbitrator cannot perform his duties in the way that he should.*[46]

This was in recognition that accusing a tribunal of impartiality is not a matter to be taken easily, as it forms a ground for the disqualification of the arbitrator hence involves a direct attack to the person and character of the tribunal. In in

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[45] *Mumias Sugar Company Limited v Mumias Outgrowers Co. (1998) Limited [2012] eKLR.*
[46] *Ibid.*

Alliance Media Kenya Limited V Monier 2000 Limited & another [2007] eKLR, Warsame J, (as he then was) noted as follows:

> ***"… no doubt disqualification is a serious matter, which must be taken seriously****. The seriousness of seeking disqualification is a true reflection or testimony that one party either by design, default and/or genuinely has no faith in the determination of his case by a particular judicial officer…. In my understanding the issue of disqualification is a very intricate and delicate matter. It is intricate because* ***the attack is made against a person who is supposed to be the pillar and fountain of justice****. In my view justice is deeply rooted in the public having confidence and trust in the determination of disputes before the court. It is of paramount importance to ensure, that the confidence of the public is not eroded by the refusal of judges to disqualify themselves when an application has been made"*[47]

Impartiality, therefore, stands as a cornerstone of the arbitration process, and failure to maintain it can constitute valid grounds for challenging the tribunal or its award. This necessitates that arbitrators have a profound grasp of their mandate, the established principles, and guidelines that govern impartiality. Arbitrators must not only be aware of these standards but also diligently apply them to ensure fairness and objectivity throughout the arbitration proceedings, so as to not only preserve the integrity of the arbitration process but also uphold the trust of all parties involved.

5. Promoting Impartiality: Building The Credibility of Arbitration as a Dispute Resolution Mechanism

Ensuring impartiality of the arbitral tribunal is important for enhancing the credibility of arbitration as a dispute resolution mechanism. Various mechanisms and best practices have been developed to safeguard against bias and maintain the integrity of arbitral proceedings. These measures are designed

[47] Alliance Media Kenya Limited V Monier 2000 Limited & another [2007] eKLR.

to address potential conflicts of interest proactively and to provide clear procedures for addressing any issues that arise.

5.1. Disclosure and Challenge Procedures

As a legal principle, the tribunal is mandated to disclose any facts or circumstances that might reasonably call into question their impartiality. The UNCITRAL Model Law on International Commercial Arbitration mandates such disclosure from the time of their appointment and throughout the arbitral proceedings.[48] This requirement ensures that parties are fully informed of any potential conflicts and can make decisions accordingly.[49] The continuous nature of this duty is crucial given that new conflicts can emerge as the arbitration progresses.[50]

If a party becomes aware of a potential conflict they may challenge the arbitrator's appointment.[51] The challenge procedure serves as a critical check to maintain the integrity of the tribunal.[52] Challenges must be made within a reasonable period after the party becomes aware of the grounds for the challenge. This time constraint prevents tactical delays and ensures that any issues are addressed promptly.[53] The arbitral institution or the courts may

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[48] UNCITRAL Model Law on International Commercial Arbitration, available at < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> accessed on 18th July 2024.
[49] Sorieul, Renaud. "The influence of the New York convention on the UNCITRAL model law on international commercial arbitration." *Disp. Resol. Int'l* 2 (2008): 27.
[50] Bantekas, I., Ortolani, P., Ali, S., Gomez, M. A., & Polkinghorne, M. (2020). *UNCITRAL model law on international commercial arbitration: A commentary*. Cambridge University Press.
[51] Muigua. K., *'Settling Disputes Through Arbitration in Kenya'* Greenwood Publishers Limited, 4th Edition, 2022.
[52] *Ibid.*
[53] M Muriithi, P. (2021). The Interface between Access to Justice and Arbitration in Kenya. *Alternative Dispute Resolution Journal*, *9*(3).

adjudicate the challenge depending on the applicable rules ensuring that there is an impartial review of the claim.[54]

The effectiveness of disclosure and challenge procedures depends on the arbitrator's adherence to their ethical obligations and the vigilance of the parties. Arbitrators must be forthcoming with information and parties must be proactive in raising concerns.[55] Together these measures create a robust framework for addressing potential conflicts and maintaining trust in the arbitral process.[56] However, the system also relies on the good faith of all participants highlighting the need for a strong ethical culture in arbitration.

5.2. Institutional Oversight

Arbitral institutions play a pivotal role in overseeing the appointment process and addressing conflicts of interest.[57] Institutions like the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) have established rigorous standards for arbitrator independence.[58] These institutions provide detailed rules and guidelines to ensure that arbitrators are impartial and that any potential conflicts are managed effectively.[59] Institutional oversight extends to vetting arbitrator appointments, managing disclosures and

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[54] Bello, A. T., '*Arbitration as An Alternative to Litigation Malady: The Frontiers of How Arbitrators Saves Time*' Arabian Journal of Business and Management Review (Nigerian Chapter) Vol. 2, No. 8, 2014.
[55] Abwunza, A. A. (2021). *Development of a Framework for Effective Construction Arbitration: A Comparative Case Study of Construction Disputes in Kenya* (Doctoral dissertation, JKUAT-COETEC).
[56] *Ibid.*
[57] Fernández-Armesto, Juan. "The governance of arbitral institutions: how to improve standards through accreditation." *Iurgium [previously Spain Arbitration Review]* 2022.44 (2022).
[58] Petrescu, Raluca Maria, and Alexandru Stan. "The 2021 ICC Arbitration Rules-New Commitments to Achieving Better Arbitration." *Rom. Arb. J.* 15 (2021): 15.
[59] *Ibid.*

handling challenges thereby providing an additional layer of scrutiny and assurance for the parties.[60]

The ICC for instance has a dedicated scrutiny process for reviewing arbitral awards which includes an assessment of the arbitrator's conduct and any potential conflicts of interest.[61] This scrutiny process is designed to ensure that the arbitral award is free from any bias or impropriety thereby enhancing the credibility of the arbitration process.[62] Similarly, the LCIA provides a comprehensive framework for addressing conflicts including detailed guidelines on disclosure and procedures for challenging arbitrators.[63] These institutional mechanisms are crucial for maintaining high ethical standards in arbitration.[64]

Institutional oversight also includes training and accreditation programs for arbitrators.[65] These programs ensure that arbitrators are well-versed in ethical standards and best practices.[66] Institutions often require arbitrators to undergo continuous professional development including training on conflict management and disclosure requirements.[67] By investing in the education and training of arbitrators' institutions help to promote a culture of integrity and impartiality within the arbitration community.[68]

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[60] *Ibid.*
[61] Sodipo, Bankole. "Dealing with Arbitrator Challenge, Nondisclosure and Allegations of Bias: A Review of the Lagos Court Ruling Setting Aside the ICC Global Gas V. Shell Award." *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 86.4 (2020).
[62] *Ibid.*
[63] See, LCIA Arbitration Rules (2020).
[64] *Ibid.*
[65] Muigua. K., *'Settling Disputes Through Arbitration in Kenya'* Greenwood Publishers Limited, 4th Edition, 2022.
[66] *Ibid.*
[67] *See,* for instance, the Chartered Institute of Arbitrators.
[68] Muigua. K., *'Settling Disputes Through Arbitration in Kenya'* Greenwood Publishers Limited, 4th Edition, 2022.

5.3. Ethical Guidelines and Training

Ethical guidelines and continuous training are essential for arbitrators to stay attuned to evolving standards of impartiality.[69] The Chartered Institute of Arbitrators (CIArb) and other professional bodies offer extensive training programs and ethical guidelines to help arbitrators navigate complex ethical dilemmas.[70] These guidelines provide practical advice on issues such as conflicts of interest confidentiality and professional conduct thereby equipping arbitrators with the tools they need to uphold the highest ethical standards.[71]

The CIArb's Code of Professional and Ethical Conduct for example outlines the core principles of integrity, fairness and independence.[72] It provides detailed guidance on how arbitrators should handle conflicts of interest including the importance of disclosure and the need to avoid situations that could compromise their impartiality.[73] By adhering to these guidelines arbitrators can ensure that they maintain the trust and confidence of the parties involved in the arbitration.

Continuous training programs are also crucial for keeping arbitrators updated on the latest developments in arbitration law and practice.[74] These programs cover a range of topics including new case law changes in institutional rules and

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[69] Rogers, Catherine A. "The World Is Not Enough*: ethics in arbitration seen through the world of film." *Arbitration International* 37.1 (2021): 397-415.

[70] See, Phillips, Isabel. "Ciarb ADR Competence Frameworks, Competence Statements, and Membership Levels." *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 88.4 (2022).

[71] *Ibid.*

[72] See, 'The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members.' Available at < https://www.ciarb.org/media/nuhbakdz/ciarb-code-of-professional-and-ethical-conduct-for-members.pdf> accessed on 18th July 2024.

[73] *Ibid.*

[74] Abwunza, A. A. (2021). *Development of a Framework for Effective Construction Arbitration: A Comparative Case Study of Construction Disputes in Kenya* (Doctoral dissertation, JKUAT-COETEC).

emerging ethical issues. Regular participation in these programs helps arbitrators stay informed and competent thereby enhancing their ability to manage conflicts of interest effectively. In an ever-changing legal landscape ongoing education is vital for maintaining the integrity and effectiveness of the arbitration process.

6. Conclusion

Ensuring the credibility of arbitration hinges on a firm commitment to impartiality and transparency. Adhering to robust disclosure standards, implementing effective challenge procedures, and fostering a culture of ethical vigilance are essential steps in maintaining trust in the arbitration process. As arbitration continues to develop, it is crucial for all participants including arbitral institutions, practitioners, and stakeholder to uphold the highest ethical standards. By doing so, the arbitration community can reinforce its role as a reliable and fair method for resolving disputes, ultimately enhancing its effectiveness and integrity.

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Assessing The Admissibility of Illegally Obtained Evidence in Arbitration in Kenya: Balancing Procedural Integrity and Fairness

By: David N. Njoroge*

Abstract

This paper examines the admissibility of illegally obtained evidence within the Kenyan arbitration framework, from a critical perspective in relation to procedural integrity and fairness of the outcome. The study explores how Kenyan law addresses evidence obtained in violation of the right to privacy and other fundamental freedoms through an analysis of constitutional and statutory provisions, case law, and comparative jurisprudence from the UK.

The analysis advocates for creating a balance between the competing principles, examining both the possibility of illegally obtained evidence offering value in disclosing relevant facts, and the procedural risks it poses.

Ultimately, the paper makes recommendations that can guide arbitrators in Kenya, advocating for a framework that protects due process and constitutional principles while paving way for fair resolution of disputes as per the parties' autonomy and choice.

1. Introduction

Arbitration has become a preferred method of resolving commercial, contractual and even private disputes due to its confidentiality, efficiency, and procedural flexibility.[1] The Kenya Arbitration Act of 1995 grants an arbitrator wide discretion in the admission of evidence, pursuant to Section 20(3).[2]

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[1] Uwantege, Diane. "Arbitration and other alternative ways of dispute resolution in Rwanda with the special reference to Comparative Law." PhD diss., University of Rwanda, 2016.

[2] The Arbitration Act of 1995

However, a critical and increasingly relevant question is whether this discretion extends to evidence obtained illegally, such as through hacking.[3] Admitting illegally obtained evidence raises fundamental concerns about the balance between fairness in revealing pertinent facts and maintaining procedural integrity, particularly given the privacy rights enshrined in the Kenyan Constitution of 2010.[4]

This struggle to admit illegally obtained evidence into arbitration proceedings also reflects broader legal trends, where courts are increasingly cautious about admissibility into proceedings of evidence obtained through illegal means.[5] This was not the case in the past, however, as demonstrated in the landmark case of *Kuruma, s/o Kaniu vs. The Queen*, where the privy Council ruled that the test to be applied both in civil and in criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue, and if it is, it is admissible, and the court is not concerned with how it was obtained.[6]

This approach was adopted in Kenya, however, it has since evolved under the 2010 Constitution and Article 50 which disallows evidence admission obtained in a way that infringes fundamental rights if such admission would prejudice the fairness of proceedings or otherwise prejudice the course of justice.[7] As the

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[3] Fabien, V., and C. A. S. Attorney-at-law. "Admissibility of unlawfully obtained evidence in international arbitration in Switzerland."

[4] Nyaga, Bernard M., Joy Cheruto Ondego, and Mogesi Joel. "Mediation and Data Protection Law in Kenya: Appraising ADR for Optimal Access to Justice under the DPA 2019." *Kenya School of Law, Forthcoming* (2023).

[5] Meso, Beatrice. "Public Eprocurement in Kenya: a Critical Analysis of the Legal Technological and Governance Challenges." PhD diss., University of NAIROBI, 2010.

[6] Kuruma, s/o Kaniu v R [1955] AC 197

[7] Biomdo, Joseph K. "Judicial Enforcement of The Right To A Fair Trial Without Unreasonable Delay Under Article 50 Of Constitution Of Kenya." PhD diss., University Of Nairobi, 2016. < http://erepository.uonbi.ac.ke/bitstream/handle/11295/97899/Biomdo_Judicial%20Enforcement%20Of%20The%20Right%20To%20A%20Fair%20Trial%20Without%20Un

practice of arbitration expands, the need for clear guidelines on the admissibility of illegally obtained evidence also increases, requiring arbitrators to navigate these issues carefully to uphold both fairness and procedural integrity.[8]

This paper undertakes a close examination of these tensions through analysis of the relevant statutory provisions and case law that guide arbitrators in Kenya. The paper provides insights into balancing privacy protections with the evidentiary value of illegally obtained evidence, suggesting ways to manage these competing interests within the arbitral process.

2. Legal Framework Governing Evidence in Arbitration

In Kenya, the Evidence Act is the primary statute governing admissibility of evidence, even though it does not specifically cover arbitration.[9] Nevertheless, undeniably, arbitrators often resort to the principles enshrined in the Act to guide them making evidentiary decisions.[10]

The Act stipulates that evidence shall be relevant to the facts in issue, pegging admissibility on probative value and not on the mode of acquisition.[11] This reiterates the general rule of evidence, that all evidence that is sufficiently relevant to an issue before the court is admissible and that all that is irrelevant, or insufficiently relevant, should be excluded.[12] This rule, however, does not

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reasonable%20Delay%20Under%20Article%2050%20Of%20Constitution%20Of%20%20Kenya.pdf.>

[8] OLIVEIRA, NICOLE BORBA. "THE ROLE OF INTERNATIONAL ARBITRATION IN RESOLVING CROSS-BORDER SMART CONTRACT DISPUTES: OPPORTUNITIES AND CHALLENGES." (2023).

[9] CAP 80 Laws of Kenya

[10] Lawrance, David M. "Law Of Evidence In Arbitrations." *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 5, no. 2 (1931).

[11] *Ibid* Section (3) (1)

[12] *See*, Cross & Taper, at p. 64. See also *Hollington v F. Hewthorn & Co Ltd* [1943] 2 All ER 35 at 39:

account for the unique challenges posed by illegally obtained evidence, which may be highly relevant yet obtained in violation of privacy rights.[13]

In arbitration, while the Evidence Act does not specifically regulate the admissibility of evidence within arbitral proceedings, the parties involved in the dispute have the discretion to determine whether they wish to be bound by the provisions of the Evidence Act.[14] If they choose to adopt its framework, then the rules regarding evidence set forth in the Act will be applicable to their arbitration process.

The Arbitration Act of Kenya endows arbitrators with broad powers to control procedural aspects of arbitration, including the admission of evidence.[15] Section 20(3) confers discretion on arbitrators to admit, reject, or allow evidence on relevance or materiality; this is wide latitude that gives freedom to the arbitrators to consider each case in its peculiar circumstances.[16] Equally, the Arbitration Act remains silent on admissibility of illegally obtained evidence and grants arbitrators discretion to interpret broader legal principles, including constitutional rights.[17]

Under Section 20(3) of the Arbitration Act, powers conferred upon arbitrators are extensive and not limited by strict guidelines.[18] As such, there are no predefined rules regarding what constitutes inadmissible evidence unless the parties themselves have explicitly established such boundaries.[19]

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[13] O'Malley, Nathan. *Rules of evidence in international arbitration: an annotated guide*. informa law from Routledge, 2019.
[14] CAP 80 Laws of Kenya
[15] *Ibid*
[16] *Ibid* section 19
[17] *ibid*
[18] *Ibid*
[19] *Ibid.*

Because arbitrators are not bound to follow strict rules of evidence as are the judicial courts, they have wide latitude, but at the same time, must also be guided by relevant statutory principles so that their decisions would be valid and the awards, executable.[20]

The burden thus lies upon an arbitrator to weigh the probative value of the illegally obtained evidence against prohibition of its use by statutes or infringement of any rights.[21] It is expected that arbitrators shall exercise such discretion in a manner consonant with the principles of justice and fairness articulated in Kenya's legal philosophy and international best practices.[22]

2.1. Constitutional Right to a Fair Hearing as an Integral Component of Accessing Justice

Fair hearing is an integral component of access to justice. The right to a fair hearing is enshrined in Article 50 of the Constitution of Kenya, and it guarantees every person the right to a fair trial.[23] This includes the presumption of innocence, the right to be informed of the charges against them, and the opportunity to present their case in an impartial forum.[24] This Constitutional right applies not only to criminal cases but also to civil cases, and disputes adjudicated by tribunals, including arbitration proceedings.[25] By ensuring that all individuals have access to a fair hearing, the Kenyan legal system upholds the principles of due process and integrity, thereby fostering public confidence in its ability to deliver fair, just and equitable outcomes across various contexts.

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[20] Busalile JackOuma Mwimali "Conceptualization and Operationalization of the Right to a Fair Trial in Criminal Justice in Kenya" 2013 **Diss University of Birmingham**

[21] Bertrou, Grégoire, and Sergey Alekhin. "The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means." *Les Cahiers de l'Arbitrage* 4 (2018): 11-71.

[22]*Ibid.*

[23] Article 50, Constitution of Kenya 2010.

[24] *Ibid.*

[25] *Ibid.*

Notably, the right to fair trial/hearing is a non-derogable right as stipulated under Article 25 of the Constitution, as was emphasized in the case of *Githiga & 5 others v Kiru Tea Factory Company Ltd.*[26] Similarly, in a concurring opinion, Njoki Ndungu, SCJ in the decision of *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* expounded on the right to fair hearing as follows:

> *" (257)Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that "although the necessity of hearing is well established, its scope and contents remain unsettled."*[27]

The Constitution under Article 50(4) provides that evidence obtained in violation of fundamental rights is excluded if its admission would prejudice a fair trial or otherwise be unfair.[28] This sets a threshold in which procedural fairness and individual rights become the limiting factors to the admissibility of evidence acquired through illegal means.[29] Particularly, this right protects individuals against illegal searches and seizures of personal information and, in

[26] Githiga & 5 others v Kiru Tea Factory Company Ltd (Petition 13 of 2019) [2023] KESC 41 (KLR) (16 June 2023)
[27] SC Petition No 18 of 2014 as consolidated with Petition No 20 of 2014 [2014] eKLR
[28] *Ibid* Article 50 (4)
[29] Constitution Of Kenya Article 31.

turn, provides a critical check against the admission of illegally obtained evidence.[30]

As such, these constitutional provisions places an obligation on arbitrators to not only consider the relevance but also the consequences of admitting evidence obtained in violation of constitutional.[31] For example, in cases where the evidence to be presented is critical and illegally obtained, arbitrators may be pressed in admitting such evidence based on its probative value.[32] But such admission may also run further risk in court, particularly Article 50(4), when such admission can be argued to compromise fairness. Hence, Kenyan arbitrators will have to weigh constitutional restraint against securing the truth while upholding procedural safeguards.[33]

3. Evolving Standards of Admissibility for Illegally Obtained Evidence

Kenyan courts have historically allowed relevant evidence in proceedings regardless of how it was obtained, a stance influenced by the common law principle articulated in *Kuruma, s/o Kaniu v R* [1955] AC 197.[34] However, the 2010 Constitution of Kenya changed this position by introducing Article 50(4), which permits the exclusion of evidence obtained in violation of rights if its admission would compromise a fair trial.[35] In the case of *Douglas Kipchumba Rutto v. Kenya Anti-Corruption Commission & 2 Others*, the High Court held that taped evidence taken without consent infringed the right to privacy and was prejudicial to the accused person.[36] This shows how the judiciary is shifting to protect

[30] *ibid*

[31] Brunet, Edward. "Arbitration and constitutional rights." *NCL Rev.* 71 (1992): 81.

[32] Benedettelli, Massimo V. "Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience." *Arbitration International* 31, no. 4 (2015): 631-659.

[33] Kurkela, Matti S., and Santtu Turunen. *Due process in international commercial arbitration*. Oxford University Press, 2010.

[34] *ibid*

[35] Constitution of Kenya, 2010.

[36] Douglas Kipchumba Rutto v Kenya Anti-Corruption Commission, Attorney General, Peter Gabriel Muteti Mutisya, Thomas Mwiwa, Francis Kipchojo Kidogo, Christine

constitutional rights, especially in areas involving evidence that is obtained illegally.[37] For arbitrators, this judicial perspective suggests that while relevance remains a vital criterion, constitutional provisions around privacy and fairness cannot be bypassed.[38]

In the UK, the admissibility of illegally obtained evidence is governed more flexibly, often considering the probative value and public interest over the method of acquisition. For example, in ***DPP v. Kilbourne [1973] AC 729***[39], the House of Lords held that relevant evidence should be admitted even though it was unlawfully obtained, provided it served a significant purpose in establishing truth. UK courts emphasize the need for truth in appropriate circumstances, suggesting that the potential interest of revealing the truth may outweigh procedural irregularities in particular cases.[40]

Similarly, the House of Lords in the case of ***Fiona Trust & Holding Corporation v. Privalov [2007] UKHL 40***, where the House of Lords supported the decision of tribunals to admit evidence that was relevant in proving material facts, despite concerns over how it had been obtained.[41] Looking into UK practices, Kenyan arbitrators can get international guidance and develop a framework for admitting illegally obtained evidence that respects both relevance and fairness, balancing probative value with privacy protections.[42]

Bahati, Juma Musi, Salesio Kinyua Mugo & Bernard Opiyo (Civil Suit 356 of 2011) [2013] KEHC 5464 (KLR)

[37] *ibid*

[38] Zekos, Georgios I. "Judges and Arbitrators as Law Makers." In *Advanced Artificial Intelligence and Robo-Justice*, pp. 53-87. Cham: Springer International Publishing, 2022.

[39] DPP v Kilbourne [1973] AC 729 (HL).

[40] Barry, B. 1964. The Public Interest (I). *Proceedings of the Aristotelian Society, Supplementary Volumes* 38(1): 1https://doi.org/10.1093/aristoteliansupp/38.1.1

[41] **Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40, [2007] 4 All ER 95**

[42] *ibid*

4. Balancing Fairness and Public Policy in Admitting Illegally Obtained Evidence

It is conventional that illegally obtained evidence presents complex issues relating to fairness and public policy. For instance, admitting such evidence may expose the arbitral process to attack under Article 50(4) of the Constitution of Kenya if it is deemed to compromise fairness, prejudices or violates fundamental constitutional rights of a party to the arbitral proceedings.[43] Nonetheless, and needless to say, illegally obtained evidence can be essential in revealing critical facts, and arbitrators may need to consider whether the public interest in truth justifies limited departures from procedural norms.[44]

To address these convolutions, arbitrators need to adopt a conditional approach to admitting illegally obtained evidence by assessing each piece's necessity, relevance, proportionality, and potential impact on the integrity of the proceedings.[45] This structured analytical framework would resonate with what is practiced within the UK, where courts perform a fine balancing between probative value and procedural improprieties so as to make certain that respect for evidentiary value does not outweigh respect for individual rights and public policy.[46]

5. Recommendations: Managing the Admission of Illegally Obtained Evidence

The peculiar problems that illegally obtained evidence present necessitate that Kenyan arbitral bodies, stakeholders and policy makers develop guidelines that

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[43] *ibid*

[44] See generally Kristin Finklea, The Interplay of Borders, Turf, Cyberspace, and Jurisdiction: Issues Confronting U.S. Law Enforcement, Cong. Rsch. Service (17 January 2013), https://sgp.fas.org/crs/misc/R41927.pdf.

[45] *ibid*

[46] Roberts, Paul, 'The Procedural Framework of Adversarial Jury Trial', *Roberts & Zuckerman's Criminal Evidence*, 3rd edn (Oxford, 2022; online edn, Oxford Academic, 17 Nov. 2022), https://doi.org/10.1093/oso/9780198824480.003.0002, accessed 29 Oct. 2024.

are consistent with constitutional and international best practices, to specify criteria for evaluating illegally obtained evidence, such as relevance, necessity, and proportionality.[47] This would, indisputably, ensure that arbitrators exercise their discretion within a defined legal and policy framework.[48]

Additionally, discretion by an arbitrator should be exercised in a manner consonant with the principles of justice.[49] Basically, arbitrators must uphold and protect legal principles in making their decisions, particularly on matters which can be revisited by courts during appeal.[50] This means that, axiomatically, the arbitrator need to weigh the value of illegally obtained evidence against possible procedural risks, making sure the evidence contributes something to the solution without violation of rights.[51]

Furthermore, there is need for Kenyan arbitral institutions to establish clear pre-arbitration disclosures and confidentiality safeguards to mitigate the risk of relying on illegally obtained evidence.[52] This would include a tiered assessment that requires arbitrators to first evaluate the probative value and relevance of the evidence before considering its legality and potential impact on procedural fairness.[53]

Formalizing this criterion will enhance Kenya's procedural integrity within the arbitration framework, so that evidence admissibility is better aligned with

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[47] *ibid*

[48] See generally Kristin Finklea, The Interplay of Borders, Turf, Cyberspace, and Jurisdiction: Issues Confronting U.S. Law Enforcement, Cong. Rsch. Service (17 January 2013), https://sgp.fas.org/crs/misc/R41927.pdf.

[49] Kenya Shell Ltd v Kobil Petroleum Ltd [2006] eKLR

[50] Carlberg, John M. *Dickens and the legal system*. Northern Illinois University, 2002.

[51] Guillermo García-Perrote, 'Admissibility of "Hacked Evidence" in International Arbitration' (7 July 2021)

[52] Baldwin IV, Charles S. "Protecting confidential and proprietary commercial information in international arbitration." *Tex. Int'l LJ* 31 (1996): 451.

[53] *Ibid.*

constitutional protections without going too far to impede efficiency in dispute resolution.

6. Conclusion

Admissibility of illegally obtained evidence into Kenyan arbitration is a time bomb and presents an acute challenge that calls for a delicate balance between probative relevance and procedural integrity. Kenyan arbitrators should attempt a delicate balance between the competing imperatives of ensuring just results while upholding Constitutional protections around privacy and due process. Needless to say, there is need to formulate a structured approach for arbitrators, guided by relevance, fairness, and proportionality.

By refining their discretion within these parameters, arbitrators can preserve the legitimacy and integrity of the arbitral process, ensuring that justice is achieved without compromising fundamental legal principles. Be that as it may, and in the absence of such policy and legal guidelines, this remains a minefield to arbitrators open to the wide discretion that is susceptible to different approach and handling from case to case.

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See generally Kristin Finklea. *The Interplay of Borders, Turf, Cyberspace, and Jurisdiction: Issues Confronting U.S. Law Enforcement.* Cong. Rsch. Service https://sgp.fas.org/crs/misc/R41927.pdf

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Reconceptualizing the Role of Women Lawyers in Climate Justice

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Abstract

The idea of climate justice seeks to foster the rights of people and communities that are most vulnerable to climate impacts including people living in small island nations and those in developing countries. Effective climate action requires climate justice to be realized. It envisages the participation of people and communities most impacted by climate change including those in developing countries, indigenous communities, women and children as part of the climate solution in order to foster climate justice. This paper critically explores the role of women lawyers in climate justice. The paper argues that women lawyers have a crucial role to play in fostering climate justice. It discusses the concept of climate justice and highlights its core tenets. It further highlights ways through which women lawyers contribute in achieving the ideal of climate justice. The paper further examines the progress made towards embracing the role of women lawyers in climate justice and challenges thereof. It also offers some ideas towards strengthening the role of women lawyers in climate justice.

1.0 Introduction

The impacts of climate change such as intense droughts, water scarcity, severe wild fires, rising sea levels, flooding, melting polar ice, catastrophic storms and declining biodiversity are being witnessed across the world threatening the achievement of Sustainable Development[1]. As a result, climate change has been

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[1] United Nations., 'What is Climate Change?' Available at https://www.un.org/en/climatechange/what-is-climate-change (Accessed on 08/05/2024)

described as the most defining challenge of our time[2]. It is a major global concern that is affecting both developed and developing countries in their efforts towards realization of the Sustainable Development agenda[3]. Climate change is an undesirable phenomenon that affects realization of the Sustainable Development agenda across the world by affecting the sustainability of the planet's ecosystems, the stability of the global economy and the future of humankind[4]. It has been noted that if left unchecked, climate change will undo a lot of the development progress made over the past years and will also provoke mass migrations that will lead to instability and wars[5].

Due to its severe impacts, climate change has risen to the top of the policy agenda, at local, national, and global levels[6]. The United Nations *2030 Agenda for Sustainable Development*[7] acknowledges that climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve Sustainable Development. Sustainable Development Goal 13 urges states to take urgent action to combat climate change and its impacts[8]. In addition, Africa Union's *Agenda 2063*[9] also recognizes climate

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[2] Ibid

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

[4] Climate Change., 'Meaning, Definition, Causes, Examples and Consequences.' Available at https://youmatter.world/en/definition/climate-change-meaning-definition-causes-and-consequences/ (Accessed on 08/05/2024)

[5] United Nations., 'Goal 13: Take Urgent Action to Combat Climate Change and its Impacts.' Available at https://www.un.org/sustainabledevelopment/climate-change/ (Accessed on 08/05/2024)

[6] United Nations Department of Economic and Social Affairs., 'Forum on Climate Change and Science and Technology Innovation.' Available at https://www.un.org/en/desa/forum-climate-changeandscience-and-technology-innovation (Accessed on 08/05/2024)

[7] United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainabl e%20Development%20web.pdf (Accessed on 08/05/2024)

[8] Ibid

[9] Africa Union., 'Agenda 2063: The Africa we Want.' Available at

change as a major challenge for the continent's development. Agenda 2063 seeks to address climate change by fostering environmentally sustainable and climate resilient economies and communities in Africa[10]. Responding to climate change is therefore key in realizing Sustainable Development.

Effective climate action requires climate justice to be realized[11]. It has been observed that some people and communities are more vulnerable to climate impacts including people living in small island nations and those developing countries[12]. In addition, it has been noted that the communities that have contributed the least to climate change are the ones that are the most affected by its impacts[13]. The concept of Climate Justice has thus therefore emerged to deal with the justice concerns brought about by climate change[14]. Therefore, in designing appropriate responses to climate change, it needs to be acknowledged that the people who have contributed least to the changing climate are being affected by it the most, and are likely to be less able to protect themselves from the impacts[15]. Effective climate action therefore envisages the participation of the people and communities most impacted by climate change including developing countries, indigenous communities, women and children as part of the climate solution in order to foster climate justice[16].

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https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed on 08/05/2024)

[10] Ibid

[11] Muigua. K., 'Fostering Climate Justice for Development' Available at https://kmco.co.ke/wp-content/uploads/2023/07/Fostering-Climate-Justice-for-Sustainable-Development.pdf (Accessed on 08/05/2024)

[12] United Nations., 'What is Climate Change?' Op Cit

[13] Sultana. F., 'Critical Climate Justice' Available at https://www.farhanasultana.com/wpcontent/uploads/Sultana-Critical-climate-justice.pdf (Accessed on 08/05/2024)

[14] Muigua. K., 'Fostering Climate Justice for Development' Op Cit

[15] Oxfam., 'Climate Justice.' Available at https://www.oxfam.org.au/what-we-do/climate-justice/ (Accessed on 08/05/2024)

[16] Muigua. K., 'Fostering Climate Justice for Development' Op Cit

This paper critically explores the role of women lawyers in climate justice. The paper argues that women lawyers have a crucial role to play in fostering climate justice. It discusses the concept of climate justice and highlights its core tenets. It further highlights ways through which women lawyers contribute in achieving the ideal of climate justice. The paper further examines the progress made towards embracing the role of women lawyers in climate justice and challenges thereof. It also offers some ideas towards strengthening the role of women lawyers in climate justice.

2.0 Conceptualizing Climate Justice

Climate justice recognizes the disproportionate impacts of climate change on the people and communities least responsible for this global problem[17]. Climate justice seeks solutions that address the root causes of climate change and in doing so, simultaneously address a broad range of social, racial, and environmental injustices[18]. The climate crisis brings enormous injustices since it affects everyone, but not equally[19]. It has been noted that people and communities who have contributed least to climate change are being affected by it the most, and are likely to be less able to protect themselves from its impacts[20]. For example, people and communities in developing nations in places such as Africa, Asia, the Caribbean Islands and the Pacific Islands which due to an unfortunate mixture of economic and geographic vulnerability, continue to shoulder the brunt of the burdens of climate change despite their relative innocence in causing it[21]. These countries are more vulnerable to adverse

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[17] Center for Climate Justice., 'What is Climate Justice?' Available at https://centerclimatejustice.universityofcalifornia.edu/what-is-climate-justice/#:~:text=Climate%20justice%20connects%20the%20climate,least%20responsible%20for%20the%20problem. (Accessed on 08/05/2024)

[18] Ibid

[19] Oxfam., 'Climate Justice.' Op Cit

[20] Ibid

[21] Giles. M., 'The Principles of Climate Justice at CoP27.' Available at https://earth.org/principlesofclimatejustice/#:~:text=That%20response%20should%20be%20based,the% 20consequences%20of%20clim ate%20change (Accessed on 08/05/2024)

impacts of climate change including severe flooding, intense droughts, sea level rise, increasing temperatures and frequency and intensity of tropical cyclones, and storm surges despite their very little contribution to greenhouse gas emissions when compared to countries such as China and large industrialized economies of Europe and North America including the United States of America[22].

Climate justice connects the climate crisis to the social, racial and environmental issues in which it is deeply entangled[23]. This concept recognizes the disproportionate impacts of climate change on low-income communities around the world, the people and places least responsible for the problem[24]. This concept acknowledges that while climate change is global, the poor are disproportionately vulnerable to its effects[25]. This is due to the fact that they lack the resources to afford goods and services they need to buffer themselves and recover from the effects of climate change[26]. Climate justice therefore links human rights and development to achieve a human-centred approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly[27]. It involves understating climate change as an issue that relates to equity, fairness, ethics and human rights and not just an environmental phenomena[28]. This concept provides a framework that focuses on the intersection between climate change and social inequalities[29]. It examines the concepts of equality and human rights

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[22] Ibid
[23] Center for Climate Justice., 'What is Climate Justice?' Op Cit
[24] Ibid
[25] United Nations Environment Programme., 'Responding to Climate Change.' Available at https://www.unep.org/regions/africa/regional-initiatives/responding-climate-change (Accessed on 08/05/2024)
[26] Ibid
[27] Mary Robinson Foundation Climate Justice., 'Principles of Climate Justice.' Available at https://www.mrfcj.org/principles-of-climate-justice/ (Accessed on 08/05/2024)
[28] United Nations Environment Programme., 'Climate Justice.' Available at https://leap.unep.org/knowledge/glossary/climate-justice (Accessed on 08/05/2024)
[29] Ibid

within the lens of climate change[30]. Climate justice focuses on how climate change impacts people differently, unevenly and disproportionately and seeks to address the resultant injustices in fair and equitable ways[31].

According to the United Nations Environment Programme (UNEP), climate justice is underpinned by principles of equity, non-discrimination, equal participation, transparency, fairness, accountability and access to justice[32]. UNEP further notes that climate justice entails issues of equity and equality within a nation, between nations and between generations[33]. These principles of climate justice are foundational building blocks for achieving a just transition out of the climate crisis[34].

Climate justice seeks to achieve various facets of justice including distributive justice, procedural justice, and justice as recognition[35]. Distributive justice involves identifying and acknowledging the disproportionate impacts that climate change is already having and will continue to have on the people, communities and countries that are least responsible for climate change but which bear the full brunt of its devastating impacts[36]; Procedural justice aims to address distributive injustices by tackling climate change through processes that are participatory, accessible, fair and inclusive[37]; while justice as recognition refers to the importance of centring the voices of people who have traditionally been marginalised in climate action as a result of structural inequality[38].

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[30] Sultana. F., 'Critical Climate Justice' Op Cit

[31] Ibid

[32] United Nations Environment Programme., 'UN Resolution Billed as a Turning Point in Climate Justice' Available https://www.unep.org/cep/news/story/un-resolution-billed-turning-point-climate-justice (Accessed on 08/05/2024)

[33] Ibid

[34] Ibid

[35] Monica. T & Bronwyn. L., 'Community Lawyering and Climate Justice: A New Frontier.' *Alternative Law Journal* (47) 3 pp 199-203

[36] Ibid

[37] Ibid

[38] Ibid

The concept of climate justice is therefore key in climate action. It seeks to address the causes and impacts of climate change in a manner that recognizes and fosters the rights and concerns of vulnerable people, communities and countries[39]. Climate justice also aims to achieve equal access to natural resources, fair and effective solutions in response to climate change and the assigning of responsibility for those who contribute most to the global threat of climate change[40]. Climate justice has been described as an important aspect of just transition toward a sustainable future[41]. This concept suggests that the responsibilities in addressing climate change should be divided according to who is contributing most to the problem, while addressing systemic, socioeconomic, and intergenerational inequalities[42]. It is therefore necessary to foster climate justice for effective climate action and Sustainable Development.

3.0 The Role of Women Lawyers in Climate Justice: Opportunities and Challenges

Lawyers in general play a key role in climate justice[43]. It has been correctly noted that members of the legal profession as a whole must get behind the movement to protect the planet from the catastrophic impacts of climate change[44]. Lawyers as agents of social engineering can foster climate justice by operating on a *pro*

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[39] Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' *WIREs Clim Change*, 2014

[40] New Internationalist., 'Four Principles for Climate Justice.' Available at https://newint.org/features/2009/01/01/principles-climate-justice (Accessed on 08/05/2024)

[41] United Nations Development Programme., 'Climate Change is a Matter of Justice – Here's Why.' Available at https://climatepromise.undp.org/news-and-stories/climate-change-matter-justice-hereswhy (Accessed on 08/05/2024)

[42] Ibid

[43] Muigua. K., 'Re-Imagining the Role of Lawyers in Climate Justice' Available at https://kmco.co.ke/wp-content/uploads/2023/07/Re-imagining-the-Role-of-Lawyers-in-Climate-Justice-Kariuki-Muigua-20th-July-2023.pdf (Accessed on 09/05/2024)

[44] The Role Lawyers Can Play in Addressing the Climate Crisis' Available at https://www.wtwco.com/engb/insights/2022/02/the-role-lawyers-can-play-in-addressing-the-climate-crisis (Accessed on 09/05/2024)

bono, volunteer, or reduced fee basis, for those negatively affected by the climate crisis, as well as advising clients of the potential risks, liability, and reputational damage arising from activity that negatively contributes to the climate crisis[45]. It has also been asserted that lawyers as influential figures and thought leaders within society can enhance climate action by living responsibly in the face of the climate crisis through measures such as reducing their environmental footprint in every- day actions and by supporting positive changes in the workplace, including the adoption of more sustainable practices, such as greater reliance on electronic file storage facilities and digital technologies, embracing the use of more energy efficient offices, and more climate-friendly practices[46].

Lawyers play a crucial role in achieving climate justice through approaches such as climate litigation[47]. This involves cases before judicial and quasi-judicial bodies that involve material issues of climate change science, policy, or law[48]. Through climate change litigation, lawyers are able to help courts and tribunals adjudicate upon pertinent issues in climate change such mitigation and adaptation measures as well as climate change-related loss and damage[49].

In addition, lawyers can also enhance climate justice by fostering public awareness, public participation and public access to information on climate

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[45] Ibid

[46] Dernbach. JC., Russell. IS., & Bogoshian M, 'Advocating for the Future', *The Environmental Forum,* March/April (2021).

[47] Muigua. K., 'Redefining the Role of Lawyers in Climate Justice' Available at https://kmco.co.ke/wp-content/uploads/2023/06/Redefining-the-Role-of-Lawyers-in-Climate-Justice-.pdf (Accessed on 09/05/2024)

[48] Ibid

[49] Setzer. J., 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance.' Available at https://www.researchgate.net/profile/JoanaSetzer/publication/331499727_Climate_change_litigation_A_review_of_research_on_courts_and_litigants_in_climate_governance/links/5e89690d92851c2f527f820d/Climate-change-litigation-A-review-ofresearch-on-courts-and-litigants-in-climate-governance.pdf (Accessed on 09/05/2024)

matters[50]. It has been noted that through such initiatives, the public will be better informed and able to effectively participate in the climate change discourse towards attaining climate justice[51]. Lawyers also a have key role to play in climate justice by unlocking climate finance[52]. This can be achieved by shaping the legal, policy, and institutional environments on climate finance in order to unlock funding necessary to support mitigation and adaptation measures that are vital in achieving climate justice[53]. In addition, lawyers can contribute to climate justice by participating in the formulation of laws and policies on climate change[54]. Through such participation, lawyers can promote climate justice through the implementation of efficient programmes, policies and plans towards climate change mitigation and adaptation[55].

Greening of the legal profession is another key approach through which lawyers can foster climate justice[56]. It has been noted that adopting practices such as the use of electronic correspondence, electronic filing of court documents, use of electronic bundles at hearings, encouraging the use of videoconferencing facilities for client interviews and virtual court sessions as an alternative to travel, where appropriate and selecting suppliers and service providers that are committed to the Sustainable Development agenda can lessen the carbon footprint of the legal profession therefore strengthening climate action[57]. Lawyers in general therefore have an integral role to play in achieving climate justice.

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[50] Muigua. K., 'Redefining the Role of Lawyers in Climate Justice' Op Cit
[51] Ibid
[52] Ibid
[53] Ibid
[54] Ibid
[55] Ibid
[56] Muigua. K., 'Green Arbitration: Aligning Arbitration with Sustainable Development.' Available at http://kmco.co.ke/wp-content/uploads/2023/04/Green-Arbitration-Aligning-Arbitration-withSustainable-Development-Kariuki-Muigua-April-2023.pdf (Accessed on 09/05/2024)
[57] Ibid

Women lawyers in particular have a vital role in climate justice. Women have been identified as the key for the future of climate action throughout the world[58]. It has been noted that the climate crisis perpetuates and magnifies structural inequalities, such as those between women and men[59]. For example, in Africa, women bear an unequal burden when it comes to climate change impacts[60]. Many women in the continent rely primarily on climate-sensitive livelihoods, such as small-scale farming and manual labour[61]. This makes them highly exposed to the impacts of extreme weather events such as recurring droughts and floods which damage crops and kill livestock upon which their livelihoods depend[62]. In addition, women face increased risks to the long-term consequences of these impacts including heightened vulnerability to food insecurity, deepening poverty, and increased exposure to violence and displacement[63]. This presents an opportunity for women lawyers to foster climate justice by spearheading climate action through advocacy, community engagement and innovative solutions in order to achieve gender-responsive climate solutions[64].

Women lawyers can also foster climate justice by spearheading feminist climate action[65]. The vision for feminist climate justice is of a world in which everyone can enjoy the full range of human rights, free from discrimination, and flourish on a planet that is healthy and sustainable[66]. According to the International

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[58] United Nations Development Programme., 'Women are Key for the Future of Climate Action in Africa' Available at https://climatepromise.undp.org/news-and-stories/women-are-key-future-climate-action-africa (Accessed on 09/05/2024)
[59] Ibid
[60] Ibid
[61] Ibid
[62] Ibid
[63] Ibid
[64] Ibid
[65] United Nations Women., 'Feminist Climate Justice: A Framework for Action' Available at https://www.unwomen.org/en/digital-library/publications/2023/11/feminist-climate-justice-a-framework-for-action (Accessed on 09/05/2024)
[66] Ibid

Development Law Organization (IDLO), women and girls are at the forefront of climate justice and must be recognized as active agents of change who possess diverse knowledge and skills essential to transformative climate action[67]. It notes that the persistence of gender-based discrimination, inequality and patriarchal institutions contribute to women disproportionately experiencing harmful effects of climate change[68]. Therefore, gender equality and climate justice are inextricably linked[69]. Women lawyers can foster a rule of law approach to feminist climate action through: empowering diverse groups of women and girls to claim environmental rights, access justice and actively participate in climate-related decision-making processes[70]; participating in the development of gender-transformative approaches to legal, institutional and regulatory processes related to climate and biodiversity[71]; and participating in programmes aimed at strengthening women's capacity to access and benefit from land and other natural resources, including through enhanced tenure security, elimination of discriminatory laws, and greater gender-responsiveness of customary and informal justice institutions[72].

According to the United Nations Development Programme (UNDP), gender equality is a cornerstone for climate justice[73]. Women lawyers can therefore play a role in promoting justice and accountability in environmental and climate change matters through the realization of environmental rights and the

[67] International Development Law Organization., 'Climate Justice for Women and Girls: A Rule of Law Approach to Feminist Climate Action' Available at https://www.idlo.int/sites/default/files/pdfs/publications/a_rule_of_law_approach_to_feminist_climate_action.pdf (Accessed on 09/05/2024)
[68] Ibid
[69] United Nations Women., 'Feminist Climate Justice: A Framework for Action' Op Cit
[70] International Development Law Organization., 'Climate Justice for Women and Girls: A Rule of Law Approach to Feminist Climate Action' Op Cit
[71] Ibid
[72] Ibid
[73] United Nations Development Programme., 'Gender Equality: A Cornerstone for Environmental and Climate Justice' Available at https://www.undp.org/blog/gender-equality-cornerstone-environmental-and-climate-justice (Accessed on 09/05/2024)

promotion of the environmental rule of law[74]. This can be realized through participation in the development of an enabling and gender sensitive legal framework that enables women to enjoy their right to a healthy environment, advocating for the development of people-centred institutions that are key in delivering gender sensitive responses for climate justice, and fostering access to justice for women in climate matters[75]. Enhancing access to justice is vital in preventing and responding to violence against women and girls in contexts of climate and environmental crises and disasters[76]. In order to achieve this ideal, it has been noted that victims and survivors should have equal and unimpeded access to high-quality services; women environmental human rights defenders should be guaranteed protection; and effective investigations of violations and abuses should lead to accountability of perpetrators and justice for victims[77]. Women lawyers therefore have an important role to play in achieving access to justice for women in climate matters.

From the foregoing, it is evident that women lawyers have a crucial role to play in climate justice. It has been correctly observed that climate change exacerbates existing social inequalities, leaving women disproportionally vulnerable to climate impacts[78]. This is due to the fact that women are more dependent for their livelihood on natural resources that are threatened by climate change[79]; women are often constrained in their response to sudden onset disasters such as floods and cyclones[80]; women farmers are disproportionately affected by climate change as a result of their limited access to natural resources and limited access to information and services about climate resilient and adaptive

[74] Ibid
[75] Ibid
[76] Ibid
[77] Ibid
[78] Mary Robinson Foundation Climate Justice., 'Women's Participation: An Enabler of Climate Justice' Available at https://www.mrfcj.org/wp-content/uploads/2015/11/MRFCJ-_Womens-Participation-An-Enabler-of-Climate-Justice_2015.pdf (Accessed on 09/05/2024)
[79] Ibid
[80] Ibid

agricultural strategies and technologies; and women face additional social, economic and political barriers that limit their participation and coping capacity[81]. Therefore, acknowledging that men and women are impacted differently by climate change and enabling equal participation in the design, planning and implementation of climate policies and programmes can contribute to the development of gender-responsive climate policies which are ultimately better for people and planet[82]. Women lawyers thus have a pertinent role to play in climate justice by participating in the design and implementation of gender responsive climate policy and climate action. It has been noted that realizing the ideal of climate justice for women is hindered by factors such as gender-blind laws and regulatory frameworks that exacerbate the injustices of climate change, systematic discrimination and diverse cultural barriers which create inaccessible pathways to justice, gender-based violence emanating from the climate crisis, gender insensitive approaches to climate-related security risks and funding, and limited access to land and natural resources, and prevailing food insecurity[83]. Women lawyers have an important role to play in addressing these challenges in order to achieve climate justice for women and society at large.

4.0 Conclusion

Climate justice is a key concept that seeks solutions that address the root causes of climate change and in doing so, simultaneously address a broad range of social, racial, and environmental injustices[84]. It seeks to address the causes and impacts of climate change in a manner that recognizes and fosters the rights and concerns of vulnerable people, communities and countries[85]. Climate justice is

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[81] Ibid

[82] Ibid

[83] International Development Law Organization., 'Climate Justice for Women and Girls: A Rule of Law Approach to Feminist Climate Action' Op Cit

[84] Center for Climate Justice., 'What is Climate Justice?' Op Cit

[85] Schlosberg. D & Collins. L., 'From Environmental to Climate Justice: Climate Change and the Discourse of Environmental Justice.' Op Cit

an important aspect of just transition towards a sustainable future[86]. Lawyers are critical agents of climate justice[87]. They can foster the achievement of the ideal of climate justice by enhancing access to justice through climate litigation, fostering public awareness, public participation and public access to information on climate matters, spearheading the law reform agenda to ensure effective legal, policy, and institutional frameworks on climate change, and greening of the legal profession[88]. Climate justice is of utmost importance to women who face an unequal burden when it comes to climate change impacts[89]. Climate change exacerbates existing social inequalities, leaving women disproportionally vulnerable to climate impacts[90]. Women lawyers can foster the attainment of climate justice by spearheading feminist climate action, advocating for gender equality in the climate agenda, enhancing access to justice for women in climate matters, and participating in the design and implementation of gender responsive climate policy and climate action[91]. It is therefore necessary for women lawyers and members of the legal profession at large to participate in legal, policy, and institutional initiatives that aim to decrease emissions of greenhouse gases and increase resilience to the effects of climate change[92].

Since confronting climate change is essential to the effective functioning of the entire society, the legal profession cannot ignore its role in climate action[93]. Women lawyers are key in strengthening the participation, leadership,

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[86] United Nations Development Programme., 'Climate Change is a Matter of Justice – Here's Why.' Op Cit
[87] Muigua. K., 'Redefining the Role of Lawyers in Climate Justice' Op Cit
[88] Ibid
[89] United Nations Development Programme., 'Women are Key for the Future of Climate Action in Africa' Op Cit
[90] Mary Robinson Foundation Climate Justice., 'Women's Participation: An Enabler of Climate Justice' Op Cit
[91] International Development Law Organization., 'Climate Justice for Women and Girls: A Rule of Law Approach to Feminist Climate Action' Op Cit
[92] Muigua. K., 'Re-Imagining the Role of Lawyers in Climate Justice' Op Cit
[93] Ibid

empowerment, and access to justice for women in climate matters. The role of women lawyers in climate justice therefore needs to be reconceptualized in order to make them key agents in the quest towards the ideal of climate justice and the just transition towards a sustainable future[94].

[94] United Nations Development Programme., 'Climate Change is a Matter of Justice – Here's Why.' Op Cit

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Leveraging Technologies in International Commercial Arbitration

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Abstract

Technology is currently transforming every facet of dispute resolution including international commercial arbitration. Some factors such as pandemics and globalization forced most of the international dispute resolution systems to go remote. Apparently, courts and arbitration institutions conduct proceedings online, this serves as an important shift from the traditional arbitration to electronic arbitration. Some of the scholars argue that electronic arbitration presents a new era of global effectiveness in the resolution of international commercial disputes, while others contend that electronic arbitration lacks the sense of reality.

Adopting a varied approach, this research posits that electronic arbitration presents both a new era and a hybrid system of resolving international commercial disputes. The varied approach saves time, cost and it helps in dealing with the complexities involved international dispute resolution. This approach also notes that e-arbitration is hampered by corruption, bias, data safety concerns and technology infrastructure. It therefore recommends for the strong adherence to the rule of law, legal reforms among others.

Key Phrases

E-arbitration; Information Communication Technology; Artificial Intelligence; E-filing; E-award; E-evidence; Video conference.

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Introduction

The rapid growth of technologies present a global shift in every aspect of life, including some aspects that were previously not associated with technology.[1] The emergence growth in technologies is revolutionizing the sphere of international dispute resolution, in general, and international commercial arbitration, in particular, devising E-arbitration.[2] The rise of E-arbitration - especially in the international sphere of commerce is facing hot arguments from scholars, with some arguing that E-arbitration presents a new era of global efficiency, reliability and effectiveness of international commercial arbitration while others argue that E-arbitration is unrealistic in resolving international commercial disputes and therefore it is a fantasy.[3] The research argues that E-arbitration is bringing in a hybrid system of international commercial arbitration that involves the use of technology and some aspects of the traditional arbitration. For instance, the system relies on Artificial Intelligence (AI) and Information Communication Technology during remote hearing while at the same time applying the traditional procedures of arbitration.

The Hybrid system of international commercial arbitration as discussed in this research seeks to broaden the scope for accessing justice in global commerce. This can be achieved through two major ways. First is by digitalizing the basis of international commercial arbitration to enable parties to rely on e-arbitration agreements, e-awards, presentation of e-evidence, and through remote hearings, which allow the parties to attend and commence arbitration proceeding without difficulties. Second is by enhancing coordination and

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[1] Nasser A. & Mazzawi M, *A guide to Telecoms Arbitration: Arbitration and the advent of new technologies. 2nd Edition* (Globl Arbitration Review)p23<https://globalarbitrationreview.com/guide/the-guide-telecoms-arbitrations/second-edition?utm_source=GAR&utm_medium=pdf&utm_campaign=The+Guide+to+Telecoms+Arbitration+-+Second+Edition>accessed 26th April 2024

[2] Lagiewska Magdalena, *New Technologies in International Arbitration: A Game-Changer in Dispute Resolution?* (Int J Semiot Law, 2023)p1<https://doi.org/10.1007/s11196-023-10070-7>accessed 26th April 2024

[3] Lagiewska(n2)pp 3&5

cooperation among courts and institutions from different jurisdictions during the enforcement of the e-awards, review and appeals.

The Hybrid system that results from the adoption of e-arbitration attributes to several factors. First is pandemics such as the Covid-19 that forced the world markets to go remote.[4] The pandemic also revamped the need of leveraging technologies in international disputes resolution to address commercial disputes efficiently and effectively; as one way of beating the travelling and interaction restrictions.[5] This revolutionized the traditional mode of international commercial arbitration- which involved face-face meetings, collection of evidence, drafting of arbitration agreements and delivery of awards- to a system that involved the use of audio/video conferences, electronic filing of cases, electronic presentation of evidence, awards and arbitration agreements.[6] Second is the desire to make arbitration more effective, faster and less burdensome to the involved parties through the adoption of technologies into the system.[7] It is imperative to note that the apparent goal of arbitration is to encourage expeditious disposal of cases, to minimize the overall cost and promote access to justice without too many legal hurdles.[8] Lastly, globalization is inter-twining relationships between nations and individual through technological advancements in global politics and commerce.[9] It is also creating

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[4] Nasser A. & Mazzawi M, *A guide to Telecoms Arbitration: Arbitration and the advent of new technologies. 2nd Edition* (Globl Arbitration Review)p23< https://globalarbitrationreview.com/guide/the-guide-telecoms-arbitrations/second-edition?utm_source=GAR&utm_medium=pdf&utm_campaign=The+Guide+to+Telecoms+Arbitration+-+Second+Edition>accessed 26th April 2024

[5] The United Nations Conference on Trade and Development (UNCTD), *Technology and the future of online dispute resolution platforms for consumer protection agencies* (2023)p4< https://unctad.org/system/files/official-document/tcsditcinf2023d5_en.pdf>accessed 26th April 2024

[6] Lagiewska(n2)p3

[7] Lagiewska(n2)p3

[8] James Heather-Hayes vs African Medical and Research Foundation (AMREF) (2014)eKLR

[9] Ann Spain, *Internationa Dispute Resolution in an era of Globalization* (University of Colorado School of Lw)p45<

a market where organizations and individuals can engage in business outside their home country.[10] This results into complex disputes that necessitate the need of a more updated system that allow foreign investors to solve disputes online.[11]

Electronic arbitration is applied by several institutions that have embraced Information Communication Technology (ICTI) such as the International Chamber of Commerce, the American Arbitration Association, the World Intellectual Property Organization Arbitration and Mediation Center, and the Chartered Institute of Arbitrators.[12] While electronic arbitration appears to be cost-effective, time conscious due to lack of complexities and based on its ability to apply the existing regulatory framework; some scholars still maintain that Electronic arbitration is more problematic especially with regards to the formation of electronic arbitration agreements, the conduct of online arbitration procedures and the efficacy of electronic arbitration.[13]

This article advances in five main sections. Section II will discuss the precisely how E-arbitration is perceived by scholars and academicians. The first perception is that E-arbitration marks a new era of global efficiency, reliability and effectiveness in resolution of international commercial disputes. The second perception is that E-arbitration is unrealistic in the resolution of international commercial disputes and therefore it is a fantasy/speculation. Section III

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https://lawweb.colorado.edu/profiles/pubpdfs/spain/IntlDispRes-EraGlobalization.pdf>accessed 26th April 2024

[10] Dr. Agil H. Nasser,*Electronic Arbitration: The new mechanism for dispute resolution* (The Arbitrator & Mediator, 2016)p75 <https://www5.austlii.edu.au/au/journals/ANZRIArbMedr/2016/8.pdf >accessed 26th April 2024

[11] Dr. Agil (n10)p75

[12] Lagiewska(n2) p3

[13] The United Nations Conference on Trade and Development, *Dipute Settlement: Intenational Commercial Arbitration, electronic Arbitration*(2003)ppp 6, 44&46< https://unctad.org/es/system/files/official-document/edmmisc232add20_en.pdf>accessed 27th April 2024

discusses the legal and institutional framework for E-arbitration while section IV analyses the key findings of this research. Finally, section V contains the concluding remarks.

For this chapter "E-arbitration" refers to an arbitration conducted fully or partially online. The term "perception" refers to the different views concerning e-arbitration, it covers the opinions of scholars and academicians. "Institution "refers to the avenues that conduct arbitration, it covers the bodies that formulate the guidelines on e-arbitration. The term "hybrid system" refers to an arbitration process that applies technology together with some aspects of the traditional arbitration, it covers situations where e-arbitration is partially applied. "Traditional arbitration" refers to the normal face-to-face or offline arbitration.

Perceptions of E-arbitration

As noted under part one, the rise of E-arbitration -as a result of technological advancements induced arguments from scholars, some argue that E-arbitration is presenting a new era of global efficiency, reliability and effectiveness of international commercial arbitration while others argue that E-arbitration is unrealistic in resolving international commercial disputes and therefore it is a fantasy.[14] These arguments can be splinted into two major perceptions; which are, E-arbitration as a new era of global effectiveness in commerce and E-arbitration as a speculation or fantasy. These perceptions are discussed in detail below.

Arbitration: a new era of global effectiveness in resolving commercial disputes

This perception is based on two major postulations, and they include that technology through E-arbitration helps in dealing with some of the complexities in international commercial arbitration. Secondly, through technologies -E-arbitration- perfects the offline arbitration and it enables it to reach new markets.

[14] Lagiewska(n2) pp 3&5

The first postulation is based on the premise that E-arbitration -through technologies- has created online platforms that help in addressing cross-border commercial disputes more effectively and efficiently.[15] The online platform relies on Information Communication Technology (ICT), Artificial Intelligence (AI) and other forms of electronic information to remotely connect the litigants from their country of residence without necessarily requiring them or their representatives to be physically present at the seat of arbitration.[16]

The significance of leveraging technologies to promote E-arbitration was better realized during the Covid-19 pandemic, which unsettled the global economy and the legal profession with restrictions from the World Health Organization.[17] Among the restrictions include social distancing and limited interactions between individuals and thus making it difficult for legal professionals to operate from their physical offices.[18] A part from the difficulties in having physical hearing, the physical presence of employees and clients in law firms and justice institutions also became difficult.[19] Since efficiency in dispute resolution still remained the key role of justice institutions, the nature of dispute resolution turned from physical to online.[20] For instance, majority of the hearings went remote and for the first time some countries got to witness evidence being presented electronically, agreements being concluded electronically without face-face meetings, electronic filing of matters, decisions

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[15] The United Nations Conference on Trade and Development (UNCTD), *Technology and the future of online dispute resolution platforms for consumer protection agencies* (2023)p4< https://unctad.org/system/files/official-document/tcsditcinf2023d5_en.pdf>accessed 27th April 2024
[16] The United Nations Conference on Trade and Development (n13) p6
[17] Muigua Kariuki, *Settling Dispute Through Arbitration: Embracing online dispute resolution and Artificial Intelligence in ADR and access to Justice.* 4th Edition (Glenwood Publishers Limited, 2022)p335
[18] Muigua Kariuki (n17)p336
[19] Muigua Kariuki (n17)p336
[20] Muigua Kariuki (n17)p337

and awards being presented electronically and witnesses testifying online via video conference.[21]

According to scholars this marked the realization of a new era of global effectiveness in dispute resolution system, and international commercial arbitration is not excluded. The term global effectiveness owes to the fact that E-arbitration saves time and cost of physical arrangement as well as helping in limiting exponential barriers in international commercial disputes. The primary role of arbitration is to minimize the cost of obtaining justice, speed disposal of matters, to offer flexibility based on the decision of the parties, to promote confidentiality and finality of the award.[22] Advancing on this goal, the remote hearing in E-arbitration allow parties to connect from their work place to the site chosen by the institution, through which he parties will exchange documents and share relevant materials online.[23] This saves the time and cost that could have been used by parties to travel to the seat of arbitration.

Regarding flexibility, the parties are allowed to draft electronic arbitration agreement when drafting both national and cross-border commercial agreements. The party making the offer will include the arbitration clause in the document then send them to the recipient via email, the receiver will sign the shared documents by use of electronic signature to signify consent and acceptance.[24] Thus, overcoming geographical barriers. Furthermore, E-

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[21] Nasser A. & Mazzawi M, *A guide to Telecoms Arbitration: Arbitration and the advent of new technologies. 2nd Edition* (Globl Arbitration Review)p23<https://globalarbitrationreview.com/guide/the-guide-telecoms-arbitrations/second-edition?utm_source=GAR&utm_medium=pdf&utm_campaign=The+Guide+to+Telecoms+Arbitration+-+Second+Edition>accessed 27th April 2024

[22] Muigua Kariuki, *Accessing Justice Through ADR* (Glenwood Publishers Limited, 2022)p13

[23] The United Nations Conference on Trade and Development, *Dipute Settlement: Intenational Commercial Arbitration, electronic Arbitration*(2003)ppp 6, 44&46<https://unctad.org/es/system/files/official-document/edmmisc232add20_en.pdf>accessed 28th April 2024

[24] The UNCTD (n23)p15

arbitration introduced new systems of storing data as online files, which can only be accessed by the parties to the dispute and can as well be transferred without hassle when necessary. This has improved on confidentiality of parties and data safety.[25]

Secondly, through technologies, E-arbitration perfects the offline arbitration and enables it to reach new markets.[26] Through the online arbitration, parties from different countries can file their matters through an online platform then proceed to virtual hearing and receive an award electronically.[27] The award sent electronically to the parties has the same effects as one delivered via a face-face hearing, and thus, parties can follow the traditional and statutory procedures to enforce the award.[28] This postulation can be said to have evolves in support of the fact that among the drivers of electronic arbitration is globalization of trade, which then invokes international commercial arbitration as the most suitable method for settling cross-border commercial disputes; because of the finality nature of arbitral award and because the award can easily be enforced throughout the world.[29]

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[25] Mediation and Arbitration Center, *Strength and challenges in online dispute resolution system.* Para6&7< https://viamediationcentre.org/readnews/MTA2Nw==/Strengths-and-Challenges-in-Online-Dispute-Resolution-System>accessed 28th April 2024

[26] Charles Rusell Speechlys, *Breaking Barriers: The Tech Revolution in Arbitration* (2024) < https://www.charlesrussellspeechlys.com/en/insights/expert-insights/dispute-resolution/2024/breaking-barriers-the-tech-revolution-in-arbitration/> accessed 22nd October 2024.

[27] Salar Atrizadeh, *E-Mediation and E-Arbitration: Harnessing Technology for Efficient Dispute Resolution* (2023) < https://www.internetlawyer-blog.com/e-mediation-and-e-arbitration-harnessing-technology-for-efficient-dispute-resolution/#:~:text=Cost%2DEfficiency%3A%20E%2Dmediation,is%20used%20for%20the%20procedures.> accessed 22nd October 2024.

[28] Ibid.

[29] W.L. Kirtley, *Bringing claims and enforcing international arbitration awards against Sub-Saharan African States and parties; the law and practice of international courts and tribunals 8* (2009) pp143-169.

E-Arbitration: a fantasy/speculation

This perception postulate that E-arbitration lacks the sense of reality due to the persistence of challenges from the offline arbitration through to the online arbitration. Some of these challenges that existed with the offline arbitration, and which are being inherited into the electronic arbitration include bias, corruption, intervention by domestic courts and inadequate legal framework.[30] This view is also premised on the belief that technology makes international commercial arbitration more complex due to several factors such as user capacity, assessment of witness credibility and unawareness among other factors.[31] Some of these factors are precisely discussed in the paragraphs below. Among the key arguments put forward by the proponents of this perception is on the perceived corruption, which permeates international commercial arbitration.[32] It is argued that acts of corruption such as illegal bribery kick off together with the process, that is from appointment of arbitrators to the conduct of the arbitration proceedings.[33] Existence of corruption in international arbitration -which must be dealt with before turning to electronic arbitration- is substantiated by the case of *the Federal Republic of Nigeria v Process & Industrial Developments Limited*,[34] where Nigeria successfully challenged an award of USS

[30] Mohammed Ahmed, E*lectronic Arbitration as a Solution for Electronic Commerce Dispute Resolution in the United Arab Emirates: Obstacles and Enforceability Challenges*: Thesis submitted to the University of Gloucestershire For the degree of Doctor of philosophy In Commercial Law (University of Gloucesters Hire Doctorate in Commercial Law (DCL) 2016) P2. < https://core.ac.uk/download/pdf/77603718.pdf> accessed 22nd October 2024.

[31] Łągiewska M., *New Technologies in International Arbitration: A Game-Changer in Dispute Resolution?*. (2024). vol. 37, International Journal Semiot Law , pp.851–864 < https://link.springer.com/article/10.1007/s11196-023-10070-7#citeas> accessed 22nd October 2024.

[32] Okoli N. Pantian, Co*rruption in international commercial arbitration – Domino effect in the energy industry, developing countries, and impact of English public policy, Journal of world energy law* (2022)15,P139< 10.1093/jwelb/jwac006> accessed 28th April 2024

[33] Okoli N. Pantian(n32)p139

[34] [2023] EWHC 2638

6.6 billion that was made against it; the petition to challenge was based on the fact that the award was obtained by fraud contrary to public policy.[35]

Scholars under this perception also blame the existing bias against African States to cause the prospects of electronic arbitration, as an era of global commercial effectiveness, to remain largely an abstract. Muigua Kariuki argues that the bias that exist against Africans is based on racism, perceiving Africans as uncivilized and corrupt, which then makes it difficult for arbitrators from Africa to be selected or even African cities from being selected as the venues for international arbitration.[36]

The perception that E-arbitration is still unattainable is also based on the existence of difficulties in drafting of the arbitration clause. This because of concerns such as choice of law in international arbitration agreement as well as the incorporation and application of trade norms in arbitration of disputes, arising from the contract.[37]

Parties are always free to choose the law that should apply to their contract. The selected law is to govern the procedural rules of international arbitration. This is based on the need to uphold the autonomy of the parties, in *Mastrobuono v. Shearson Lehman Hutton,*[38] the supreme court of the United States (US) adopted this requirement and added that the test to be applied is whether the choice of

[35] The Federal Republic of Nigeria v Process & Industrial Developments Limited (2023)EWHC 2638< https://www.mofo.com/resources/insights/231114-v-p-id-renewed-scrutiny-ai>accessed 28th April 2024
[36] Muigua Kariuki(n17) p268
[37] Malloy P. Michael, *Curren issues in international arbitration* (McGeorge School of Law Faculty Scholarship, 2002)p46< https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1028&context=facultyarticles>accessed 28th April 2024
[38] 514 US.52(1995)

law can be objectively demonstrated from the language of the agreement.[39] Despite guaranteeing the parties their freedom to choose the law that favors their contract, most of them end up misinterpreting the arbitration clauses on basis of having different national laws, blaming confusion that existed when deciding on the applicable law.[40] This confusion is because of lack of uniformity on the law that is to apply commercial disputes globally, the existence of this gap makes the commercial world not read for electronic arbitration. Worth noting is that the incorporation of commercial norms and trade usages distort the nature of the parties' agreement, despite it being championed for by most commercial codes, including the Uniform Commercial Code (UCC) as important sources for courts to consider when resolving contract disputes.[41]

Lack of awareness and knowledge on electronic arbitration has opened the door for unwarranted interventions by domestic courts, which delay the process.[42] Scholars of the perception, on e-arbitration as fantasy, are trying to provoke the international and national communities to invest more on international commercial arbitration by first eliminating the challenges that have been preventing the offline arbitration from moving forward, before shifting to the online arbitration which can be more complicated.

Worth noting is that this perception is also linked to the fact that technological advancements are transitioning faster than legal developments. Mostly the law follows technology and as a result, it has not been able to keep up with the

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[39] Mastrobuono v. Shearson Lehman Hutton (1995)514 US. 52< https://scholar.google.com/scholar?q=Mastrobuono+v.+Shearson+Lehman+Hutton+(1995)514+US.+52&hl=en&as_sdt=6&as_vis=1&oi=scholart>accessed 28th April 2024

[40] Muigua Kariuki(n17) p266

[41] Malloy P. Michael(n37) p52

[42] James Ngotho, *A Critical Analysis of the Challenges Facing Arbitration as a Tool of Access to Justice in Kenya* (2018) vol. 2(1) Journalofcmsd. PP.80-90. < https://journalofcmsd.net/wp-content/uploads/2018/05/A-Critical-Analysis-of-the-Challenges-Facing-Arbitration-as-a-Tool-of-Access-to-Justice-in-Kenya.pdf> accessed 22nd October 2024.

advancements in technology.[43] To enhance a sense of reality in electronic arbitration, the law must be able to adopt to contemporary changes including the developments and the uncertainties of technologies in the legal industries.[44]

The Regulatory and Institutional Framework for International Commercial Arbitration

International commercial arbitration takes place within a complex framework which is made up of international conventions and rules, institutional rules and State legislation,[45] including the United Nations Commission on International Trade Law (UNICITRAL) Model Law on International Commercial Arbitration.[46] It is rightly argued that international arbitration has undergone a process of self-sustaining evolution which has steadily enhanced arbitral authority.[47] In the current times, technological advancements have spearheaded a change in the way things are being conducted, from e-commerce to video conferencing among others, which brings the connection between arbitration and technology into picture.

[43] Moses B. Lyria, *Recurring Dilemmas: The Law's Race to Keep up with Technological Change* (University of New South Wales) p16< https://deliverypdf.ssrn.com>accessed 29th April 2024

[44] Moses B. Lyria, *Recurring Dilemmas: The Law's Race to Keep up with Technological Change* (University of New South Wales) p16< https://deliverypdf.ssrn.com>accessed 29th April 2024

[45] K. Muigua, *The Legal Framework for International Commercial Arbitration in Kenya,* (The Lawyer Africa, 2023) < https://thelawyer.africa/2023/09/12/law-of-international-commercial-arbitration-in-kenya/#:~:text=The%20basic%20legal%20framework%20for,the%20development%20of%20effective%20institutional > accessed April 29, 2024

[46] Pepperdine Law Blog, *What is International Commercial Arbitration?*, (Pepperdine Caruso School of Law, 2023) < https://law.pepperdine.edu/blog/posts/what-is-international-commercial-arbitration.htm > accessed April 29, 2024

[47] K. Muigua, *Settling Disputes through Arbitration in Kenya,* (Gleenwood Publishers, 4th Edition, 2022) p251

The legal framework for international commercial arbitration

The basic legal framework for international commercial arbitration gets its roots from the Geneva Protocol of 1923 on Arbitral Clauses and the 1927 Geneva Convention on Execution of Foreign Arbitral Awards. The two conventions came in to deal with the chaotic conditions that existed when it came to facilitating and enforcement of proceedings due to the different State laws that were in place.[48] The 1927 supplements the Protocol in that its application is based pursuant to agreements that are covered by the Protocol.[49] The main aim of the 1923 Geneva Protocol was to bring uniformity in the enforceability of arbitral clauses that were to refer future disputes to arbitration which was provided under Article 1 of the Protocol which stipulated that arbitral agreements were valid whether relating to present or to future differences between the parties.[50] The Protocol then lacked when it came to enforcement which pushed for the adoption of the 1927 Convention which now was covered the enforcement of foreign arbitral awards that were subject to the provisions of the Protocol.[51] Accordingly, the enforcement under the Convention was subject to a set of conditions which were to be met for it to stand, it had to; be rendered pursuant to a valid arbitration agreement; the object of the award must be capable of settlement in the State of enforcement; the arbitral tribunal was constituted according to the agreement and to the law of the State where the tribunal sits; the award must be a final award with no pending appeal; and the recognition of the award must not be contrary to public policy in the State of enforcement.[52]

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[48] C. Paolo, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* (The American Journal of Comparative Law, vol. 8, no. 3, 1959) pp. 287 < https://doi.org/10.2307/837713 > accessed 29th April 2024

[49] C. Paolo (n48) p288

[50] UNCTAD, *Dispute Settlement: International Commercial Arbitration*(Recognition and Enforcement of Arbitral Awards:The New York Convention), UNCTAD/EDM MISC.232/ADD.37 p3 < https://unctad.org/system/files/official-document/edmmisc232add37_en.pdf > accessed 29th April 2024

[51] C. Paolo (n48)

[52] C. Paolo (n48) p289

The 1923 Protocol and Convention however failed to meet the expectations attached to them which led the International Chamber of Commerce to adopt the New York Convention which then incorporated the ideas that were in the Geneva Protocol and Convention on Arbitration.[53] The Convention required the courts of the contracting States to give effect to arbitration agreements when presented with such matters and to recognize and enforce foreign arbitral awards subject to provided limitations.[54] The convention stands as the key treaty in the modern system of international arbitration and is seen to give the parties a wide sense of assurance of the recognition of awards in foreign States therefore facilitating transnational commerce.[55]

The question of enforceability was tackled by the Swedish Supreme Court in *AB Gotaverken v. Genegal National Maritime Transport Company (GMTC)*[56] where the appellant in the case sought for postponement of enforcement of proceedings based on an appeal launched in France. Court dismissed the appeal and allowed for enforceability based on the New York Convention and on the Swedish domestic law on arbitration. Accordingly, the court can refuse to enforce an arbitration agreement in instances provided under Article V which are; the party challenging the arbitration lacks capacity under the agreement or at law; the applying party does not furnish notice to the party against whom it is to be enforced; the award deals with a matter not contemplated under the agreement;

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[53] New York Convention, History 1923-1958 < https://www.newyorkconvention.org/text/travaux-preparatoires/history-1923-1958 > accessed 29th April 2024

[54] United Nations, UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958, 2016 Edition) pIV < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf > accessed 29th April 2024

[55] Doak Bishop, Sara McBrearty, *The New York Convention: A Commentary;* Reinmar Wolff (eds), Arbitration International, Volume 30, Issue 1, 1 March 2014, Pages 187–188, < https://academic.oup.com/arbitration/article-abstract/30/1/187/361938 > accessed 29th April 2024

[56] Gotaverken v. Genegal National Maritime Transport Company (GMTC) YCA, Vol. 4 (1981)

the arbitral tribunal was not well constituted; the award is not yet binding to the parties or has been set aside in the country of origin; the enforcement would be contrary to public policy; and, the subject matter is not capable of settlement under the domestic laws of that State.[57]

The Contracting States have a discretion to have their own domestic laws regulating arbitration as long as the domestic regulations that are set are not onerous.[58] The Convention is seen to allow for room for States to utilise more liberal domestic laws that are not contrary to the Convention pursuant to Article VII.[59] The Convention therefore safeguard and guarantees the minimum set standards of liberalism in the Contracting States.[60]

Additionally, the UNCITRAL Model Law on International Commercial Arbitration primarily regulates arbitration in international trade. The Model Law generally is meant to act as a guideline towards the uniformity, harmonization and modernization of State laws with regard to enforceability of foreign awards.[61] Unlike the New York Convention, the Model Law does not only focus on the recognition and enforcement of foreign arbitral proceedings, its provisions cover the whole arbitration process from the agreement to

[57] Article V of the New York Convention
[58] Article III of the New York Convention
[59] "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." Article VII (1) of the New York Convention.
[60] United Nations (n54) para 7
[61] UNCITRAL, A Guide to UNCITRAL Basic facts about the United Nations Commission on International Trade Law, para 37-38 < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf >accessed 29th April 2024

arbitrate,[62] the composition of the tribunal,[63] the conduct of the proceedings,[64] to the recognition and enforcement of arbitral awards.[65]

Technology is now being leveraged to service arbitration as it is seen to be more effective in expediting the arbitration process. Currently there is yet to be developed specific international instrument for the regulation of technology and arbitration. Be that as it may, provisions for the use of technology can be traced from within the established framework for commercial arbitration. Some institutions have moved a step ahead to make guidelines regulating the utilisation of technology in arbitration. The Chartered institute of Arbitrators has gone a step ahead to come up with the Framework Guideline on the Use of Technology in International Arbitration.[66] The Guidelines are mainly to advise arbitrators on how best to utilize technology in order to achieve the best possible outcomes of it as at Part I of the Guidelines, Part II of the guidelines has guidance on best practice relating to cyber-security and ways to avoid personal and case-related data breaches, this includes with regard to data storage and confidentiality.[67]

Other instruments also provide for use of technology in arbitration proceedings for instance pursuant to Article 22 of the ICC Rules, the tribunal and parties are to make efforts, based on the nature and complexity of the issue, to conduct the arbitration in an expeditious and cost effective manner.[68] Article 26 of the ICC Rules allows the tribunal to decide on how the hearings should be conducted,

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[62] Chapter II of the Model Law on International Commercial Arbitration
[63] Chapter III of the Model Law on International Commercial Arbitration
[64] Chapter V of the Model Law on International Commercial Arbitration
[65] Chapter VII of the Model Law on International Commercial Arbitration
[66] CIArb, The future is now: the new CIArb Guideline on Technology in Arbitration, (Nov, 2021) < https://www.ciarb.org/news/the-future-is-now-the-new-ciarb-guideline-on-technology-in-arbitration/ > accessed 29th April 2024
[67] CIArb Framework Guideline on the Use of Technology in International Arbitration < https://www.ciarb.org/media/17507/ciarb-framework-guideline-on-the-use-of-technology-in-international-arbitration.pdf > accessed 29th April 2024
[68] ICC Arbitration Rules, Article 22

either physically or by video-conferencing depending on the facts of the case and upon consultation with the parties.[69] Article 24 of the same provides for video conferencing in the case management conference and coming up with the procedural timetable,[70] which precedes the hearing stage under Article 26 above.

Institutional Framework

There are also various institutions which are set to implement and monitor international commercial arbitration, and which have set up their own rules to regulate Arbitration practice and the use of technology in arbitration practices. The International Chambers of Commerce leads the way when it comes to institutions regulating the international arbitration.[71] The ICC Arbitration Rules provide for among others the International Court of Arbitration as well as the procedures thereto.[72] The International Court of Arbitration administers arbitration through supervision of arbitral proceedings,[73] made via an application made pursuant to Article 4 of the Rules.[74] It is not a court as the name suggests, rather the name arises from the role it plays which is supervision of those proceedings brought in under the Rules and the arbitrators under their

[69] As above, Article 26

[70] As above Article 24 (4)

[71] Jerome Sgard, T*he International Chamber of Commerce, Multilateralism and the Invention of International Commercial Arbitration* (2022) p.3 < https://sciencespo.hal.science/hal-03594372/document> accessed 22nd October 2024.

[72] ICC, 2021 Arbitration Rules, < https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/ > accessed 29th April 2024

[73] ICC, ICC International Court of Arbitration, < https://iccwbo.org/dispute-resolution/dispute-resolution-services/icc-international-court-of-arbitration/ > accessed 29th April 2024

[74]A party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the "Request") to the Secretariat at any of the offices specified in the Internal Rules. The Secretariat shall notify the claimant and respondent of the receipt of the Request and the date of such receipt: See Article 4(1) of the 2021 Arbitration Rules

roll of arbitrators.[75] The ICC Arbitration Rules were seen in play in *ITIIC v. DynCorp (2008)* where the ICC selected the forums to be used for arbitrating the dispute.[76]

The UNCITRAL body of the UN also comes into picture playing a major role in the harmonization and modernization of the laws relating to international trade.[77] The body does so by pushing for Conventions, Model Laws and Rules; in the case of Model laws in the sense that they give recommendations on how domestic legislations is to be coined to promote harmonization of laws.[78] the Model Law on International Commercial Arbitration is the main text of the body towards international commercial arbitration. Additionally, it has adopted the UNCITRAL Arbitration Rules which is a set of procedural rules upon which the parties may agree to utilise in the conduct of arbitral proceedings and have been used widely in administered arbitration as well as ad hoc arbitration.[79]

Some States have also established their own institutions to cater for Arbitration subject to the International Laws that are existent. In the United States, the New York Centre for Arbitration has been established to deal with international arbitration within the State.[80] The Centre has been seen in action for instance in *First Capital Real Estate Invs. v. SDDCO Brokerage Advisors, LLC* where the appeal was made over the selection of one of the tribunal members; the court set aside

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[75] ICC (n73)

[76] International Trading and Industrial Investment Co -v- Fyncorp Aerospace Tech. Civil Action No. 09-791 (RBW)

[77] Will Kenton, *United Nations Commission on International Trade Law* (UNCITRAL) (2023)< https://www.investopedia.com/terms/u/united-nations-commission-on-international-trade-law-uncitral.asp#:~:text=Established%20in%201966%2C%20UNCITRAL%20is,facilitate%20international%20trade%20and%20investment.> accessed 22nd October 2024.

[78] UNCITRAL (n61)

[79] United Nations, UNCITRAL Arbitration Rules <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration#:~:text=The%20UNCITRAL%20Arbitration%20Rules%20were,and%20commercial%20disputes%20administered%20by > accessed 29th April 2024

[80] NYIAV, About NYIAC, < https://nyiac.org/about/ > accessed 29th April 2024

the appeal as the appellant had waived the right to appoint an arbitrator in the proceedings.[81] The Chartered Institute of Arbitrators is also an international institute with branches in several States with its main mandate being in the regulation of the arbitrators and how they are to proceed with the proceedings.[82] It has also came up with Rules and Guidelines to regulate the practice of Arbitration which have been discussed in the preceding subsection.

Findings

Electronic arbitration has introduced a fourth party into the system of resolving international commercial disputes.[83] The fourth party is the virtual workspace ICT and AI tools that are used during an online arbitration.[84] This is quite different from the traditional arbitration, which involved face-face interactions and physical exchange of documents, because the fourth party relies on platforms such as zoom to connect the disputing parties with the arbitrator.[85]
Imperatively, electronic arbitration has changed some of the important aspects of the traditional arbitration. For instance, in electronic arbitration the documents are exchanged via email, witnesses testify through a video conference and the award is sent electronically to the parties, consents and appointment of arbitrators is also done online.[86] While this tremendously saves on time and cost, it still rises concerns on the determination of the seat for arbitration, the due process, data protection and finality of the award that has been given electronically.

Some of the key roles and challenges of electronic arbitration in promoting global commerce effectiveness are discussed below.

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[81] 19-670-cv (2d Cir. 2019)

[82] See CIArb < https://www.ciarb.org/about-us/about/ > accessed 29th April 2024

[83]Dr. Hussain Agil, *Electronic Arbitration: The new mechanism for dispute resolution* (The Arbitrator & Mediator 2016) p.68 < https://www5.austlii.edu.au/au/journals/ANZRIArbMedr/2016/8.pdf> accessed 22nd October 2024

[84] Ibid.

[85] Ibid.

[86]Ibid.

The role of E-arbitration in promoting global commerce

E-arbitration assists traders in resolving complex disputes that may arise during business transactions due to globalization.[87] It offers a more effective, reliable, and flexible system for resolving commercial disputes. It's worth noting that effectiveness and efficiency are crucial factors when evaluating the suitability of electronic arbitration as a tool for addressing international commercial disputes.[88] This also extends to the imperative of reducing costs and promoting expeditious resolution of commercial disputes.[89]

Flexibility is drawn from the fact that electronic e-arbitration eliminates the need for parties to move, it as well eliminates the need for parties to determine the seat of arbitration; instead, parties can attend to matters through video conferencing from any part of the world. With regards to effectiveness, electronic arbitration uses Information Technology (IT) to simplify the transmission of information, thus, escalating the proceedings.[90]

Reliability, on the other hand, is based on the fact that an award from online arbitration still enjoys the privilege of being valid, final, and, based on the New York Convention, it can be enforced using the same procedures as those for enforcing an arbitral award delivered during face-face arbitration proceedings.[91] This builds confidence among commercial stakeholders to

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[87] Salar Atrizadeh, *E-Mediation and E-Arbitration: Harnessing Technology for Efficient Dispute Resolution* (2023) < https://www.internetlawyer-blog.com/e-mediation-and-e-arbitration-harnessing-technology-for-efficient-dispute-resolution/#:~:text=Cost%2DEfficiency%3A%20E%2Dmediation,is%20used%20for%20the%20procedures.> accessed 22nd October 2024.

[88] Giupponi Olmos, *Impact of Covid on international disoute: Virtual resolution of disputes in international arbitration; mapping its advantages and main caveats in the face of Covid-19* (Beill, 2022)ch.3 p82< https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf>accessed 29th April 2024

[89] Giupponi Olmos(n88)ch.3 p82

[90] Thomas S. & Gabrielle k., *The use of Information Technology in Arbitration* (Newsletter 5, 2005)p6< https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf>accessed 29th April 2024

[91] Thomas S. & Gabrielle K.(n90)p6

engage in cross-border commercial transactions and investments, and thus, enhancing tremendous growth in the commercial sector.

The challenges of E-arbitration in promoting global commerce

Despite E-arbitration being regarded as the game changer and key in ensuring an effective, reliable and efficient mode of resolving international disputes; it is worth noting that this process is also hampered by several challenges. These challenges include Cyber-security, absence of technology neutral legal framework, individual capacity based, difficulties in assessing the validity of evidence and credibility of witnesses.[92] The challenges noted here are because of the following factors.

Lack of physical appearance of parties

E-arbitration is always conducted online which has negative effects on several factors. First, it makes it hard for the arbitrator to assess the credibility of a witness who is giving testimonies in an audio or video conference, because of the loss of the subtleties of non-verbal communication.[93] Additionally, online arbitration makes it very difficult for arbitrators to evaluate the authenticity on the origin of the information submitted to it by a party.[94] This combined with other factors affects the reliability of electronic arbitration.

Technology infrastructure and skills

One must possess knowledge and skills to use technology tools like AI and IT, which leads the conclusion that the effectiveness of electronic arbitration is

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[92] Ahmed Adnan, *Challenges of Electronic Arbitration in Electronic Commerce transactions* (2017), issue 2, Multi-Knowledge Electronic Comprehensive Journal For Education And Science Publications (MECSJ). P.122. < https://mecsj.com/uplode/images/photo/Challenges_of_Electronic_Arbitration_in_Electronic_Commerce_transactions_2.pdf> accessed 22nd October.

[93] Lubano N., Barasa J. & Eva M., *The Role of Alternative Dispute Resolution in Online Commerce* (Legal@oraro, 2019)para15< https://www.oraro.co.ke/add-to-cart-the-role-of-alternative-dispute-resolution-in-online-commerce/>accessed 29th April 2024

[94] Lubano N.(n79) para16

based on individual capacity to use technologies.[95] Unfortunately, the supporters of online dispute resolution presumes that every person has unlimited access to internet, technology tools, skills and required resources to manipulate technologies in seeking justice.[96] However, this is often not the case due to development inequalities, and it frequently leads to limited access to justice.

Data safety concerns

Confidentiality is among the key attributes of arbitration,[97] the online platforms through which parties exchange information during the arbitration process are susceptible to cyber-attacks.[98] For instance, it is possible for a third party to hack and alter the system that is used to host the proceedings, additionally, there are counterfeit applications created to deceive parties in an arbitration proceedings to disclose their information.[99] This directly undermines confidentiality and data privacy for the parties involved.

Legal challenges

There are two major legal challenges, which are inadequate legal framework and the choice of law in electronic arbitration. The legal framework for international commercial arbitration has not yet evolved to adopt to contemporary advancements in technology, and as a result there is a lack of

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[95] Ahmed Adnan (n92) p.122.

[96] Lubano N.(n93)par17

[97] Muigua Kariuki, *Alternative dispute resolution and access to justice in Kenya* (Glenwood Publishers Limited, 2015)p36

[98] Adnan Ahmed, *Challenges of Electronic Arbitration in Electronic Commerce transactions; Multi-Knowledge Electronic Comprehensive Journal For Education And Science Publications (MECSJ) Issue 2*, (Arbitration & Business Law Department, University of Gloucestershire, 2017)p127< https://mecsj.com/uplode/images/photo/Challenges_of_Electronic_Arbitration_in_Electronic_Commerce_transactions_2.pdf>accessed 29th April 2024

[99] Adnan Ahmed(n98)p126

uniformity in the regulation of the conduct of online arbitration.[100] The lack of uniformity together with the difficulties in selecting the seat of arbitration for an online arbitration makes it hard for parties to recognize the laws that should apply to the arbitration process.[101] Traditionally, in arbitration, the applicable laws are often those of the country hosting the proceedings.[102] Unfortunately, when the proceedings are hosted online, it becomes very difficult to determine the seat for arbitration and the law that should apply because the parties join the proceedings online from their country of residence.[103]

Recommendations and Conclusion

Recommendations

To perfect international commercial arbitration there is the need to encourage cooperation and coordination between courts from different jurisdictions, transform the existing legal framework, adherence to the rule of law, and promoting e-arbitration education as among the compulsory subjects. Some of these solutions are discussed below.

Cooperation and Coordination of Courts

International commercial arbitration is a subject that is still developing because of globalization and the increased interconnections between individuals and states; worth noting is that its development and continued acceptance heavily depends on cooperation among the developed, developing and the least developed states in the world. [104] The imperative of cooperation and

[100] Muigua Kariuki, *Accessing Justice Through ADR* (Glenwood Publishers Limited, 2022)p1011

[101] Adnan Ahmed(n98)p126

[102] International Arbitration Law and Rules in Kenya < https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/kenya> accessed 22nd October 2024.

[103] Ahmed Adnan (n92) p.122.

[104] Muigua Kariuki, Settling *disputes through arbitration in Kenya.* 4th edition (Glenwood Publishers Limited) p272

coordination is to make sure that the outcome of the online arbitration is recognized and enforced in all the jurisdictions involved.

Transforming the legal framework

Commercial arbitration is shifting from the traditional physical system to a hybrid system and even to a new era of operation.[105] As noted earlier, there is still no standalone international instrument that regulates the practice of e-arbitration, its application depends on the provisions of the existing instruments as noted with the ICC Arbitration Rules.[106] This then invites legal practitioners at the international and national level to consider the drafting of a single legislation that will govern the conduct of electronic arbitration, licensing of law firms that offer online arbitration, data safety and clarity on the requirement of writing of arbitration agreements for those drafted online.

Encouraging adherence to the rule of law

It has been noted earlier that arbitrators in some countries are rarely picked for an international commercial arbitration due to the perceived corruption. On the same note, perceived bias against some of the states especially those from the African continent is among the realized challenges in international arbitration.[107] All this can be eliminated by ensuring that the rule of law is recognized and upheld by countries at the international and national levels.

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[105] Łągiewska M., *New Technologies in International Arbitration: A Game-Changer in Dispute Resolution?* (2024) Vol. 37. Int J Semiot Law, PP. 851–864

[106] International Arbitration Law and Rules in Kenya < https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/kenya> accessed 22nd October 2024.

[107] Jean Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law?: Lessons from Abroad* (2007) vol.56(2) 56 DePaul Law. Review. P569. < https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1307&context=law-review#:~:text=It%20urges%20that%20%22ADR%20programs,toward%20these%20objectives.%22%20Id.> accessed 22nd October 2024.ss

It is important to mention the fact that international arbitration developed over the years to stand as a transitional legal order and therefore, its outcome heavily depends on national courts and laws in conservatory orders as well as recognition and enforcement of arbitral awards.[108] There is therefore a need for reforms and continued fidelity to the rule of law in all the countries so that to win the confidence of investors in choosing arbitrators and the seat of arbitration without the fear of bias or corruption.[109]

E-arbitration education

Educating stakeholders on the significance of electronic arbitration as an alternative justice system revamps access to justice. This is because education creates awareness among the citizens on the existence of electronic arbitration, which is effective in resolving commercial disputes, as well as stimulating the minds of professionals to adopt to innovations.[110] This power of education was once recognized by Aristotle, who stated that "education is an ornament in prosperity and refuge in diversity." [111]

Conclusion

Technology, accompanied by other factors, is changing the phase of international dispute resolution mechanisms, and the international commercial arbitration is not excluded.[112] The influence of technologies, such as AI and ICT, in international dispute resolution is completely changing the mode of

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[108] Muigua Kariuki(n104)p270

[109] Muigua Kariuki(n104)p271

[110] Olachi Jackton, The role of Education & Training in promoting ADR (CIARB Features, 2019)para1< https://ciarb.org/resources/features/the-role-of-education-training-in-promoting-adr/>accessed 29th April 2024

[111] Olachi Jackton(n110) para1

[112] Dr. S hahla Ali, *The Use of Technology in Arbitration Proceedings* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06_shahla_ali_-_drde_hk_8nov2023.pdf> accessed 23rd October 2024.

commercial arbitration from the traditional to electronic arbitration.[113] In electronic arbitration, unlike in the traditional arbitration, hearing is conducted remotely, witnesses testify via a video conference, evidence is presented electronically, and the award is also presented electronically to the parties.[114] While this is perceived to promote efficiency and effectiveness in resolution of commercial disputes, some scholars still argue that e-arbitration lacks the sense of reality in its entirety. This argument is exacerbated by some issues such as; data security concerns, choice of laws, corruption, and inadequate legal framework to regulate the conduct of electronic arbitration.

Taking a varied approach this research has recommended electronic arbitration as the most effective method of resolving international commercial disputes. According to this research, electronic arbitration saves time and costs, its flexible and it adopts to contemporary challenges such as pandemics and the increased rate of globalization. However, to make electronic arbitration a perfect bullet for dealing with international commercial disputes, this research calls upon states to cooperate and coordinate in the enforcement of the outcome of electronic arbitration; to adhere to the rule of law and to enact a single international concord that will regulate the conduct of electronic arbitration globally.

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[113] Łągiewska M., *New Technologies in International Arbitration: A Game-Changer in Dispute Resolution?* (2024) Vol. 37. Int J Semiot Law, PP. 851–864

[113] International Arbitration Law and Rules in Kenya < https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/kenya> accessed 22nd October 2024

[114] Ibid.

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international arbitration; mapping its advantages and main caveats in the face of Covid-19 (Beill, 2022)ch.3 p82< https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf>

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Lubano N., Barasa J. & Eva M., *The Role of Alternative Dispute Resolution in Online Commerce* (Legal@oraro, 2019)para15< https://www.oraro.co.ke/add-to-cart-the-role-of-alternative-dispute-resolution-in-online-commerce/>

Adnan Ahmed, *Challenges of Electronic Arbitration in Electronic Commerce transactions; Multi-Knowledge Electronic Comprehensive Journal For Education And Science Publications (MECSJ) Issue 2*, (Arbitration & Business Law Department, University of Gloucestershire, 2017)p127< https://mecsj.com/uplode/images/photo/Challenges_of_Electronic_Arbitration_in_Electronic_Commerce_transactions_2.pdf>

Eco-Mediation: Making the Case for Mediation in Resolving Climate Change Disputes

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Abstract

Climate change disputes pose significant challenges to global cooperation and sustainable development. In a world increasingly affected by climate-induced conflicts, conventional litigation fails to provide efficient solutions. However, mediation offers more timely, efficient, and effective approaches to addressing these disputes. It has emerged as a precious dispute-resolution tool in this arena since it encourages sustainable and long-term solutions facilitating collaborative problem-solving. This paper sheds light on instances such as the Olkaria IV Geothermal Project mediation to demonstrate the effectiveness of mediation in climate-related disputes. The paper also shows that this approach supports global cooperation and sustainable development by facilitating joint management of shared resources and responsibilities among disputing parties. It also acknowledges various challenges including implementation of mediation, funding, and consensus from the disputing parties. In light of these issues, the paper advocates for various recommendations including a collaborative approach to promoting the use of mediation in climate change disputes. Ultimately, the paper argues that utilizing mediation in solving climate change disputes is crucial for coordinated, long-term, and sustainable responses to climate change impacts.

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1.0 Introduction

"Climate change is not science fiction. This is a battle in the real world, it is impacting us right now."[1] This statement encapsulates what climate change entails; it is a pressing global issue with far-reaching consequences and impacts on the environment, economies, and human societies.[2] Climate change manifests in extreme weather events, rising temperatures, and rising sea levels which result in problems like food insecurity, violence, and large-scale displacement of people.[3] Disputes arising from climate change, deter countries from making efforts toward the realization of the Sustainable Development Agenda and are described as the most defining challenge of our time.[4] This is because, climate change disrupts economies, impacts health, and displaces communities, primarily by diverting resources and focus from long-term sustainable development efforts, thereby hindering progress towards achieving the Sustainable Development Goals (SDGs) and affecting lives altogether.[5]

Consequently, Sustainable Development Goal 13 calls for countries to take action to combat climate change and its adverse impacts.[6] This can be achieved by incorporating climate-related measures into national policies, promoting education and awareness, and strengthening institutional capacity for

[1] Arnold Schwerzenegger Speech, First World Summit of Conscience for Climate, 2015-< Arnold Schwarzenegger: "Climate Change is Not Science Fiction" | TIME> on 20 June 2024.
[2] United Nations, 'What is climate change?'-< What Is Climate Change? | United Nations> on 20 June 2024.
[3] Messer E, 'Climate change & violent conflict: A critical literature review,' Oxfam America Research Backgrounder Series, 2010, 5.
[4] Muigua. K, 'Achieving sustainable development, peace and environmental security,' *Glenwood Publishers Limited*, 2021, 68.
[5] UNFCCC Secretariat, '*Climate Change: Impacts, vulnerabilities and adaptation in Developing Countries,*' 2006, 42 -< CLIMATE CHANGE: IMPACTS, VULNERABILITIES AND ADAPTATION IN DEVELOPING COUNTRIES (unfccc.int)>
[6] United Nations Children's Fund, SDG 13 <SDG Goal 13: Climate Action - UNICEF DATA > on 20 June 2024.

adaptation.[7] In Kenya, sustainable development is enshrined in Article 69(1) of the 2010 Constitution. It mandates the state to ensure sustainable exploitation, utilization, management, and conservation of the environment and natural resources.[8]

Climate change disputes can be broadly defined as any dispute arising out of or about the effect of climate change and climate change policy, *the United Nations Framework Convention on Climate Change* ("UNFCCC"), and the Paris Agreement.[9] Over time, the global response to climate change has been hindered by disputes over issues such as emission reduction targets, allocation of responsibility among nations, and financial support for developing countries.[10] This has led to it being termed a conflict multiplier.[11] Disputes attributable to climate change arise at international, national, and community levels, involving governments, civil society, businesses, and locals.[12] This situation invokes the need to implement an efficient dispute resolution mechanism to help curb disputes that arise.

This paper advocates for mediation to take center stage in such dispute resolution endeavors owing to its potential to effectively and efficiently solve climate change disputes. To support this, chapter two contextualizes climate

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[7] Osanan B, 'The Application of ADR in resolving climate-related disputes to achieve sustainable development in Kenya,' 10, *University of Nairobi Law Journal,* 1, 2023, 59.
[8] Article 69 (1), *Constitution of Kenya* (2010).
[9] Article 14 (1), *United Nations Framework Convention on Climate Change*, 7 November 1990, 1771 UNTS 107. See also Article 24, The Paris Agreement, 12 December 2015, 3156 UNTS 79.
[10] United Nations, 'Global issues: Climate change,' -<Climate Change | United Nations> on 20 June 2024.
[11] United Nations Environment Programmes, 'Climate litigation more than doubles in five years, now a key tool in delivering climate justice,' 27 July 2023-< Climate litigation more than doubles in five years, now a key tool in delivering climate justice (unep.org) > on 20 June 2024.
[12] Kariuki F and Sebayiga V, 'Evaluating the role of ADR mechanisms in resolving climate change disputes,' *Alternative Dispute Resolution,* 2022, 12.

change disputes, exploring their causes, impacts, and the stakeholders involved. Chapter three delves into the role of mediation in solving climate change disputes, highlighting its advantages, procedure, and past examples. Chapter four examines the role of mediation in sustainable development, illustrating how mediation supports the achievement of sustainable development goal 13 by facilitating the resolution of climate change disputes to support environmental sustainability, resilience, and equitable development. Chapter five reviews the challenges encountered in the mediation process and finally, chapter six provides recommendations for enhancing the effectiveness and adoption of mediation in climate change disputes. Ultimately, this paper makes the claim that if mediation were to be utilized more predominantly in resolving climate change disputes, then this would lead to more timely resolution of such disputes and help achieve our sustainable development goals.

2.0 Conceptualizing Climate Change Disputes

Disputes related to climate change emerge from its diverse and widespread impacts, spanning various levels and scopes. As mentioned earlier, climate change can be termed a conflict multiplier since it has the potential to intensify and broaden the scope of existing disputes or directly give rise to other serious disputes.[13] For instance, problems like food and water insecurity that arise due to climate change may cause unrest and violence among communities as they struggle to get a share of the limited resources.[14] Not only do climate change disputes involve disputes over the allocation of resources but they also include disputes over responsibility for damages and the implementation of mitigation policies and adaptation strategies.[15] These disputes frequently intertwine with

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[13] Funder M, Ginsborg IP and Cold-Ravnkilde SM in the Danish Institute of International Studies Report, '*Addressing climate change and conflict in development cooperation experiences from natural resources management*,' 2012, 12.

[14] Born C, '*A Resolution for a Peaceful Climate: Opportunities for the United Nations Security Council*,' Stockholm International Peace Research Institute, 2017, 4.

[15] United Nations Environment Programme, 'Climate litigation more than doubles in five years, now a key tool in delivering climate justice,' -<Climate litigation more than doubles in five years, now a key tool in delivering climate justice > on 20 June 2024.

broader concerns of justice and sustainability, highlighting societal tensions regarding responsibility and cost-sharing in addressing climate change.

This paper identifies and examines three principal origins of climate change disputes. These are contracts relating to the execution of energy transition, mitigation, or adaptation measures, per commitments under the Paris Agreement; contracts without any specific climate-related purpose, but under which a dispute involves or induces a climate or related environmental issue; and submission or other specific covenants entered into to resolve existing climate change or related environmental disputes potentially involving affected demographics.[16] These disputes are classified as climate change disputes because they directly involve issues such as emissions reduction, environmental impacts, and sustainability commitments related to climate change mitigation and adaptation efforts.[17] The focus on these contracts is justified by their significant impact on climate governance, widespread implications across various sectors, and potential to shape future climate-related legal and policy developments.[18]

2.1 Contracts relating to the execution of energy transition, mitigation, or adaptation measures per commitments under the Paris Agreement

This section will discuss examples of how climate-change disputes manifest under the first category. States, state institutions, industries, and investors may enter into agreements under the first category for the realization of the energy transition to renewable energy sources, mitigation of climate change effects, or

[16] ICC Arbitration and ADR Commission, 'Resolving climate change related disputes through Arbitration and ADR, 2019,' 8-< ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR - ICC - International Chamber of Commerce (iccwbo.org)> on 20 June 2024.

[17] Knaster A, 'Resolving conflicts over climate change solutions: Making the case for mediation,' 10, *Pepperdine Dispute Resolution Law Journal,* 3, 2010, 488.

[18] Norton Rose Fullbright, 'Climate change and sustainability disputes: Energy sector perspectives,' July 2021-<Climate change and sustainability disputes: Energy sector perspectives | Kenya | Global law firm | Norton Rose Fulbright> on 20 June 2024.

adaptation measures to cope with adverse effects of climate change, following commitments under the Paris Agreement. These agreements often involve collaborative efforts to reduce greenhouse gas emissions, promote renewable energy sources, enhance energy efficiency, and implement climate adaptation strategies.[19] The aspects of these agreements include: establishing systems to track progress and ensure transparency in meeting climate goals, encouraging cooperation between the public sector and private companies to leverage resources and expertise, and sharing advanced technologies and knowledge to support global efforts in mitigating climate change.[20]

Therefore, the swift and extensive transformations of energy, land infrastructure, and industrial systems require parties to manage and allocate risks, emphasizing the need for effective dispute-resolution mechanisms.[21] Contracts linked to the UNFCCC include agreements with the Green Climate Fund (GCF), a pivotal component of the Paris Agreement. As the largest global climate fund, it supports developing nations in achieving their Nationally Determined Contributions (NDCs) for climate-resilient and low-emission pathways.[22] Disputes may arise over the allocation and use of these funds, the effectiveness of funded projects, and compliance with the terms of the agreements. Other examples of contracts under this category include contracts relating to insuring, funding, licensing, plant construction or supply of renewable energy, decommissioning of non-renewable power plants, adjusting

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[19] COP26 reaches consensus on key actions to address climate change 2021-<COP26 Reaches Consensus on Key Actions to Address Climate Change | UNFCCC> on 22 June 2024.

[20] United Nations Climate Change, Launch of new climate reporting tools for enhanced transparency, 1 July 2024 <Launch of New Climate Reporting Tools for Enhanced Transparency | UNFCCC> on 4 July 2024.

[21] ICC Arbitration and ADR Commission, 'Resolving climate change related disputes through Arbitration and ADR, 2019,' 8-< ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR - ICC - International Chamber of Commerce (iccwbo.org)> on 21 June 2024.

[22] About GCF-< About GCF | Green Climate Fund> on 14 July 2024.

existing infrastructure to adapt to a warming climate, and enhanced irrigation systems to reduce greenhouse gas emissions.[23] This may involve disputes over delays in construction, cost overruns, decommissioning costs, and environmental liabilities.

Disputes relating to plant construction can be depicted by the *Lake Turkana Wind Power Project* (LTWP) case in Kenya.[24] Kenya's NDCs under the Paris Agreement include increasing the generation of renewable generation to mitigate greenhouse gas emissions. The project endeavored to scale back carbon dioxide emissions by swapping electricity generated by fossil fuels and promoting sustainable energy solutions. Consequently, it resulted in land disputes between the local community in Laisamia District and Lake Turkana Wind Power Limited based on unfair compensation and alleged illegal titles following the company's unprocedural acquisition of the community land.[25] It is therefore evident that disputes under this category are multisectoral, and cross-cutting, and require timely resolution.

2.2 Contracts without any specific climate-related purpose, but under which a dispute involves or induces a climate or related environmental issue

The implications of climate change extend beyond dedicated climate change policies and projects influencing a wide array of commercial contracts across various sectors. For example, transitioning systems in alignment with a 1.5°C global warming pathway, along with mitigation measures and climate change adaptation, can impact these commercial agreements.[26] These systems are crucial for compliance, cost management, resilience, and competitive advantage

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[23] About GCF-< About GCF | Green Climate Fund> see the Green Climate Fund proposal toolkit 2017 3.

[24] *Mohamud Kochale & Others v Lake Turkana Wind Power Limited & Others* (2021) eKLR.

[25] *Mohamud Kochale & Others v Lake Turkana Wind Power Limited & Others* (2021) eKLR.

[26] ICC Arbitration and ADR Commission, 'Resolving climate change related disputes through Arbitration and ADR,' 2019,9-< ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR - ICC - International Chamber of Commerce (iccwbo.org)> on 21 June 2024.

in a climate-regulated environment. They involve aligning commercial agreements with climate goals, incorporating sustainability measures, managing costs and risks, and complying with regulations for resilience and competitive advantage. The sectors affected include infrastructure, energy, agriculture, transportation, and food production and processing industries.[27]

Subsequently, regulatory changes, increased costs, and performance issues due to climate change can lead to disputes in contracts over compliance, responsibilities, costs, and fulfillment of terms.[28] For instance, contracts for operating food processing plants can lead to disputes over who pays for costly modifications required by new carbon emissions and energy efficiency regulations. The sector-specific commercial contracts mentioned above may be unrelated to climate change and could have been established before the Paris Agreement came into effect yet, they are still affected by issues like regulatory compliance, increased operational costs, and disputes over fulfillment of responsibilities.[29]

Notwithstanding, contractual obligation fulfillment across several sectors may be impacted by the contracting parties' responses to (1) regulations or policies to fulfill country commitments under the Paris Agreement; (2) modification in national laws; (3) environmental impacts of climate change; (4) voluntary pledges by industries or individual corporations as part of climate or sustainability-focused corporate social responsibility; and/or (5) responses to

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[27] ICC Arbitration and ADR Commission, 'Resolving climate change related disputes through Arbitration and ADR, 2019,' 9-< ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR - ICC - International Chamber of Commerce (iccwbo.org)> on 21 June 2024.

[28] Glover J, 'The impact of climate change on contracts and the law,' 2021-<The impact of climate change on contracts and the law (fenwickelliott.com)> on 21 June 2024.

[29] ICC Arbitration and ADR Commission, 'Resolving climate change related disputes through arbitration and ADR, 2019,' 9-< ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR - ICC - International Chamber of Commerce (iccwbo.org)>

associated climate change action in national courts and other fora.[30] This category underscores how energy and system transitions, as well as mitigation and adaptation actions, can influence any contractual arrangement or corporate activity.[31]

Therefore, the second category of climate change disputes also shows a need for effective dispute resolution; one that addresses the root causes of the dispute.

2.3 Submission or other specific covenants entered into to resolve existing climate change or related environmental disputes potentially involving impacted groups or populations

A submission agreement is a contract where parties agree to submit a dispute related to climate issues, such as emissions, environmental regulations, or sustainability commitments, to arbitration.[32] It includes details such as the scope of the climate-related dispute, the selection of arbitrators with expertise in climate issues, the procedural rules to be followed, and any relevant environmental standards or regulations. A submission agreement typically arises when a dispute has arisen and one party unilaterally offers to arbitrate.[33]

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[30] ICC Arbitration and ADR Commission, 'Resolving climate change related disputes through arbitration and ADR,' 2019,9-< ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR - ICC - International Chamber of Commerce (iccwbo.org)>

[31] ICC Arbitration and ADR Commission, 'Resolving climate change related disputes through arbitration and ADR,' 2019,9-< ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR - ICC - International Chamber of Commerce (iccwbo.org)>

[32] Climate Action Network International, 'Climate action network submission on 2.1c,' June 2023-<Climate Action Network Submission on 2.1c - Climate Action Network (climatenetwork.org)> on 21 June 2024.

[33] ICC Arbitration and ADR Commission, 'Resolving climate change related disputes through arbitration and ADR,' 2019,9-< ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR - ICC - International Chamber of Commerce (iccwbo.org) >

They may be potentially employed on certain occasions if all participating parties legally and validly consent to be bound by the agreement.

For instance, a local community could be directly affected by an investment project in a protected forestry area.[34] In such situations, a submission agreement could elude multiple court proceedings by facilitating a voluntary resolution of disputes outside of formal legal battles with conflicting outcomes and offering certainty to the parties involved.[35] It also ensures finality within a more expedited timeframe compared to court litigation.[36] However, these submissions can themselves be sources of climate change disputes. This is because they often involve complex negotiations and can lead to disagreements over their terms such as the specific procedural rules to be followed and applicable environmental standards. Additionally, the impacted groups could question the validity of the agreements if the process needs to sufficiently address their concerns. [37]

One significant instance of a submission agreement facilitated by the Permanent Court of Arbitration was the Sudan Comprehensive Peace Agreement. Within this framework, the Abyei Arbitration Agreement was reached between the Republic of Sudan and the Sudan People's Liberation Movement to address a

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[34] Climate Investment Funds, 'Sustainable forests,' -< Forest Investment Program | Climate Investment Funds (cif.org)> on 21 June 2024.

[35] Elizabeth F, Kohe H, James P, Lucy M, and Clement F, 'Moving existing disputes into arbitration: Submission agreements allow you to access arbitration's benefits after disputes arise,' 27 April 2020- <Moving existing disputes into arbitration: Submission agreements allow you to access arbitration's benefits after disputes arise | Perspectives | Reed Smith LLP> on 21 June 2024.

[36] ICC Arbitration and ADR Commission, 'Resolving climate change related disputes through arbitration and ADR,' 2019,9-< ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR - ICC - International Chamber of Commerce (iccwbo.org)>

[37] Mashal F, 'Resolving Climate Change Disputes through Arbitration: The ICC Perspective,'-<Resolving Climate Change Disputes through Arbitration: The ICC Perspective - Al Tamimi & Company> on 22 June 2024.

boundary dispute in the Abyei region, which had been a point of contention between the north and south of Sudan.[38] The dispute over Abyei stemmed from differing interpretations of the boundaries of the Abyei Area, which was crucial due to its significant oil resources and strategic location. Both sides claimed ownership and control over the region, leading to violent clashes and ongoing tensions.[39] Therefore, this agreement aimed to peacefully resolve territorial disagreements concerning the Abyei region, highlighting the role of international arbitration in managing complex intra-state disputes.[40]

As demonstrated in this section, climate change disputes involve diverse stakeholders, including states, state institutions, industries, and local communities. Therefore, while arbitration can be effective in certain cases, mediation should be advocated as a primary dispute resolution mechanism for climate change disputes. This is because mediation offers a more collaborative and flexible approach, ensuring that the needs and interests of all disputing parties are considered. Therefore, implementing mediation can help prevent the recurrence of climate change-related disputes in the future by addressing the root cause of the problem, and fostering mutual understanding, cooperation, and sustainable solutions.

3.0 The Role of Mediation in Solving Climate Change Disputes

Mediation is a voluntary and non-adversarial process led by an impartial third party who facilitates dispute resolution between parties, distinct from judicial

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[38] The Government of Sudan / the Sudan People's Liberation Movement/Army (Abyei Arbitration) (2008), Permanent Court of Arbitration, -<Cases | PCA-CPA> 21 June 2024.

[39] Sudan: Deadly violence in the disputed Ayabei area, 17 March 2023 -<Sudan Situation Update: March 2023 | Deadly Violence in the Disputed Abyei Area (acleddata.com)> on 21June 2024.

[40] ICC Arbitration and ADR Commission, 'Resolving climate change related disputes through arbitration and ADR,' 2019,10-< ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR - ICC - International Chamber of Commerce (iccwbo.org)>

settlement.[41] Mediators are chosen jointly by the disputing parties after carefully considering their needs and interests.[42] Unlike judges and arbitrators, mediators usually facilitate discussions between disputing parties without necessarily seeking to impose solutions.[43] In the dispute resolution process, mediators assist the conflicting parties in recognizing their mutual interests, enhancing shared advantages, and collaboratively tackling common underlying issues and challenges.[44]

In this context, mediation emerges as an invaluable tool for solving climate change disputes because it offers a more flexible and collaborative approach to solving disputes.[45] This is evident as it facilitates dialogue and aids in customizing solutions which result in preserved relationships and improved compliance among parties.[46] By fostering unified problem-solving and building relationships, mediation has the potential to contribute to the achievement of sustainable development goals, particularly SDG 13 where traditional litigation often falls short in the provision of sustainable solutions.[47]

In addition to its flexibility and cooperative nature, mediation processes are cost-effective and time-efficient compared to traditional litigation.[48] Climate change disputes can be protracted and expensive when handled through litigation burdening the parties involved and further delaying action on critical

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[41] Section 2, *Civil Procedure Act* (Act No. 18 of 2018).
[42] Goldberg S, Sander F, Rogers N, and Cole SR, '*Dispute Resolution: Negotiation, mediation, and other processes*,' 7ed, Aspen Publishers, 2020, 4.
[43] Goldberg, 'Dispute Resolution: Negotiation, mediation, and other processes,' 111.
[44] Kariuki F, Kerecha G, and Kirwa J, 'Handling extractives related grievances in Kenya: A guide for judicial officers,' *Extractives Baraza,* 2019, 66.
[45] Knaster A, 'Resolving conflicts over climate change solutions,' 472.
[46] Paul S, 'Climate change conflict and the role of mediation,' Lawyer Monthly, 28 September 2023-< Climate Change Conflict and the Role of Mediation (lawyer-monthly.com)> on 23 June 2024.
[47] Knaster A, 'Resolving conflicts over climate change solutions,' 472.
[48] Muigua K and Kariuki F, 'ADR, access to justice and development in Kenya,' *Strathmore Law Journal*, Nairobi, 2015, 15.

issues.[49] Mediation, by contrast, tends to be faster and less costly, allowing for timely resolution of disputes.[50] Furthermore, the funds that could have been used in resolution can be put towards implementing agreed-upon solutions. This efficiency is particularly valuable in the urgent context of climate change, where delays can exacerbate environmental and social harms.

The mediation procedure begins with the selection of a neutral and impartial mediator agreed upon by all the parties involved.[51] After the initial introduction of the mediator and the parties, the mediator explains the rules and objectives of the process, emphasizing confidentiality and voluntary participation.[52] Each party will then be allowed to present their case without interruption, outlining their concerns and desired outcomes related to the climate issue at hand. Following the opening statements, the mediator facilitates discussions encouraging the parties to identify underlying interests and explore possible solutions. Moreover, the mediator may hold joint discussions or caucuses to help clarify the points and negotiate differences.[53]

The mediator is expected to remain neutral and impartial throughout the process.[54] If an agreement is reached, the mediator will then draft a settlement subject to review by all parties.[55] The parties will then sign the final settlement agreement and in some cases, the mediator may also sign the agreement as a

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[49] Uwazie E, 'Alternative Dispute Resolution and Peace-building in Africa.' - <Alternative Dispute Resolution and Peace-building in Africa> on 23 June 2024.
[50] Bennett C, 'The philosophy and approach to mediation' *BDJ In Pract*, 34, 2021, 34–35 Accessible on <https://doi.org/10.1038/s41404-021-0870-9>
[51] Goldberg, 'Dispute Resolution: Negotiation, mediation, and other processes,' 4.
[52] Knaster A, 'Resolving conflicts over climate change solutions,' 469.
[53] Goldberg, 'Dispute Resolution: Negotiation, mediation, and other processes,' 117-18.
[54] Gaffney I, 'Impartiality and neutrality in mediation,' *Journal of Mediation and Applied Conflict Analysis*, 8, 2022 60-63.
[55] McRedmond P, 'Mediation and the European Union' in *Mediation Law*, 1, Bloomsbury Publishing, Ireland, 2018, 321.

witness to the settlement.[56] Finally, the parties begin implementing the terms of the settlement agreement and the mediator may follow up with the parties to ensure compliance and address any issues that arise during the implementation phase.[57] By following these steps, the mediation settlement agreement becomes a legally binding document that the parties are obligated to adhere to, contributing to effective resolution and climate action without the need for court enforcement.[58]

Mediation proceedings are private and confidential, unlike public court cases.[59] This allows parties to have sensitive discussions without fear of information being made public.[60] Additionally, it allows for customized solutions tailored to specific disputes, as opposed to a one-size-fits-all ruling that may not fully settle the dispute adequately leaving room for recurrence.[61] This flexibility is more suited for climate change disputes because they usually involve diverse stakeholders with unique interests. Moreover, the mediation process encourages constructive dialogue by laying emphasis on open communication

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[56] Laite G C, 'Deal or No Deal? Don't Leave a Mediation Without a Signed Final Settlement Agreement,' William Mullens, 17 January 2017 -<Deal or No Deal? Don't Leave a Mediation Without a Signed Final Settlement Agreement | Williams Mullen> on 23 June 2024.

[57] Laite G C, 'Deal or No Deal? Don't Leave a Mediation Without a Signed Final Settlement Agreement,' -<Deal or No Deal? Don't Leave a Mediation Without a Signed Final Settlement Agreement | Williams Mullen>

[58] Strathmore Dispute Resolution Center, 'Mediation settlements are binding,' 30 November 2018 -<Mediation Settlements are Binding – The Strathmore Dispute Resolution Centre> on 23 June 2024.

[59] Wolski B, 'Confidentiality and privilege in mediation: Concepts in need of better regulation and explanation,' *University of New South Wales Law* Journal, 43, 2020, 1553.

[60] Aishwarya Girimarayanan, 'Can climate change disputes be resolved through mediation?' 23 April 2021-<Can Climate Change Disputes Be Resolved Through Mediation? | Voices of Youth> on 22 June 2024.

[61] Susskind L, McKearnan S, and Thomas-Larmer J, 'The CONSENSUS building handbook: A comprehensive guide to reaching agreements,' Sage Publications, 1999, 327 - 333.

and consensus-building between the parties.[62] Consequently, parties can voice out their concerns, understand each side`s viewpoints, and work towards innovative solutions that will create a win-win result for all.[63]

3.1 Mediation in Practice

The ability to build trust and facilitate constructive dialogues between disputing parties can be depicted by the Magarini inquiry in Malindi.[64] It centered on a dispute between mining companies and the local community. The local community felt that the mining activities were negatively impacting their livelihoods and the environment, leading to tensions.[65] To address these issues, the Kenya Association of Manufacturers engaged Ufadhili Trust in 2016 to mediate and facilitate a resolution between the mining companies and the community.[66] In this case, the mediator was able to create a common platform of dialogue between the parties. This empowers the community to negotiate as informed partners with the companies and increases awareness and capability of the companies to engage in strategic community interactions. It also guides the parties in developing and implementing an action plan to address disputes related to environmental impacts, labor practices, land ownership, and community engagement.[67] This process enabled the mining company and the citizens to work directly to resolve their disputes and reach amicable solutions to them.

[62] Susskind L *et al*, *The consensus building handbook,* 327.

[63] Omondi S and Munene C, 'Bridging the gap to sustainable development through mediation in Kenya' 19 March 2023, 10. Available at Bridging the Gap to Sustainable Development through Mediation in Kenya by Bright Shalom, Christopher Munene :: SSRN on 16 July 2024.

[64] Kariuki F *et al*, *Handling extractives related grievances in Kenya*, 97.

[65] Kenya National Commission on Human Rights, *The Malindi public inquiry audit report*, 2018, 21-< Malindi Public Inquiry_Audit Report.pdf (knchr.org)> on 25 June 2024.

[66] Kariuki F *et al*, *Handling extractives related grievances in Kenya*, 97.

[67] Kariuki F and Sebayiga V, 'Evaluating the role of ADR mechanisms in resolving climate change disputes,' 16.

Mediation has also seen success in the African region as demonstrated by the Agacher Strip mediation between Burkina Faso and Mali.[68] In this case, both countries sought to regulate the 100-mile-long Agacher Strip and its substantial amounts of natural gas and mineral resources. The tension centered on defining the border, leading to two armed conflicts: one in 1974 and another in 1985.[69] This historical context demonstrates how disputes over resource-rich territories can escalate, illustrating challenges akin to those seen in climate change disputes, where competing interests and resource management can provoke conflict. There were several attempts at mediation. First, Ivory Coast, Senegal, and Guinea initiated a mediation process between the parties but the parties failed to reach an agreement.[70] Subsequently, the President of the Organization of African Unity (OAU) formed a mediation commission to resolve the dispute over the territory and supervise the withdrawal of troops.[71] On June 18, 1975, the parties reached an agreement recommending an independent demarcation of the frontier zone. The war finally ceased when the NonAggression and Defense Aid (NADA) group facilitated an agreement leading to a cease-fire and troop withdrawal. [72]

Narrowing down to Kenya, the Olkaria IV Geothermal Project mediation between 2015 and 2016 is a notable example of one of the most successful mediation cases conducted concerning climate change disputes.[73] The project, which involved the Kenya Electricity Generating Company (KenGen) and

[68] Spain A, 'Beyond adjudication: Resolving international resource disputes in an era of climate change,' 30 *Stanford Environmental Law Journal,* 343, 2011, 380.
[69] United Nations Security Council Report, Case Studies Demonstrating the Use of Mediation, Consensus Building and Collaborative Problem Solving in Resolving Environmental and Climate-related Conflicts,' 2009, 6. (UNSC, Report # S/2009/189).
[70] Spain A, 'Beyond adjudication,' 380.
[71] Spain A, 'Beyond adjudication,' 380.
[72] Spain A, 'Beyond adjudication,' 381.
[73] Kongani L, Wahome R, and Thenya T, 'Mediating energy project implementation conflicts, a learning curve: The Case of Olkaria IV Geothermal Kenya,' 5, *Journal of Conflict Management and Sustainable Development*, 2, 2020, 6.

Project-Affected Persons (PAPs) was marked by significant disputes over land use, resettlement, and livelihoods. The government of Kenya, through KenGen Company, needed land to expand geothermal production to meet its commitment to increase electricity supply while mitigating climate change through green energy production.[74] The PAPs, deeply affected by the situation, complained to the financers- the European Investment Bank (EIB) and the World Bank- via emails requesting their intervention on the matter.[75] After a thorough investigation, the EIB recommended the 2015 mediation to help solve the dispute. Therefore, the mediation process, facilitated by the European Investment Bank Complaints Mechanism(EIB-CM), brought together the parties to address these issues and find a mutually acceptable solution.[76]

The mediation process began in 2015 and culminated in a mediation agreement being signed on May 28, 2016. Moreover, the mediation process involved extensive community engagement with community representatives actively participating in the process. The agreement was presented to the community at a public meeting, where a clear majority supported it. The aforementioned agreement addressed key concerns including the resettlement of Maasai communities, land use, and livelihoods.[77]

The Okaria IV mediation case further highlights several important lessons that should be emulated in other mediation cases. These are, that mediation can be an effective tool for resolving climate-change disputes that involve multiple stakeholders, community engagement, and participation. These factors are crucial in ensuring the success of the mediation process and a mediation

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[74] European Investment Bank-Complaint Mechanism (EIB-CM), Final Monitoring Report, 2021.
[75] EIB-CM, 'Olkaria I and IV, Kenya mediation report: Complaint/SG/E/2014/07&08,' 2018, 5.
[76] EIB-CM, Final Monitoring Report, 2021, para 3.1.
[77] Kongani L, Wahome R and Thenya T, ' Managing geothermal project implementation conflicts through mediation: A case of Olkaria IV Project, Nakuru county, Kenya,' 5, *Journal for sustainability, environment, and peace,* 1, 2022, 96–108.

agreement can provide a framework for the implementation of the resettlement action plan, addressing issues of non-compliance and the well-being of PAPs.[78]

The case studies were selected based on the presence of a significant dispute, the involvement of diverse stakeholders, the use of mediation as a resolution tool, and its success in resolving the dispute. From these examples, it is evident that mediation is a vital tool for a variety of factors. First, it provides a platform for the community to voice out their concerns. It also allows for the identification of action points and presentations of solution packages that effectively address the concerns of the community. Finally, the mediation agreement provides a basis for the implementation of the action plan, addressing the issues of non-compliance identified by the mediation panel.

4.0 The Role of Mediation in Promoting Sustainable Development

Sustainable Development understood in terms of intergenerational equity entails development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[79] In Kenya, the promotion of sustainable development is enshrined in Article 69 of the 2010 Constitution which is drafted under ecological terms.[80] It places an obligation on the state to ensure the sustainable exploitation, utilization, conservation, and management of the environment and natural resources and the equitable sharing of accruing benefits.[81] Subsidiary legislation also defines sustainable development as 'development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems'.[82] It is clarified

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[78] EIB-CM, Final monitoring Report 2021, para 4.3-4.5.

[79] Report of the World Commission on Environment and Development: Our Common Future, 16. Available at Our Common Future: Report of the World Commission on Environment and Development> on 16 July 2024.

[80] Article 69, *Constitution of Kenya* (2010).

[81] Article 69, *Constitution of Kenya* (2010).

[82] Section 2, *the Environmental Management and Coordination Act* (Act No. 8 of 1999).

to entail principles of public participation, international cooperation in environmental resource management, intergenerational and intragenerational equity, the polluter-pays principle, and the precautionary principle.[83]

Mediation plays a fundamental role in promoting Sustainable Development, particularly Sustainable Development Goal 13 (SDG 13) on climate action, by facilitating the resolution of climate change disputes to support environmental sustainability, resilience, and equitable development.[84] Environmental sustainability involves the duty to preserve natural resources and safeguard global ecosystems to promote health and well-being, both in the present and for future generations.[85] Mediation in climate change disputes brings together diverse stakeholders, including governments, communities, businesses, and non-governmental organizations.[86] Through the collaborative avenue offered by mediation, parties are encouraged to move beyond their initial positions and consider the broader implications of their actions on the environment, economy, and society.[87]

Climate-related challenges have also been seen to have a direct relation to disputes in promoting peace and environmental security.[88] These include disputes related to natural resources, fight for political control, poverty, negative ethnicity, religion, environmental causes, and external influence,

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[83] Section 5, *the Environmental Management and Coordination Act* (Act No. 8 of 1999).
[84] SDG 13 Climate Action -<SDG 13 Climate action | Open Development Cambodia (ODC)> on 2 June 2024.
[85] Sphera Editorial Team, 'What is environmental sustainability?' 2020 -<What Is Environmental Sustainability? (sphera.com)> on 3 June 2024.
[86] Muigua K, 'The nature of climate change related conflicts and disputes,' 26 August 2023-<The Nature of Climate Change Related Conflicts and Disputes – The Lawyer Africa > on 3 June 2024.
[87] United Nations Department of Political and Peacebuilding Affairs (UN-DPPA), *the implications of climate change for mediation and peace processes*, September 2022, 4.
[88] Muigua K, 'Promoting peace and environmental security in Africa through mediation,' Kariuki Muigua and Company Advocates, 2024, 8.

among others.[89] Mediation can promote the achievement of sustainable development in this regard because it addresses the root causes of conflict.[90] Other than the creation of long-lasting solutions discussed in previous parts of this paper, this also reduces the chances of these disputes re-emerging in the future.[91]

Climate change is also one of the factors that threaten to increase competition for natural resources beyond the current strain imposed by factors such as population growth and environmental degradation.[92] Mediation therefore acts as an effective mechanism for managing natural resource-based disputes due to its potential to build peace and bring people together toward the common goal of sharing resources.[93] This has been evident in various case scenarios discussed in subsequent sections of this paper.[94]

Another example of mediation being used in sustainable development programs is the Lake Victoria Basin Water Resources Management Program.[95] The program is geared towards encouraging regional sustainable development through enhanced availability of water and sanitation, encouraging sustainable farming, and preserving the environment. This project encapsulates the

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[89] Muigua K, 'Promoting Peace and Environmental Security in Africa through Mediation,' 8.
[90] Muigua K, 'Promoting Peace and Environmental Security in Africa through Mediation,' 8.
[91] Muigua K, 'Promoting Peace and Environmental Security in Africa through Mediation,' 8.
[92] Muigua K, 'Promoting Peace and Environmental Security in Africa through Mediation,' 9.
[93] Muigua K, 'Promoting Peace and Environmental Security in Africa through Mediation,' 11.
[94] See section 3.0.
[95] Omondi S and Munene C, 'Bridging the gap to sustainable development through mediation in Kenya' 13.

evolving discourse on water resource management and climate change.[96] It has employed mediation as its key dispute resolution mechanism. Mediation has been used to solve a wide range of disputes most of which are climate change-induced.[97] These range from disputes between landowners and livestock farmers over the utility water sources involved in the program to the utilization of water supplies for agriculture.[98]

Another key aspect of mediation that has been identified is involving the affected party in problem-solving. This ensures that the solutions identified are relevant and practical for the people involved, and increases the likelihood of their acceptance and implementation.[99] This results in inclusive solutions that are more easily adopted by the parties, leading to long-lasting and peaceful rectifications. It has been argued that the advancement of human rights, social justice, and sustainable development are all dependent on the pursuit of peace.[100] Therefore, the promotion of a conflict-resolution method centered on peaceful processes and outcomes becomes more prominent in realizing sustainable development. The two are intertwined; there can be no Sustainable Development without peace and no peace without Sustainable Development.[101]

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[96] Hissen N, Conway D, and Goulden M C, 'Evolving discourses on water resource management and climate change in the Equatorial Nile Basin,' 26, *The Journal of Environment & Development*, 2, 2017, 186-213.

[97] Omondi S and Munene C, 'Bridging the gap to sustainable development through mediation in Kenya' 13.

[98] Odongtoo G, Ssebuggwawo D, and Okidi L P, 'The mediating effect of effective decision making on the design of water resource management ICT model: The case of the management of Lake Victoria Basin, 14, *African Journal of Environmental Science and Technology*, 5, 2020, 124-130.

[99] Omondi S and Munene C, 'Bridging the gap to sustainable development through mediation in Kenya' 8.

[100] Muigua K, 'Promoting Peace and Environmental Security in Africa through Mediation,' 7.

[101] Muigua K, 'Promoting Peace and Environmental Security in Africa through Mediation,' 7.

It is therefore clear that as we strive to realize sustainable development, mediation can and should play a more prominent role in resolving climate change disputes. Flowing from the conceptualization of sustainable development within the Kenyan legal framework, this section has shown how mediation is strongly suited to advance the parameters envisioned therein. However, even outside this framework, this paper has argued that mediation possesses inherent qualities that align with the ideals of sustainable development. Mediation in climate change disputes is, therefore, not only valuable for the outcomes it leads to but is also valuable in and of itself.

5.0 Challenges of Mediation in Climate Change Disputes

Mediation presents numerous benefits; however, it is not short of challenges. These include implementation of mediation, funding, and consensus from the disputing parties.[102] Therefore, balancing these factors to foster meaningful dialogue and consensus-building presents unique hurdles in resolving disputes effectively and sustainably.

5.1 Challenges of implementing mediation in solving climate change disputes

Implementing mediation processes for sustainable development faces several challenges that hinder their effectiveness and widespread adoption. These challenges include insufficient knowledge of mediation among stakeholders and varying levels of engagement among the parties involved. [103] This disparity in knowledge and commitment makes it difficult to align goals and reach a consensus, complicating the mediation process.

Inadequate knowledge of mediation is a key challenge in its application. This is because knowledge of mediation among stakeholders is needed to ensure their

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[102] Omondi S and Munene C, 'Bridging the gap to sustainable development through mediation in Kenya' 17-20.
[103] UN-DPPA, 'The implications of climate change for mediation and peace processes,' 7-8.

ability to engage in and benefit from the process effectively. [104] Therefore, this underscores the need for participants to get a clearer understanding of what mediation entails and how it can facilitate conflict resolution and collaboration for sustainable outcomes. Additionally, mediators and conflicting parties often lack access to detailed information about current or projected climate stressors and their cascading impacts.[105] As a result, numerous individuals turn to litigation when a dispute occurs because it is the most recognized method of dispute resolution in Kenya. This leads to caseloads on the part of the judiciary and even though it has seen a significant reduction in caseloads (by 17% at the end of June 2023) there is still room for improvement by utilizing mediation.[106]

Climate change disputes involve complexities across various governance levels. Local impacts of climate change are keenly felt, necessitating local responses even in the absence of higher-level actions. [107]At the same time, solutions often demand agreements at national or regional levels where climate impacts are identified and addressed. However, bridging these governance levels poses challenges.[108] Each level has its power brokers and intermediaries, complicating efforts to achieve integrated solutions. This interplay between local, national, and regional levels underscores the need for cohesive strategies that can effectively navigate these complexities to mitigate climate change impacts and foster sustainable development.[109]

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[104] Omondi S and Munene C, 'Bridging the gap to sustainable development through mediation in Kenya' 18.
[105] UN-DPPA, 'The implications of climate change for mediation and peace processes,' 8.
[106] Judiciary of Kenya, 'A guide for the citizen, FY 2023/24 Judiciary draft budget report,' 6 -<FY-2024-25-Judiciary-Budget-Report-A-Guide-for-the-Citizen-1-1.pdf> on 8 July 2024.
[107] Mehra M, 'Climate Change Governance & the Challenge of Multi-Level Action,' the Commonwealth Parliamentary Association UK, 2021, 9-11.
[108] UN-DPPA, 'The implications of climate change for mediation and peace processes,' 8.
[109] UN-DPPA, 'The implications of climate change for mediation and peace processes,' 8.

5.2 Challenges in funding

One of the key challenges in funding mediation for sustainable development in climate change disputes is the need for dedicated sources of finance.[110] Climate change mediation often falls into the gap between traditional development aid and climate finance, making it difficult to secure funding.[111] Donors may be reluctant to fund mediation processes since they are seen as political or not directly focused on emissions reductions or adaptation.[112] This is also because mediation is a relatively new approach in the climate space, so there is a limited track record to point to in terms of demonstrating the impact.

Moreover, existing climate finance mechanisms like the Green Climate Fund have very specific investment criteria and processes that are not well suited to supporting mediation initiatives.[113] The high transaction costs and lengthy time required to access these funds can be prohibitive, particularly for local organizations, making it challenging for them to secure the necessary financial support for mediation efforts.

5.3 Challenges in attaining consensus from the disputing parties

Building consensus involves a process that requires a sincere effort to address the interests of all parties and achieve mutual agreement.[114] Therefore, building consensus and cooperation in climate change disputes presents significant

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[110] Bercovitch J, 'Mediation success or failure: A search for the elusive criteria,' 7, *Cardozo Journal of Conflict Resolution,* 2007, 289-301.

[111] UN-DPPA, 'The implications of climate change for mediation and peace processes,' 16-17.

[112] OCHA Report, 'Climate compass: Navigating mediation challenges in a warming world,' 28 May 2024-<Climate compass: Navigating mediation challenges in a warming world - World | ReliefWeb> on 8 July 2024.

[113] About GCF-< About GCF | Green Climate Fund> on 24 June 2024.

[114] Omondi S and Munene C, 'Bridging the gap to sustainable development through mediation in Kenya' 19.

challenges due to the diverse interests, priorities, and complexities involved.[115] First, stakeholders often have conflicting economic, environmental, and social priorities, making it difficult to reach an agreement on climate policies and mitigation strategies. Bridging these differences requires transparent communication, mediation, and compromise to find common ground.[116]

There is also the perception of imposition by conflict parties, who may resist including climate change issues in negotiations if they feel that the topic is being forced upon them.[117] This challenge becomes particularly pronounced during the implementation phase of the mediation process, where parties may be focused on concrete outcomes and may view the introduction of climate considerations as a distraction or an external agenda imposed on them. Securing consensus from the disputing parties on the relevance and integration of climate-related issues into the mediation process is crucial for effective implementation.[118]

Furthermore, the differentiated impacts of climate change on various stakeholders present a challenge in garnering consensus among the disputing parties. [119]Different groups within the conflict-affected communities may experience climate change effects differently, leading to varying priorities and

[115] Omondi S and Munene C, 'Bridging the gap to sustainable development through mediation in Kenya' 19.
[116] Rüttinger L, Janßen A, Knupp C, and Griestop L, 'from conflict to collaboration in natural resource management: A handbook and toolkit for practitioners working in aquatic resource systems,' Collaboration for Resistance, 2014, 20.
[117] Talentino K A, 'Perceptions of peacebuilding: The dynamic of imposer and imposed upon,' *International Studies Perspectives*, 8, 2007, 153-156.
[118] UN-DPPA, 'The implications of climate change for mediation and peace processes,' 16.
[119] UNFCCC, 'Differentiated impacts of climate change on women and men; the integration of gender considerations in climate policies, plans and actions; and progress in enhancing gender balance in national climate delegations,' 2019, 8-9.

interests in the mediation process.[120] For instance, while some may prioritize immediate economic relief, others may focus on long-term environmental sustainability or social equity. Implementing mediation strategies that address these differentiated impacts and ensure the inclusion of marginalized voices, such as women, youth, and indigenous communities, requires careful navigation and consensus-building among the parties. This involves fostering a shared understanding of how climate considerations are relevant to the conflict and peace process, ensuring that all stakeholders recognize the interconnectedness of their issues and the importance of integrated solutions.[121] By effectively addressing these varied interests and promoting inclusive dialogue, mediators can overcome challenges and work towards sustainable outcomes that benefit all parties involved. This approach not only resolves the immediate disputes but also contributes to broader efforts of climate resilience and social cohesion.[122]

6.0 Recommendations

It is crucial to adopt comprehensive and forward-thinking strategies to address the complexities and diverse stakeholder interests inherent in climate change disputes.[123] Having explored the challenges faced in adopting mediation in climate change disputes, this paper presents the following recommendations. These are: integrating climate-related issues indirectly into the mediation process, supporting climate-related negotiation tracks, inviting climate experts

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[120] UNFCCC, 'Differentiated impacts of climate change on women and men; the integration of gender considerations in climate policies, plans and actions; and progress in enhancing gender balance in national climate delegations,' 13-45.

[121] UNFCCC, 'Differentiated impacts of climate change on women and men; the integration of gender considerations in climate policies, plans and actions; and progress in enhancing gender balance in national climate delegations,' 11.

[122] UN-DPPA, 'The implications of climate change for mediation and peace processes,' 17.

[123] Khatibi F, Dedekorkut-Howes A, Howes M and Torabi E, 'Can public awareness, knowledge and engagement improve climate change adaptation policies?' *Discover Sustainability, 2,* 2021, 1-2.

and private-sector representatives to problem-solving workshops, setting appropriate expectations before launching collaborative efforts for public engagement, providing feedback to constituents on how their input influenced the decision-making process and finally giving adequate communication in cases where consensus is not achievable.

First, rather than addressing climate change as a standalone item, these issues can be woven into provisions on natural resources or agricultural production for a more holistic approach. By reframing climate-related challenges in the context of shared benefits and new income sources, mediators can help parties see the opportunities for cooperation and mutual gain. This approach aims to shift the narrative around climate issues from potential sources of conflict to areas for potential collaboration and sustainable development.[124]

Second, supporting climate-related negotiation tracks is also a viable method to facilitate discussions on climate issues within the mediation framework. Establishing expert group meetings or local dialogues focused on climate topics can provide a platform for technical experts and stakeholders to delve into specific climate-related agenda points. These focused tracks can help build understanding, generate innovative ideas, and lay the groundwork for integrating climate considerations into broader political discussions.[125]

Third, inviting climate experts and private-sector representatives to problem-solving workshops can inject fresh ideas and technological solutions into climate-related discussions within the mediation process. This collaborative approach can enhance the quality of deliberations, broaden the scope of

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[124] UN-DPPA, 'The implications of climate change for mediation and peace processes,' 6.
[125] UN-DPPA, 'The implications of climate change for mediation and peace processes,' 14.

solutions considered, and foster a more comprehensive understanding of the intersection between climate change and conflict dynamics.[126]

Fourth, it is important to set appropriate expectations before launching collaborative efforts for public engagement. Government officials have previously been advised to clearly define the goals of the mediation process, whether it is to obtain meaningful public input to inform decisions or to reach consensus on specific policy details. By establishing clear boundaries and objectives upfront, stakeholders can better understand the purpose of the mediation and contribute constructively to the process.[127]

The fifth recommendation is to provide feedback to constituents on how their input influenced the decision-making process. By offering transparency and communication regarding the outcomes of the mediation, stakeholders can feel valued and engaged in the resolution of climate change disputes. This feedback loop fosters trust, accountability, and ongoing participation from the public in future mediation efforts.[128]

Finally, there should be adequate communication in cases where consensus is not achievable. It is advised that officials make it clear that they may need to make difficult decisions in the absence of a full community agreement. This transparency helps manage expectations, clarifies decision-making processes, and ensures that stakeholders understand the role of mediation in addressing climate change disputes.[129]

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[126] UN-DPPA, 'The implications of climate change for mediation and peace processes,' 12-17.
[127] Knaster A, 'Resolving conflicts over climate change solutions,' 478-481.
[128] Knaster A, 'Resolving conflicts over climate change solutions,' 489.
[129] Knaster A, 'Resolving conflicts over climate change solutions,' 480.

Conclusion

Climate change, a borderless and contemporary phenomenon, is upon us. With it comes a multitude of new perspectives, innovations, and challenges. This has seen the world take a shift in how it views disputes arising from climate change and Kenya has not been left behind. However, more can be done to meet the demands of change in this regard. This paper has acknowledged the various mitigating and preventive steps that Kenya has taken. Still, it has also shown how mediation in particular can and should be placed at the forefront in solving climate-change disputes. This has been argued among other things, to foster sustainable development which climate change disputes have threatened to hinder. Therefore, it would be important to reflect on the role we, in our individuality and collective, can play in this new dawn for Kenya and the world.

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Navigating the Complexities of International Commercial Arbitration in Africa

By: ***Maryanne Mburu****

Abstract

Despite its rising relevance in global trade and investment, Africa has not reached its optimum potential in the area of international commercial arbitration. Recent trends have seen a move towards the Africanization of International Commercial Arbitration among African States, as well as African ADR practitioners, stemming from the realization that modern international commercial arbitration still tilts towards the utilization of Western arbitral institutions for resolution of international commercial disputes even where the subject matter or parties to the dispute are African. This paper engenders growing literature on "African Solutions for African Problems" and argues for reforms that will challenge the Westernized perceptions of international arbitration and expand the role of African arbitral institutions in facilitating International Commercial Arbitration.

Keywords: *International Commercial Arbitration, Africa, Arbitral Institutions, ADR*

1.0 Introduction

Owing to the rise of the global economy and increased growth of transnational and international business activities, there is a correlated increase in the prevalence of international commercial disputes.[1] Alternative Dispute

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Resolution (ADR) mechanisms have gained acceptance as viable alternatives to traditional court room litigation in resolution of disputes arising out of international commercial relationships. ADR has numerous advantages including simplicity, procedural control, time and cost efficiency.[2] In this regard, arbitration and in particular, international arbitration, has been a popular alternative to litigation owing to its numerous advantages such as transnational applicability, time efficiency and autonomous application.[3]

International arbitration is the most preferred method of resolving international disputes and equally, international commercial arbitration is the preferred method of resolving international commercial disputes.[4] Arbitration is defined as a voluntary and private process whereby a neutral third party adjudicates over a dispute between two or more parties and gives a determination.[5] International commercial arbitration, on the other hand, is described as an arbitration process involving a commercial dispute between parties connected to different jurisdictions and/or an international transaction.[6] Within the context of increasing pressure to embrace alternative mechanisms of dispute settlement, this paper addresses the challenges facing international commercial

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[1] Dr Mahesh Koolwal, 'International Commercial Arbitration: Resolving International Commercial Disputes And Preserving Business Relationship' International Commercial Arbitration.

[2] Ilijana Todorović and Bobby Harges, 'Alternative Dispute Resolution in the World of Commercial Disputes' (2021) 5 Journal of Strategic Contracting and Negotiation 214.

[3] David Kariuki Muigua, 'Promoting International Commercial Arbitration in Africa' (2016).

[4] Mary Zhao, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach' (2019) 59 Virginia Journal of International Law 175.

[5] David Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (Glenwood Publishers, Nairobi 2012).

[6] Tochukwu Nkiruka Nwachukwu and Ifeoma Nwakoby, 'An Exposition of the International and Commercial Concepts in International Commercial Arbitration' (2023) 10 Journal of Commercial and Property Law <https://journals.unizik.edu.ng/index.php/jcpl/article/view/2235> accessed 28 July 2023.

arbitration in Africa and also proposes solutions to increase its effective application in the region.

2.0 Understanding International Commercial Arbitration

International Commercial Arbitration has developed significantly in recent times owing to the growth in world trade and foreign investments.[7] The origins of modern international commercial arbitration lay in the Geneva Protocol of 1923 which was followed by the Geneva Convention.[8] Dissatisfaction with the Geneva Protocol and Geneva Convention led to the establishment of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1958, which among other things ensures enforcement of foreign awards in national courts.[9] Additionally, to harmonize national laws on arbitration, the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on International Commercial Arbitration.[10] The main qualifying elements of international commercial arbitration are internationality and commerciality.[11] Internationality may refer to a dispute between parties of different countries or

[7] Andrew Myburgh and Jordi Paniagua, 'Does International Commercial Arbitration Promote Foreign Direct Investment?' (2016) 59 The Journal of Law and Economics 597.

[8] The Geneva Protocol on Arbitration Clauses (1923) and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927).

[9] 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' <https://legal.un.org/avl/ha/crefaa/crefaa.html> accessed 28 July 2023.

[10] 'UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006 | United Nations Commission On International Trade Law' <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 28 July 2023.

[11] Michael Polkinghorne, Tuuli Timonen and Nika Larkimo, 'Scope of Application' in Ilias Bantekas and others (eds), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge University Press 2020) <https://www.cambridge.org/core/books/uncitral-model-law-on-international-commercial-arbitration/scope-of-application/DAFEB36E0828CB2C9CCB1D1D7C648F0B> accessed 23 October 2024.

where the subject matter is of international character.[12] Commerciality relates to relationships of a commercial nature including exchange of goods and services, construction, consulting, banking among others.[13]

Within the Kenyan context, the Arbitration Act 1995 (as amended in 2009) defines international arbitration as one where the place of business of the disputants was in different states, where the juridical seat of arbitration is outside of the state where parties have their place of business or where a substantial part of the obligations of the commercial relationship are performed outside of the country where the parties have their place of business.[14] Section 36 of the Arbitration Act further requires that international arbitration awards shall be recognized as binding for enforcement purposes since Kenya is a signatory to the New York Convention.[15] Kenya has also enacted the National Centre for International Arbitration Act meant to establish a regional center for international commercial arbitration.[16]

International Commercial Arbitration offers numerous benefits to parties with the most significant being the availability of enforcement under the New York Convention which requires national courts to enforce foreign arbitral awards.[17] Furthermore, international commercial arbitration allows for neutrality of forum which is not available in national court litigation which is laden with perceptions of bias.[18] Additionally, the process gives parties the chance to choose and agree on arbitrators with expertise in the area under dispute and

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[12] Nwachukwu and Nwakoby (n 6).
[13] 'UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006 | United Nations Commission On International Trade Law' (n 10).
[14] Arbitration Act 1995, section 3(3).
[15] Ibid, section 36(2).
[16] Nairobi Centre for International Arbitration Act No. 26 of 2013.
[17] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
[18] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2017).

also allows for shorter processing time in contrast to court case management systems which are slow.[19]

3.0 International Commercial Arbitration in the African Context

3.1 Challenges in the Development of International Commercial Arbitration in Africa

The development of International Commercial Arbitration in Africa, unlike the rest of the world, has been slow and unsatisfactory.[20] However, the increase in trade and investment in African countries requires a similar development of robust ADR systems for the resolution of commercial and investment disputes occurring in the continent, between and among African nationals as well as between African nationals and nationals from other parts of the world. Prof. Muigua argues that the referral of disputes in the African context to Western arbitral institutions is cost ineffective and leads to unsatisfactory results.

Appointment of African ADR practitioners to institutions such as the International Centre for Settlement of Investment Disputes (ICSID) is still low even with the increased reference of investor-state disputes involving African States to ICSID.[21] Babu also argues that the perceived advantages of international commercial arbitration actually work against developing countries and are solely for the interests of Western countries.[22] He further argues that there is unequal bargaining power between developed and developing countries in arbitration processes and also that there is a coercive element to the current model whereby developing countries must accept arbitration if they want to attract foreign investment.[23] Karanja argues that the

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[19] Ibid.

[20] Muigua, 'Promoting International Commercial Arbitration in Africa' (n 3).

[21] Mmiselo Freedom Qumba, 'Africa and Investor-State Dispute Settlement: Mixed Reactions, Uncertainties and the Way Forward' (2021) 28 South African Journal of International Affairs 47.

[22] Rajesh Babu, 'International Commercial Arbitration and the Developing Countries' [2006] AALCO Quarterly Bulletin 386.

[23] Ibid.

interaction of African States in the international commercial arbitration regime is passive and imbalanced.[24] Some African countries such as the Republic of South Africa have broken away from international investment arbitration based on the realization of the biases that at times exist in international arbitration processes and in a bid to facilitate a balanced approach to settlement of international investment disputes in the country.[25] Presently, the South African national courts are the first and last resort for such disputes.[26]

Biresaw also argues that there is a lack of uniformity in as far as the rules in application with regards to jurisdiction, applicable law, enforcement and recognition of foreign awards which challenges the resolution of international commercial disputes.[27] Further, Prof. Muigua argues that the success of an international arbitration institution is dependent on among other things, the quality of the legal system of the host state.[28] To this end, most African countries are perceived as being highly susceptible to corrupt practice making them unattractive destinations for foreign investors and parties looking for appropriate forums for international commercial arbitration.[29] Even among African countries, there is still a preference for Western arbitral institutions

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[24] Natasha Karanja, 'The Nationalisation of Kenya's Bilateral Investment Interaction during the New Age of Sustainable Foreign Direct Investment' (2021) 8 SOAS Law Journal 109.

[25] Mmiselo Freedom Qumba, 'South Africa's Move Away from International Investor-State Dispute: A Breakthrough or Bad Omen for Investment in the Developing World?' (2019) 52 De Jure Law Journal 358.

[26] Ibid.

[27] Samuel Maireg Biresaw, 'Appraisal of the Success of the Instruments of International Commercial Arbitration Vis-a-Vis International Commercial Litigation and Mediation in the Harmonization of the Rules of Transnational Commercial Dispute Resolution' (2022) 2022 Journal of Dispute Resolution 1.

[28] Kariuki Muigua and Ngararu Maina, *Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration* (2016).

[29] Kariuki Muigua, '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).

which can be attributed to the colonial mentality.[30] Avayiwoe blames the current state on the failure to emphasize Africa's historical culture of amicable dispute resolution and the failure to challenge the conception that peaceful dispute resolution is a Western concept.[31] All that to say that there has been a skewed manner of development of international commercial arbitration in favor of developed countries, and that there is a need for focused reforms that address the participation of African States in the development of international commercial arbitration jurisprudence as equal stakeholders rather than passive recipients.[32]

3.2 Way Forward: Opportunities for the Development of International Commercial Arbitration in Africa

For significant progress to be made in as far as the development of international commercial arbitration in the African continent, there needs to be the establishment of permanent arbitral institutions within the African region.[33] The Asian African Legal Consultative Organization (AALCO) appreciated the need to develop institutional arbitration for both its Asian and African Member State' regions and in 1978, the AALCO decided to establish regional centers for international commercial arbitration.[34] Pursuant to this, there are now regional centers for arbitration in Kuala Lumpur, Cairo, Tehran, Lagos, Nairobi and Hong Kong.[35] That said, more needs to be done to promote African international

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[30] Emilia Onyema, 'Reimagining the Framework for Resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement' (2020) 19 World Trade Review 446.

[31] Gracious Avayiwoe, 'Ensuring North-South Diversity in and Legitimacy of International Investment Arbitration: Africa in Perspective' (30 June 2021) <*https://papers.ssrn.com/abstract=4023442*> accessed 30 July 2023.

[32] Olabisi D Akinkugbe, 'Reverse Contributors? African State Parties, ICSID and the Development of International Investment Law' (2019) 34 ICSID Review - Foreign Investment Law Journal 434.

[33] Samson L Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' (1992) 41 International & Comparative Law Quarterly 387.

[34] 'Arbitration Centres | Asian African Legal Consultative Organization' <https://www.aalco.int/arbitration> accessed 28 July 2023.

[35] Ibid.

commercial arbitration including the strategic partnership of the existing arbitration institutions such as through training, awareness activities and joint accreditation of arbitration practitioners.[36]

In the wake of the African Continental Free Trade Area (AfCFTA) flagship project, international commercial arbitration in Africa has a greater opportunity to flourish under the principle of "*African solutions for African problems*."[37] African States can use this opportunity to facilitate greater coherence in their regional and national international commercial arbitration regulatory framework. Article 20 of the Agreement Establishing the AfCFTA establishes a Dispute Settlement Mechanism in accordance with the Protocol on Rules and Procedures on Settlement of Disputes.[38]

There have been calls for the designation of regional centers for arbitration in the eight regional economic communities namely: [a] Southern African Development Community (SADC), [b] Intergovernmental Authority on Development (IGAD), [c] Economic Community of West African States (ECOWAS), [d] Economic Community of Central African States (ECCAS), [e] the East African Community (EAC), [f] Community of Sahel – Saharan States (CEN-SAD), [g] Common Market for Eastern and Southern Africa (COMESA), and [h] Arab Maghreb Union (UMA).[39] An understanding of the unique African investment challenges will result in the development of our own culture of

[36] Muigua and Maina (n 28).

[37] N Negm, 'Arbitration as a Means to Settle Disputes in the Wake of AfCFTA - Keynote Statement' (2022) 19 Transnational Dispute Management (TDM) <*https://www.transnational-dispute-management.com/article.asp?key=2897*> accessed 30 July 2023.

[38] 'African Arbitration Association - Three Scenarios in Which Arbitration Arises in the AfCFTA Dispute Settlement Mechanism by ALN Academy*' <https://afaa.ngo/page-18097/12620276> accessed 30 July 2023.

[39] Onyema (n 30).

international commercial arbitration that is specific to the development needs of African States.[40]

To deal with the challenge of nonuniformity of applicable rules on enforcement and recognition of foreign awards, Onyema proposes the establishment of an African Commercial Court with the exclusive jurisdiction to enforce awards arising out of international commercial arbitration.[41] Beyond this, more needs to be done by States and private actors in the African region to make international commercial arbitration thrive including ensuring that contracts entered into with foreign investors have a negotiated arbitration agreement that requires settlement of disputes to be done within the region through the available regional centers for arbitration. Furthermore, there needs to be greater efforts to educate the African business community on the importance of promoting regional arbitration processes in terms of costs and satisfactory results.

4.0 Conclusion

From the above discussion, it is clear that international commercial arbitration is increasingly gaining traction world over. However, the advantages of the international commercial arbitration process have not been fully realized in the African region. To fully realize this advantages, there needs to be renewed efforts to create and uphold Africa centered arbitration thereby balancing out the interests of African countries and African businesses in the global economy. Africa needs to develop its own culture of international commercial arbitration as a catalyzer of international commercial arbitration jurisprudence, and through these efforts, African countries will be able to make international commercial arbitration work for them.

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[40] Makane Moïse Mbengue, '"Somethin" ELSE':1 African Discourses on ICSID and on ISDS—An Introduction' (2019) 34 ICSID Review - Foreign Investment Law Journal 259.
[41] Onyema (n 30).

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Negm N, 'Arbitration as a Means to Settle Disputes in the Wake of AfCFTA - Keynote Statement' (2022) 19 Transnational Dispute Management (TDM) <*https://www.transnational-dispute-management.com/article.asp?key=2897*> accessed 30 July 2023

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'UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006 | United Nations Commission On International Trade Law' <*https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration*> accessed 28 July 2023

Zhao M, 'Transparency in International Commercial Arbitration: Adopting a Balanced Approach' (2019) 59 Virginia Journal of International Law 175

The Permanent Court of Arbitration and Investor-State Dispute Resolution (including Conciliation)

Dr. Wyne Mutuma [*]

Abstract

The Permanent Court of Arbitration is a renowned international organisation that has been at the forefront of resolving disputes through arbitration and conciliation. Established in 1899, it is an institution dedicated to providing a neutral and impartial forum for the resolution of international disputes. It is a key player in Investor-State Dispute Resolution offering redress for investors against host states in violations of investment treaties thus shaping the development of this field hence promoting investment and economic growth between nations. This paper provides a comprehensive overview of the Permanent Court of Arbitration and its role in Investor-State Dispute Resolution, with a particular focus on the use of conciliation. The paper explores the historical background of the Permanent Court of Arbitration, tracing its evolution from its establishment to its current structure of the Administrative Council, Members of the Court, and the International Bureau and also delves into the functions of the institution. It highlights the significance of Investor-State Dispute Resolution in providing a clear and impartial legal framework for dispute adjudication, thereby fostering a stable and predictable investment climate and shows how the Permanent Court of Arbitration resolves disputes relating to investor-state agreements. The paper also underscores the role and importance of conciliation in Investor-State Dispute Resolution as a preliminary step before arbitration or litigation, emphasising its flexibility and role in preserving business relationships and reducing the costs and time of more formal dispute resolution proceedings. This work offers valuable insights into the role of the Permanent Court of Arbitration in settling Investor-State disputes and the role that conciliation

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plays.

Keywords: *Investor-State Dispute Resolution, conciliation, impartial, administrative council*

1.0 Introduction

The Permanent Court of Arbitration (PCA) is an essential institution for resolving international disputes, fulfilling an indispensable function as an arbitration and conciliation platform among states, state entities, intergovernmental organisations, and private parties. The PCA was established in 1899; through the years, it has evolved to deal adequately with the sophistry of modern international conflicts, especially those relating to Investor-State Dispute Resolution (ISDR).

ISDR is one of the mechanisms under international investment law for investors to redress against host states in alleged violations of investment treaties. Such a dispute resolution system is a critical component in ensuring a stable and predictable climate for investment, as it provides a clear legal framework under which disputes can be adjudicated transparently and impartially.[1] Its importance comes from the fact that balancing the interests of investors and host states fosters an enabling environment for foreign direct investment without jeopardising overall sovereign rights.[2]

Of the various alternate dispute resolution methods, conciliation assumes excellent significance in ISDR. Conciliation holds that a third party independent of both parties in dispute will have a dialogue with both parties and chalk out an amicable solution. Unlike arbitration, which is concluded by a binding

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[1] Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth (2012) 28 2 Arbitration International).

[2] Rudolf Dolzer and Christopher Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012).

verdict, conciliation is characterised by voluntary compliance and consensus. It therefore incorporates a less adversarial aspect into the dispute-resolution process.

Conciliation in ISDR is significant, for this would typically be a preliminary step before arbitration or litigation, which would preserve business relationships and hence save the costs and time of more formal dispute resolution proceedings.[3]

1.1 Historical background and the current structure of the PCA

Historical background

The Permanent Court of Arbitration (PCA) is a 125-year-old Intergovernmental Organization currently with 122 contracting states. It was established at the turn of the 20th Century during the first Hague Peace Conference held between 18th May and 29th July 1899. The Conference had been convened at the initiative of Czar Nicolas II of Russia "with the object of seeking the most objective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments."

Among the aims of the Conference had been the strengthening of systems of international dispute resolution, especially international arbitration. The delegates at the Conference were mindful that, during the previous 100 years, there had been several successful international arbitrations, starting with the "Jay Treaty" Mixed Commissions at the end of the 18th century, and reaching a pinnacle with the Alabama arbitration in 1871-1872.[4]

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[3] Muthucumaraswamy Sornarajah, The International Law on Foreign Investment (Cambridge University Press, 2017).

[4] Dr. Kariuki Muigua, Brief History of the Permanent Court of Arbitration (PCA) The Lawyer Africa (26 May 2023).

In addition, the Institut de Droit International adopted a code of procedure for arbitration in 1875. This movement toward arbitration as a means of international dispute resolution was continued in 1899, and the most concrete achievement of the 1899 Conference was the establishment of the PCA as the first global mechanism for the settlement of disputes between states. Article 16 of the 1899 Convention recognized that "in questions of a legal nature, and especially in the interpretation or application of International Conventions" arbitration is the "most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle".[5]

Accordingly, Article 20 of the 1899 Convention formally established the PCA, stating that with the object of facilitating an immediate recourse to arbitration for international differences which it has not been possible to settle by diplomacy, the signatory Powers undertake to organise a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention. As a result, the Permanent Court of Arbitration (PCA) was established in 1900 and began operating in 1902.

The PCA as established consisted of a panel of jurists designated by each country acceding to the Convention with each country being entitled to designate up to four from among whom the members of each arbitral tribunal might be chosen. In addition, the Convention created a permanent Bureau, located in The Hague, with functions similar to those of a court registry or secretariat.

The 1899 Convention laid down a set of rules of procedure to govern the conduct of arbitrations under the PCA framework. The 1899 Convention was revised at the second Hague Peace Conference in 1907. In 1993, the Permanent Court of

[5] Ibid.

Arbitration adopted new "Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State" and, in 2001, "Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment".[6]

It was the first permanent intergovernmental organisation to provide a forum for the resolution of international disputes through arbitration and other peaceful means and today the PCA provides services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organisations, and private parties. The PCA has also diversified its service offering alongside those contemplated by the Conventions. For instance, the International Bureau of the PCA serves as a registry in important international arbitrations. The PCA is headquartered in the Peace Palace in The Hague, Netherlands.[7]

Structure of the Permanent Court of Arbitration

Although the PCA was originally established for interstate arbitration, the Hague Conventions allow considerable flexibility in the constitution of a "special Board of Arbitration.[8] The PCA is not a court in the traditional sense but a framework within which ad hoc arbitration tribunals operate. The PCA has a three-part organisational structure consisting of an Administrative Council that oversees its policies and budgets, a panel of independent potential arbitrators known as the Members of the Court, and its Secretariat, known as the International Bureau, headed by the Secretary-General.

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[6] PCA Website: https://pca-cpa.org/en/about/introduction/history/ accessed on 21st June 2024.
[7] Ibid.
[8] Convention for the Pacific Settlement of International Disputes 1899 Article 26; Convention for the Pacific Settlement of International Disputes 1907 Article 47.

Administrative Council

This body, in consultation with the Secretary-General, shapes the policy of the organisation. It provides general guidance on the work of the PCA and supervises its administration, budget, and expenditure.[9] The Council operates under the Rules of Procedure of the Administrative Council of the Permanent Court of Arbitration. The budget of the PCA is funded in part by contributions from Contracting Parties, the amount of which is based on the system of units maintained by the Universal Postal Union. The Secretary-General reports annually to the Administrative Council on the activities of the PCA and its expenditure.[10]

The Council entrusts the financial supervision of the International Bureau to a Financial Committee composed of three independent experts elected by the Council for three-year terms. The PCA has also established a Financial Assistance Fund to provide financial assistance to developing countries that are parties to PCA proceedings. A Budget Committee exists and functions in parallel to the Financial Committee and is open to the representatives of all Contracting Parties – thereby enabling the full membership of the organisation to give early consideration to documents of a financial nature.

Members of the Court

Members of the Court are potential arbitrators appointed by Contracting Parties. Each Contracting Party state is entitled to nominate up to four persons of "known competency in questions of international law, of the highest moral reputation and disposed to accept the duties of arbitrators" as "Members of the

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[9] Permanent Court of Arbitration, 'Structure of the Administrative Council' (2024) https://pcacpa.org/en/about/structure/administrative-council/ accessed 20th June 2024.

[10] Permanent Court of Arbitration website, Administrative Council, https://pcacpa.org/en/about/structure/administrative-council/ accessed 19th June 2024.

Court." Members of the Court are appointed for a term of six years, and their appointments can be renewed.[11]

In addition to forming a panel of potential arbitrators, the Members of the Court from each Contracting Party constitute a "national group," which is entitled to nominate candidates for the election to the International Court of Justice (Article 4(1) of the Statute of the International Court of Justice). The Members of the Court (along with the judges of the ICJ) are among a handful of groups entitled to nominate candidates for the Nobel Peace Prize.[12]

Parties to a dispute may, but are not obliged to, select arbitrators from the list of the Members of the Court. In addition to forming a panel of potential arbitrators, the members of the PCA from each Contracting State constitute a "national group", which is entitled to nominate candidates for election to the ICJ.[13]

International Bureau

The PCA's Secretariat, the International Bureau is headed by its Secretary-General and consists of an experienced team of legal and administrative staff of various nationalities. The current Secretary-General is Hugo H. Siblesz who acts as the principal administrator of the PCA, overseeing the International Bureau's activities, and may also be called upon to designate or appoint arbitrators under certain circumstances.

The bureau provides administrative support to tribunals and commissions, serving as the official channel of communications and ensuring safe custody of

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[11] Ibid.
[12] Permanent Court of Arbitration website, Administrative Council, https://pcacpa.org/en/about/structure/administrative-council/ accessed 19th June 2024.
[13] Charter of the United Nations 1945 Article 92; Statute of the International Court of Justice 1945, Article 4.

documents. It provides services such as financial administration, logistical and technical support for meetings and hearings, travel arrangements, and general secretarial and linguistic support.[14]

It also provides administrative support to tribunals or commissions conducting PCA dispute settlement proceedings outside The Netherlands. Ad hoc tribunals are constituted on a case-by-case basis, tailored to the specific dispute. Tribunals are composed of arbitrators chosen by the parties involved in the dispute, often with assistance from the Secretary-General.

Under Article 47, paragraph 1 of the Convention of 1907, the Bureau was "authorised to place its offices and its staff at the disposal of the Contracting Powers for the use of any special board of Arbitration". This provision was aimed at inter-state arbitrations organised outside the Permanent Court. However, it was interpreted in a broad manner as of 1930 with the Radio Corporation of America vs. China case to permit the International Bureau to offer its services even in disputes between a State and a public or private enterprise. As James Crawford will explain to you, this formula was recently retained in numerous similar cases.[15]

The International Bureau is available to provide information and advice to parties contemplating dispute resolution, including states and nationals of states that are not parties to the Conventions. The PCA opened its office in Mauritius in 2010 according to the PCA-Mauritius host country agreement. The PCA opened its office in Singapore in January 2018 according to the PCA-Singapore host country agreement signed on 25 July 2017. The PCA opened its

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[14] Ibid.
[15] Gilbert Guillaume, 'The contribution of the Permanent Court of Arbitration and its International Bureau to arbitration between states' in Permanent Court of Arbitration (ed), Institutional and Procedural Aspects of Mass Claims Settlement Systems (OUP 2000).

office in Buenos Aires in October 2019 according to the PCA-Argentina host country agreement concluded in 2009.

1.2 Functions of the Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) serves a variety of functions to facilitate the peaceful resolution of international disputes. It provides administrative support in international arbitrations involving various combinations of states, state entities, international organisations, and private parties.[16] It offers various sets of arbitration rules tailored to different types of disputes, including inter-state disputes, investor-state disputes, and commercial disputes.[17]

It also administers conciliation and mediation processes, offering neutral facilitation to help parties reach an amicable settlement. It provides procedural rules and administrative assistance for these alternative dispute resolution mechanisms.[18]

The PCA can establish fact-finding commissions of inquiry to investigate and report on specific issues or incidents relevant to a dispute. This function helps clarify factual matters and can contribute to the resolution of conflicts.[19] Which in turn helps it to offer advisory services, including the designation and appointment of arbitrators, mediators, and experts? It provides legal and procedural guidance to parties involved in dispute resolution processes.

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[16] Howard Holtzmann and B E Shifman, 'The role of the Permanent Court of Arbitration in the United Nations Decade of International Law and The Peaceful Settlement of International Disputes: 19901999 and Beyond' in Al-Nauimi N and Meese R (eds), International Legal Issues Arising under the United Nations Decade of International Law (The Hague, Kluwer Law International 1995).

[17] https://www.curtis.com/glossary/commercial-arbitration/court-of-arbitration accessed 21st June 2024.

[18] https://pca-cpa.org/en/services/ accessed 21st June 2024.

[19] Ibid.

2.0 An Overview of Investor-State Dispute Resolution Processes under the Permanent Court of Arbitration

The rapidly increasing rate of technological invention, the growth of corporations and other forms of business associations as methods of raising, accumulating and deploying capital, political stability, and human resource development led to the increase in foreign investment.[20] An increase in foreign investment in return increased foreign investment disputes as the large infrastructure projects introduced by foreign companies became vital to the welfare of the population and security of the state hence the host countries sought to control them.[21]

They relied on the international law principle of territorial sovereignty to expropriate foreign-owned projects forcing the investors to turn to their governments for assistance through diplomatic protection. However diplomatic protection proved unsatisfactory as it was uncertain whether the government was willing to act in the investors' interests and even where the investors' government intervened, a conflict was bound to arise with the host government.[22]

Furthermore, relying on the national courts of the host country to enforce the obligations owed to foreign investors was problematic. This therefore brought out the need for an alternative means to settle these investor-state disputes hence the creation of International Investment Agreements which provided for International Arbitration as a suitable means to resolve disputes between private foreign investors and government entities.[23]

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[20] William Michael, ' Foreign Investment Disputes', in William Michael Reisman, James Richard Crawford, et al. (eds), Foreign Investment Disputes: Cases, Materials and Commentary (Second Edition Kluwer Law International 2014) 1.
[21] Ibid.
[22] Ibid.
[23] Steven P Finizio, Ethan G Shenkman, and Julian Davis Mortensen, '*Recent Developments in Investor-State*

2.1 Investor-State Dispute Resolution

An investor-state dispute is one between an investor from one country and a government that is not its own that relates to an investment in the host country. Investors contract with a state under a Bilateral Investment Treaty (BIT) which is signed between the host state and the state of the investor[24]. A BIT is an umbrella treaty between two states and on that treaty, investors from either state can enter into investor-state agreements with the other state.[25] The majority of these BITs contain provisions for the settlement of disputes between investors and their host states through International Arbitration.[26]

ISDR processes are legal mechanisms allowing an investor from one contracting state to an international investment agreement to bring a claim against another contracting state in which it has made an investment.[27] International Investment agreements such as the BITs and Investor-State Dispute Resolution mechanisms were created to protect investors from arbitrary expropriation and to ensure non-discriminatory treatment against foreign investors[28]. Most BITs contain clauses providing for consent of arbitration in case of a dispute between a host state and an investor. In such cases the bilateral investment treaty contains an Investor-State Arbitration (ISA) provision, which gives investors the right to, and provides the means to, initiate an arbitral proceeding against a foreign

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Arbitration: Effective Use of Provisional Measures' http://www.wilmerhale.com/uploadedFiles/WilmerHaleSharedContent/Files/Editorial/Publication/investor state-arbitration.pdf accessed on 2nd July 2024.

[24] Permanent Court of Arbitration (PCA) https://blog.ipleaders.in/permanent-court-of-arbitration accessed on 19th June 2024.

[25] Bilateral Investment Treaties < https://www.international-arbitration-attorney.com/find-bilateral-investment treaties/> accessed on 2nd July 2024.

[26] UNCTAD 'Series on Issues in International Investment Agreements II, Investor-State Dispute Settlement' 2013.

[27] Investor-State Dispute Settlement https://uk.practicallaw.thomsonreuters.com/0-6246147 accessed 20th June 2024.

[28]UNCTAD 'Series on Issues in International Investment Agreements II, Investor-State Dispute Settlement' 2013.

government under international law, seeking redress for violation of the BIT by the foreign government.[29]

International Forums for Resolving Investors State Disputes

International arbitration has established itself as the best option through which foreign investors can pursue claims they have against host states.[30] This is because it depoliticizes investment disputes, it assures neutrality and independence of the decision makers and it is swift and flexible. One of the arbitral institutions specialising in this type of dispute is the Permanent Court of Arbitration (PCA).

PCA in Investor-State Disputes Resolution

The PCA has over 100 states that are party to its conventions and it provides a comprehensive range of services for the resolution of disputes by arbitration and other Alternative Dispute Resolution means. UNCTAD reported that at the end of 2011, 65 treaty-based investor-state disputes had been administered by the PCA with 32 outstanding.[31] The PCA was initially conceived as an instrument for the settlement of disputes between states until it received a request in 1934 to administer a case between the Radio Corporation of America and the National Government of the Republic of China.[32]

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[29] Steven P Finizio, Ethan G Shenkman, and Julian Davis Mortensen, '*Recent Developments in Investor-State Arbitration: Effective Use of Provisional Measures'* http://www.wilmerhale.com/uploadedFiles/WilmerHaleSharedContent/Files/Editorial/Publication/investor state-arbitration.pdf accessed on 2nd July 2024.

[30] UNCTAD Series on International Investment Policies for Development, *Investor-State Disputes: Prevention and Alternatives to Arbitration.* United Nations New York and Geneva, 2010.

[31] PCA, 111th Annual Report: 2011, (23) 2 3 6 8 (2012).

[32] William Michael, 'Forums for Resolving Foreign Investment Disputes', in William Michael Reisman, James Richard Crawford, et al. (eds), Foreign Investment Disputes: Cases, Materials and Commentary (Second Edition Kluwer Law International 2014) 281.

After its considerations, the PCA Administrative Council concluded that the PCA's founding conventions permitted the International Bureau to offer its services to cases between private entities and states.[33] This case set a precedent for the PCA's future activity in providing services for the resolution of disputes by investors in foreign states for the protection of their investments. Parties to the dispute may by agreement adopt their procedural framework or elect to use the PCA modern rules of procedure[34] which are based on the UNCITRAL Arbitration Rules. The rules applicable to investor-state disputes are the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State (1993).

Furthermore, some BIT's parties assign the PCA a role as an appointing authority. The 2010 UNCITRAL Arbitration Rules entrust the Secretary-General of the PCA with maintaining the integrity of the international arbitral process by authorising the Secretary-General, upon the request of a party, to designate an appointing authority.[35] Under the 2010 Rules, an appointing authority may be called upon to appoint arbitrators, appoint a sole arbitrator under certain circumstances including that there is no agreement on the number of arbitrators, decide challenges to arbitrators, apply a fee schedule to an arbitration, comment on deposit amounts, determine whether a party may be deprived of its right to appoint a substitute arbitrator[36].

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[33] Radio Corporation of America v National Government of the Republic of China (1935) 1934-01 (PCA).
[34] PCA Arbitration Rules 2012.
[35] William Michael, 'Forums for Resolving Foreign Investment Disputes', in William Michael Reisman, James Richard Crawford, et al. (eds), Foreign Investment Disputes: Cases, Materials and Commentary (Second Edition Kluwer Law International 2014) 281.
[36] UNCTAD, 'Dispute Settlement: Permanent Court of Arbitration' (2003) UNCTAD/ITE/IIT/2003/1 https://www.google.com/url?q=https://unctad.org/system/files/official-document/iteiit20031_en.pdf&sa=U&ved=2ahUKEwjHn4Lk2oiHAxXVBNsEHRN-A4EQFnoECCUQAQ&usg=AOvVaw17iwkn6iRgYu7JkbWXV_YG accessed on 2nd July 2024.

Suitability of PCA in resolving disputes relating to investor-state agreements

As stated earlier, concerning disputes between a State and a non-state party, the PCA "Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State" provide an effective means for conducting an arbitral proceeding to resolve a wide variety of cases including investor-state disputes. These Optional Rules are based, in large part, on the UNCITRAL Arbitration Rules that were designed for all types of disputes, regardless of their subject matter.[37]

A challenge the PCA has faced in handling investor-state disputes is inadequate attention and support from its member states. This can be seen from the PCA's long period of dormancy, with only two registered cases between 1940 and 1988, and this was not a period when arbitrations were extinct; rather, the PCA's Member States simply forgot about the institution they had created and its potential.[38] Professor Jan Paulssonin in his address observed that for intergovernmental organisations engaged in the resolution of disputes to be effective, they require the support of their member states.[39]

Criticism the PCA Has Faced in Handling Investor-State Disputes

PCA has faced criticism due to the assumption that investment arbitration is a distraction from its primary role as it commercialises the institution thereby moving away from matters relating to international peace which is the PCA's founding purpose. In dispelling these assumptions, Professor Juan in his speech at the Peace Palace emphasized that the majority of the PCA's early inter-state arbitrations precisely involved private interests (of the type that would typically

[37] UNCTAD 'Dispute Settlement: Permanent Court of Arbitration' (2003) UNCTAD/EDM/Misc.232/Add.26.
[38] Jan Paulsson, 'Confronting Global Challenges: From Gunboat Diplomacy to Investor-State Arbitration' PCA Peace Palace Centenary Seminar, 2013.
[39] Ibid.

now be dealt with through investor-state arbitration), espoused by the State in question through diplomatic protection[40] as the treatment of such private interests could and did pose a significant challenge to international peace. He goes further to state that; the PCA is simply handling the same sorts of disputes differently, through a process which reduces the likelihood that a major dispute will threaten international peace.

2.2 The Role of Conciliation in Investor-State Dispute Resolution

In international law, conciliation is a unique process which shares the characteristics of both arbitration and mediation. It can be used as an alternative dispute resolution method or a preliminary step to arbitration.[41] Conciliation is sometimes subsumed as a form of mediation as in the case of PCAs Optional Conciliation Rules that treats conciliation and mediation interchangeably.[42] Other times as was the case in the Democratic Republic of Timor-Leste and the Commonwealth of Australia, it is practised as compulsory conciliation taking the form of arbitration.[43]

Under the PCA the rules of conciliation provisions can be found under the Permanent Court of Arbitration Optional Conciliation Rules and the Permanent Court of Arbitration Optional Conciliation Rules for Conciliation of Disputes Relating to Natural Resources and the Environment.[44] The Rules describe how to start a conciliation, how to appoint conciliators, what functions conciliators are expected to perform, and how to encourage parties to speak freely and candidly with conciliators while at the same time preserving necessary confidentiality.[45]

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[40] Ibid.

[41] Linda C Reif, 'Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes' (14 Fordham Int'l Law Journal 1990) 578.

[42] Permanent Court of Arbitration Optional Conciliation Rules 1996.

[43] Republic of Timor-Leste v Commonwealth of Australia (2016) 10 (PCA).

[44] Permanent Court of Arbitration Optional Rules 1996.

[45] Ibid.

Conciliation is a dispute settlement mechanism that suits investor-state disputes. It is a voluntary process, it provides flexibility, preserves relationships, encourages creative solutions, and is cost-effective. It offers a neutral evaluation of the disputes and gives parties more control over the outcome of the process.

The initiation and continuation of conciliation is entirely voluntary. It encourages parties to participate in the process because they have the autonomy to begin and follow through the process. Article 2 of the PCA Rules provides for the commencement of the proceedings and states that where a party rejects the invitation, there will be no proceedings. In the case that the process is no longer desirable after the proceedings have started, a party may terminate the process to seek more efficient resolution means.

This can be seen in the interstate conciliation case of the Steamship Roula (1955) where a Greek steamer was sunk by an Italian submarine. A Conciliation Commission was established by a joint agreement of the two Governments to look into whether the destruction of the Roula was justified. The Commission held that sinking the steamship was not justified and therefore it violated international law.

Conciliation also facilitates relationship preservation. The General Counsel of the World Bank in 1984 Aron observed that if parties had come to the end of the road in their business relations, and they hoped to continue their relationship, conciliation was preferable than arbitration.[46] The character of the conciliatory process offers an advantage because it facilitates the maintenance of a harmonious business relationship. It is appropriate where parties are prepared to prolong their cooperation on the investment for example in long-term contracts.

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[46] Aron Broches, 'Avoidance and Settlement of International Investment Disputes' (1984) 78 Am Soc'y Int'l L Proc. 38.

It is ideal for settling political issues underlying investment disputes. Where "bringing disputes settlement proceedings against a state is regarded as an 'unfriendly act' that may imply diplomatic costs in inter-state relations", conciliation procedures with their consensual outcomes may be more acceptable as they are a 'softer' form of dispute settlement which is 'less threatening to the sovereignty of host states'.[47] It has the flexibility to accommodate 'diversity in the players and their interests, underlying antagonisms and disrupting developments as well as the 'evolution of political disputes'. [48]

Article 14 of the Permanent Court of Arbitration Optional Conciliation Rules provides for confidentiality which serves as another benefit of the process. The conciliator together with the parties are supposed to keep all matters relating to the conciliation proceedings confidential, unless the parties agree otherwise to the disclosure or it is required for judicial proceedings. The settlement agreement is also confidential except where its disclosure is necessary for purposes of implementation and enforcement.[49]

The process is cost and time effective. It produces quicker resolutions as compared to the normal litigation processes. By providing a speedy resolution, the parties can focus on profitable business engagements rather than spending time and money on litigation. It is also overall cheaper than the litigation process in its entirety.[50] Overall, the procedure enhances a flexible alternative for dispute resolution, tailoring the procedure to the specific needs of each case and

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[47] August Reinisch, 'Elements of Conciliation in Dispute Settlement Procedures' in Christian Tomuschat, Riccardo Pisillo Mazzerschl and Daniel Thurer (eds) Conciliation in International Law (Brill 2017) 126.
[48] Michael E Schneider, 'Investment Disputes- Moving beyond Arbitration' in Laurence Boisson de Chazournes, Marcelo Kohen and Jorge Vinuales (eds) Diplomatic and Judicial Means of Dispute Settlement (Brill 2012) 126.
[49] Permanent Court of Arbitration Optional Conciliation Rules 1996, Article 14.
[50] Ujwala Shinde, 'Conciliation as an Effective Mode of Alternative Dispute Resolving System' (2012) 4 3 JHSS 1.

allowing the parties to move between the stages of the proceedings in the manner they prefer thus fostering them to think creatively to find solutions that meet their interests and concerns.

Despite the benefits and advantages of using conciliation as a dispute resolution mechanism, some challenges are posed. These include the unbinding nature of conciliation, which means that the parties are not bound by the decision that is reached and therefore, they can fault it. There are also no follow-up measures after a decision has been made.[51] The process might not lead to an outcome and hence, a decision is not guaranteed at the end. The parties may follow through the proceedings, spending time and money only for them not to come up with a solution.

The provisions in various Conciliation categories fall short of providing advance consent to conciliation. An example is Conciliation Category 9 whose provisions empower States but not the investor to initiate conciliation unilaterally.[52] This means that if an investor wishes to initiate a conciliation proceeding, they must obtain a separate agreement with the disputing state. An example is Article 14.23 (1) of the Australia-Indonesia CEPA (2019).[53] Conciliation has remained a dormant mechanism in ISDR for more than half a century and its potential is yet to be fully realised.[54] A low proportion of International Investment Agreements (IIAs) contain investor-state conciliation provisions.

Recommendations

To enhance the effectiveness of the Permanent Court of Arbitration (PCA) in

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[51] Ujwala Shinde, 'Conciliation as an Effective Mode of Alternative Dispute Resolving System' (2012) 4 3 JHSS 1.
[52] Romesh Weeramantry, Brian Chang and Joel Sherard-Chow, 'Conciliation and Mediation in Investor-State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis' (2023) 38 1 ICSID Review 221.
[53] Ibid.
[54] Ibid 233.

Investor-State Dispute Resolution (ISDR), several recommendations can be made. First, the PCA should invest in creating more accessible resources and information on ISDR and conciliation processes. This can include comprehensive guides, training programs, and workshops aimed at educating both investors and state entities about the benefits and procedures involved[55]. Additionally, states should be encouraged to adopt clear and robust legal frameworks that support ISDR mechanisms, including conciliation. Harmonising national laws with international standards will ensure consistency and predictability in dispute resolution[56].

To address the voluntary nature of conciliation, the PCA could develop mechanisms to incentivize compliance with conciliation agreements. This might involve establishing follow-up procedures or offering recognition and enforcement support for successfully concluded conciliations. Moreover, to mitigate potential power imbalances in conciliation processes, the PCA should implement measures to ensure that all parties have equal access to legal and technical expertise. This could be achieved by providing financial assistance or pro bono services to less-resourced parties[57].

Encouraging mediation as a preliminary step before proceeding to arbitration can also promote early settlement and reduce the burden on arbitration proceedings. The PCA could formalise mediation as a mandatory preliminary step in ISDR processes[58]. Furthermore, leveraging technology to streamline ISDR and conciliation processes is essential. Online dispute resolution (ODR) platforms can facilitate faster, more cost-effective and accessible dispute

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[55] Peter Muchlinski, Federico Ortino and Christopher Schreuer, The Oxford Handbook of International Investment Law (Oxford University Press, 2008).
[56] UNCTAD, World Investment Report 2023 (UNCTAD, 2023) https://unctad.org accessed 2 July 2024.
[57] David Caron and Lee Caplan, The UNCITRAL Arbitration Rules: A Commentary (Oxford University Press, 2013).
[58] PCA, Arbitration Rules 2022 (PCA, 2022) https://pca-cpa.org accessed 2 July 2024.

resolution, which is particularly beneficial in a globalised investment environment.[59] By adopting these recommendations, the PCA can enhance its role in ISDR, promoting more efficient, equitable, and amicable resolution of disputes. Ultimately, this will foster a more stable and inviting investment climate globally.

Conclusion

The Permanent Court of Arbitration has been an indispensable institution in the landscape of international dispute resolution, particularly in Investor-State Dispute Resolution. Its historical development, and sound structure, together with comprehensive rules of arbitration, has equipped it to handle and resolve very complex cases featuring huge issues amply. Though it has a lot of advantages, such as neutrality, enforceability, and the capability to handle sophisticated legal claims, PCA arbitration certainly does not come cheaply or without its problems.

Conciliation within ISDR, provided by the PCA, remains an essential and less adversarial alternative with a more collaborative approach to resolving disputes. It is underlined by the business relationship and reduction of costs via the promotion of voluntary compliance for the importance of this process within the ambit of international investment law. Challenges need to be dealt with to be practical. Of these, its voluntary nature and very significant difficulties that it would present, as well as possible power imbalances between parties, are major and need to be addressed to enhance its efficiency.

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[59] Meg Kinnear, Building International Investment Law: The First 50 Years of ICSID (Wolters Kluwer, 2016).

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A4EQFnoECCUQAQ&usg=AOvVaw17iwkn6iRgYu7JkbWXV_YG accessed on 2nd July 2024.

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accessed 2 July 2024.

Does Party Autonomy Limit the Arbitrator's Powers?

By: Lilian Ngeresa*

Abstract

*An Arbitrator is the **master of procedure in arbitration**. The arbitrator steers the arbitration process by ensuring that both parties have a fair opportunity to present their case and at the same time are in compliance with the law. The Arbitrator also sets down rules of procedures, timelines, and any other relevant guidelines to be followed in the course of the arbitration proceedings.*

*On the other hand, the parties to the arbitration have the freedom to determine the terms and procedures of their arbitration process. This principle is known as **party autonomy**, that which grants the parties control in the manner in which the dispute is to be resolved and by whom.*

ARBITRATOR AS A MASTER OF PROCEDURE

The Arbitration Act in section 20, states that the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings[1]. Failing an agreement, the tribunal may conduct the arbitration in the manner it considers appropriate having regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases.[2]

Some of the powers and duties of the arbitrator/arbitral tribunal include:

i. Power to determine the admissibility, relevance, materiality and weight of any evidence and to determine at what point an argument or

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[1] Section 20 (1) Arbitration Act Cap 49 Laws of Kenya
[2] Section 20 (2)

submission in respect of any matter has been fairly and adequately put or made[3]

ii. Direct that a party or witness be examined on oath or affirmation [4]

iii. Competence to rule on its own jurisdiction [5]

iv. Order a party to take such interim measure of protection [6]

v. Order any party to provide security in respect of any claim or amount in dispute[7]

vi. Order a claimant to provide security for costs[8]

vii. Power to decide whether to hold oral hearing or documents-only arbitration[9]

viii. Apply the law it considers appropriate to the dispute where parties have failed to agree on the choice of law[10]

PARTY AUTONOMY

Party autonomy basically means the freedom of the parties with respect to arbitration proceedings.[11] The disputing parties are free to agree on the manner in which they wish the dispute to be determined.[12] Such freedom would not ordinarily be available to parties in litigation.[13] The Court of Appeal in ***Kenya Oil Company Limited & Kobil Petroleum Limited v Kenya Pipeline Company [2014] KECA 851 (KLR)*** noted that arbitration is underpinned by the principle of party autonomy that as long as it does not offend the strictures imposed by

[3] Section 20 (3)
[4] Section 20 (4)
[5] Section 17
[6] Section 18 (1) (a)
[7] Section 18 (1) (b)
[8] Section 18 (1) (c)
[9] Section 25
[10] Section 29 (2)
[11] Section 1(b) Arbitration Act 1996
[12] Muigai G. and Kamau J., "The *Legal Framework of Arbitration in Kenya*," Arbitration Law and Practice in Kenya published by Law Africa Publishing (K) Limited, 2011
[13] Kajimanga C. and Mutuna N. K., "*Handbook on Arbitration in Zambia*", Juta & Company (Ppty) Ltd, 2023

law, parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts.

WHY IS PARTY AUTONOMY IMPORTANT TO ARBITRATION?

Since the disputing parties have opted to resolve their dispute through arbitration, party autonomy is therefore important to enable the parties feel that they are in control of the process.[14] This of course is done within a defined legal framework.

The Arbitration Act expressly brings out the element of party autonomy by use of phrases like "***the parties are free to agree,***" "***the parties are free to determine***" and "***unless otherwise agreed by parties***". The use of such words indicate that the parties have a lot of control over the manner in which the dispute is to be determined. The Arbitration Act, is however clear that its provisions will only take effect upon the disagreement on the conduct of the arbitration proceedings.[15]

The party's autonomy can apply in the following situations:

i. Choice and number of Arbitrators: Parties have the freedom to select the arbitrator or arbitration panel that will hear their dispute irrespective of nationality[16]
ii. The appointment procedure of the arbitrator or panel of arbitrators[17]
iii. The procedure for challenging the appointment of an arbitrator [18]
iv. The effect of termination of the mandate and substitution of an arbitrator [19]

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[14] Muigai G. and Kamau J., "*The Legal Framework of Arbitration in Kenya*." Arbitration Law and Practice in Kenya published by Law Africa Publishing (K) Limited, 2011
[15] Section 20 (1) and (2)
[16] Section 11 (1) and 12 (1)
[17] Section 12 (2)
[18] Section 14 (1)
[19] Section 16

v. The effect of withdrawal of an arbitrator from office [20]

vi. Parties can choose the rules and procedures that will govern the arbitration process[21]

vii. Parties can decide on the location of the arbitration hearings and the language in which proceedings will be conducted. [22]

viii. The commencement date of arbitral proceedings[23]

ix. Amend or supplement pleadings [24]

x. Only the disputes which the parties have chosen to be referred to arbitration will be referred to arbitration. One ground of challenge to the award is that the arbitrator dealt with a dispute not contemplated[25]. Parties may wish for certain disputes to be referred to arbitration, or others to be resolved through mediation or negotiation or even litigation.

xi. Parties can choose the governing law or laws that will be applied by the arbitrator in resolving their dispute. This principle is known as *Lex arbitri*

xii. *The* effect of the award and whether the same is final and binding upon the parties to it[26]

xiii. Costs and expenses of the arbitration, their determination and apportionment [27]

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[20] Section 16A
[21] Section 20 (1)
[22] Sections 21 (1) and 23
[23] Section 22
[24] Section 24 (3)
[25] Section 35
[26] Section 32A
[27] Section 34b (1)

LIMITATION OF PARTY AUTONOMY

The Act has a fall back plan in the event parties fail to agree where the Act picks up and guides the arbitration.[28] There are however mandatory legal provisions which the parties must apply and cannot derogate from. They include:

i. Form of an arbitration agreement: an arbitration agreement has to meet some minimum requirements for it to be considered as a valid arbitration agreement.[29] These include that the agreement must be in writing. An arbitration agreement is in writing if it is contained in a document signed by both parties.[30] Though the Kenyan Arbitration Act is silent on the requirement of signatures, Section 5(2) (a) of English Arbitration Act states that "*There is an agreement in writing if the agreement is made in writing, whether or not it is signed by the parties*". To play it safe, it is better to have the agreement signed.

ii. The English Arbitration Act lists a number of rules and procedures which parties must comply with. These are found in Schedule 1 of the English Act.[31]

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[28] An example is the procedure for appointment under Section 12. The parties are two agree in the first instance. Where the parties fail to agree, the Act provides for the appointment procedure.

[29] Section 4 of the Arbitration Act

[30] Section 4 (2) and 3(a)

[31] Section 4 (1) of the English Arbitration Act of 1996 provides that the Mandatory provisions of this part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary. These include: stay of legal proceedings, power of court to extend agreed time limits, application of Limitation Acts, power of court to remove arbitrator, effect of death of arbitrator, liability of parties for fees and expenses of arbitrator. Immunity of arbitrator, objection to substantive jurisdiction of the tribunal, determination of preliminary point of jurisdiction, general duty of tribunal, items to be treated ad expenses of arbitrators, general duty of parties, securing attendances of witnesses, power to withhold award in case of non-payment, effectiveness of agreement for payment of costs in any event, enforcement of award, challenging the award as to the tribunals substantive jurisdiction and on the ground of serious irregularity, saving rights of persons who takes no part in proceedings, loss of right to object immunity of arbitral institutions and charge to secure payment of solicitor's costs.

iii. One emerging issue is the impact on party autonomy of mandatory rules of a state with some relationship to the arbitration.[32] Mandatory rules are laws that purport to apply irrespective of a contract's proper law or the procedural regime selected by the parties.[33] They can be either procedural, for example requiring due process, or substantive, such as certain tax, competition and import/export laws.[34]

iv. Considerations of public policy also plays a key role.[35] It has been determined that public policy is an unruly horse, it is one of the grounds a party can successfully challenge the enforcement of an award. [36]

v. Court interference and Court intervention: In as much section 10 of the Act provides that no court shall intervene in matters governed by the Act, there are instances where the Court has to step in to assist the arbitration process.[37] The role of the Court is limited to the following specified circumstances:[38]

- Determination of the enforceability of arbitration agreement
- Stay of Court proceedings
- Interim measure of protection
- Appointment of arbitrators
- Termination of arbitrator's mandate

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[32] Barraclough A. and Waincymer J., "*Mandatory Rules of Law in International Commercial Arbitration*" Melbourne Journal of International Law Volume 6 (2005). See Also Pryles M., Limits to Party Autonomy in Arbitral Procedure accessed at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012223895489410limits_to_party_autonomy_in_international_commercial_arbitration.pdf on 29/10/2024 at 7.15 a.m.
[33] Ibid
[34] Ibid
[35] Under Section 35 (2) of the Arbitration Act, the High Court may set aside the arbitral award if the court finds that the award is in conflict with the public policy of Kenya.
[36]Section 35 (2)(b) (ii) of the Arbitration Act
[37] Muigai G., "The Role of the Court in Arbitration proceedings." Arbitration Law and Practice in Kenya published by Law Africa Publishing (K) Limited, 2011
[38] Ibid

- Determination of the arbitrator's jurisdiction
- Assistance to the tribunal exercise powers conferred on it
- Assistance in taking evidence
- Setting aside arbitral awards
- Enforcement of awards
- Appeal

vi. Party autonomy may also be limited where there is power imbalance.[39] The Employment and Labour Relations Court at Nairobi in ***Steve Okeyo vs. Board of Directors HHI Management Service Limited & Another (Cause E970 o[40]f 2023) [2024] KEELRC 1006 (KLR) (6 May 2024)***[41] recently held that arbitration is not applicable to employment contracts. Most people argue that in employment contracts, the employer has a greater bargaining power and may want to include an arbitration clause in order to frustrate the employee. The position might be true considering that the parties to a have to cater for the costs of arbitration. Someone who is out of a job may be prevented from pursuing his/her rights because they are not in a position to pay.

LIMITATIONS TO ARBITRATOR'S POWERS

i. Arbitrators can only arbitrate disputes that parties have agreed to submit to arbitration.[42] If a dispute falls outside the scope of the

[39] https://arbitrationagreements.org/power-imbalance/ accessed on 28/10/2024 at 1.32 p.m.

[41] The 2nd Respondent in the matter applied for stay of proceedings pending the reference of the dispute to arbitration pursuant to an employment contract between the Claimant and 2nd Respondent. The Court, among others, found that "***Incorporation of arbitral clauses in employment contract is atypical and underlines the reality of the unequal bargaining power between the employer and the employee***."

[42] Mbobu K., "*The arbitration Agreement*," Arbitration Law and Practice in Kenya published by Law Africa Publishing (K) Limited, 2011

arbitration agreement or involves parties who have not consented to arbitration, the arbitrator lacks jurisdiction to hear the case.[43]

ii. Arbitrators must adhere to procedural rules and guidelines agreed upon by the parties or mandated by applicable arbitration laws.[44] They cannot deviate from these rules without the parties' consent.[45]

iii. The Arbitrator lacks the power to enforce his/her own award.[46] The parties have to move to court to have the award recognised and/or enforced. Sometimes, the award may face the fate of being set aside by the Court.[47]

iv. In terms of compliance of the directions or orders, the tribunal relies on the good will of the parties.[48] In Court, the parties comply for fear of being held in contempt of court or the court making such adverse orders against the non-complying party.[49] In addition, court orders

[43] Section 35 (2) (iv) of the Act

[44] Muigai G. and Kamau J., "*The Legal Framework of Arbitration in Kenya*." Arbitration Law and Practice in Kenya published by Law Africa Publishing (K) Limited, 2011

[45] In the case of ***Sonile Holdings Limited v Vinayak Builders Limited; Simon Saili Malonza (Interested Party) [2020] eKLR,*** one of the grounds relied upon by the Applicant seeking the removal of the arbitrator was that the arbitrator had used the Evidence, which in the opinion of the applicant, was not applicable to arbitral proceedings.

[46] Kajimanga C. and Mutuna N. K., Handbook on Arbitration in Zambia, Juta & Company (Ppty) Ltd, 2023

[47] Section 37

[48] The parties having chosen arbitration as their preferred mode of dispute resolution, the presumption is that parties will do all things necessary for the proper and expeditious conduct of the arbitral proceeding as provided for under Section 19A of the Act

[49] Court Orders bear a Penal Notice to all parties: "*This is a valid court order and any party who does not obey is liable to imprisonment or fine or both for contempt of court*." Unfortunately, Orders for directions issued by arbitral tribunals do have such a notice.

are effective immediately. To ensure compliance, the Arbitrator may however issue a peremptory Order under Section 26 (e) of the Act.

DOES PARTY AUTONOMY LIMIT THE ARBITRATOR'S POWERS?

In determining the dispute, the arbitrators work is within the framework established by the parties through their agreement.[50]

As earlier discussed, under the Arbitration Act where the parties have failed to agree, the provisions of the Act apply. Can parties having failed to agree, and the provisions of the Act coming into effect, revert to their former position and agree otherwise?

Section 20 (2) of the Arbitration Act provides that the arbitrator should conduct proceedings in a manner that it considers appropriate, having regard to the desirability of avoiding unnecessary expense or delay. What happens where the parties are the cause of the unnecessary expense or delay? What recourse does the arbitrator have?

Under Rule 26 of the CIArb Rules, the tribunal may reject pleadings filed out of time, unless the parties agree otherwise or the tribunal after hearing the parties allows the admission. This implies that the parties, despite directions by the tribunal on compliance, parties can agree otherwise.

It is easier for the arbitrator when one party is guilty of causing unnecessary delay.[51] However, when both parties are guilty of causing the unnecessary

[50] Mbobu K., "*The arbitration Agreement*," Arbitration Law and Practice in Kenya, published by Law Africa Publishing (K) Limited, 2011

[51] Under Section 26 (g) of the Arbitration Act, where a party fails to comply with any other peremptory order, the tribunal may direct that the party in default shall not be entitled to rely on any allegation or material that was the subject-matter of the order, draw such adverse inferences from the noncompliance as the circumstances justify, proceed to an award on the basis of such materials as have been properly provided to it and make such order as it thinks fit as to the payment of costs of the arbitration incurred as a result of the noncompliance.

delay, the Arbitrator has a harder task.[52] The court in exercise of its functions issues orders to parties and requires immediate compliance.[53] If any party is aggrieved they have a right of appeal or the party can apply for review.[54] An arbitrator on the other hand cannot appear to be high handed and has to maintain a calm demeanor throughout the proceedings lest their impartiality is challenged.[55]

When an arbitrator finds themselves where party autonomy threatens the integrity, efficiency and expediency of the arbitration process, there are several options available to the arbitrator. These include:

i. To issue a peremptory order under section 26 (e) of the Act. Rule 101 provides that if any party fails to comply with any order or direction of the tribunal, the tribunal may proceed to issue orders prescribed under Section 26 or any section of the Act.

ii. Under Rule 90 (g), the CIArb Rules 2020, the arbitrator has power to proceed with the arbitration notwithstanding the failure or refusal of any party to comply with these rules or with its orders and directions, or to attend any meeting or hearing.

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[52] Under Rule 90 (g), of the CIArb Rules, the arbitrator has jurisdiction to proceed notwithstanding the failure or refusal of any party to comply with the Rules, orders and directions of the tribunal.

[53] Muigua K., Settling Disputes through Arbitration, 4th Edition, 2022, published by Glenwood Publishers.

[54] The right to appeal is provided for under sections 65 to 79G of the Civil Procedure Act Cap 21 Laws of Kenya and Orders 42, 43 and 44 of the Civil Procedure Rules 2010, revised 2019, whereas review is provided for under Section 80 and Order 45 respectively.

[55] In ***Kenya Medical Women's Association v Registered Trustees Gertrude's Gardens; Paul Ngotho, Arbitrator (Interested Party) [2021] KEHC 4454 (KLR),*** one of the grounds that the applicant raised in court when seeking to terminate the mandate of the arbitrator was that the arbitrator had issued directions compelling parties to attend mediation. The Applicant was of the opinion that the position taken by the arbitrator was hardliner therefore unreasonable and unjustified.

A reading of both Section 26 of the Act, Rule 101 and 90 of the CIArb Rules, the tribunal's recourse is issuance of peremptory orders.

CAN A PEREMPTORY ORDER BE CHALLENGED?

Peremptory Orders can be challenged in Court.[56] In addition to challenging the orders, the challenging party can also seek to have the arbitrator removed.[57]

In ***Shree Haree Builders Limited v Bazara Alex Tabulo & another [2016] eKLR,*** the applicant sought the recusal of an arbitrator on grounds that the Arbitrator had refused to hear the application for recusal; the Arbitrator had been very slow in setting down the hearing of the dispute which had also escalated the costs and that there is reasonable apprehension that the arbitrator was not impartial and/or independent. The Applicant had challenged the jurisdiction of the arbitrator and shortly thereafter application before the arbitral tribunal challenging the independence of the Arbitrator. The arbitrator in the arbitration proceedings had directed that the challenge to his jurisdiction be determined first before the question of his impartiality. The arbitrator issued peremptory orders after the applicant failed to file submissions (in compliance with those peremptory orders and that it instead rushed to the High Court to file an Originating Summons seeking to remove the Arbitrator.

The Court reinforced Section 20 of the Arbitration Act stating that:

"***Section 20(1) of the Act empowers the Arbitrator to determine the rules of procedure to be used by the arbitral tribunal in the conduct of proceedings. The Arbitrator has the power to determine the admissibility, relevance, materiality***

[56] https://arbitrationblog.kluwerarbitration.com/2016/02/22/the-arbitrators-clothes-peremptory-orders-and-state-immunity-in-arbitration/ accessed on 28/10/2024 at 8.47 a.m.

[57] Under Section 15(1) (c) of the Act, parties can agree in writing to have the mandate of the arbitrator terminated or make an application to the High Court apply to the High Court to decide on the termination of the mandate under Section 15(2)

and weight of any evidence and to determine at what point an argument or submissions in respect of any matter has been fairly and adequately made"

The Learned Judge further stated that "*I would only intervene in the pending arbitral process if there was evidence of violation of the law or the Constitution, and or where an arbitral award is issued as provided for under Section 33 of the Arbitration Act*."

The Court dismissed the application.

In ***George Arunga Sino t/a Maywood Auctioneers v NCBA (Formerly Nic Bank Limited) [2022] eKLR,*** the Respondent did not participate in the arbitration despite being duly served. The matter therefore proceeded in the absence of the Respondent. After the matter had gone ahead in the absence of the Respondent, the arbitrator indicated that he would deliver his ruling.

While the Ruling was pending, the arbitrator informed the Applicant that he would not be delivering the ruling within 30 days, as had been scheduled. Instead, the arbitrator directed that there would be a meeting to deliberate on the Respondent's request for the ruling to be delayed. After considering the Respondent's request, the arbitrator issued a peremptory order, through which not only was the Ruling delayed but the entire proceedings were re-opened.

The Applicant was aggrieved by the peremptory order and filed an application at the High Court seeking the removal of the arbitrator and the refund of fees paid to the arbitrator.

The Court allowed the application noting that the arbitrator had misconducted himself, especially with regard to the question of fees. Not only was the arbitrator removed, he was also ordered to refund part of the fees.

CONCLUSION

As much as arbitration is party driven, the parties cede control to the arbitrator.[58] If the process were to be left at the whims and wishes of the parties, then the process would cease to be effective and efficient.[59] The parties having enlisted the expertise and assistance of an impartial and independent third party to assist them in resolving the dispute, they have an obligation to ensure that the process remains credible.[60] Both the arbitrator and parties to arbitration have to work in harmony in ensuring expedient resolution of disputes.[61]

[58] Professor Emilia Onyema argues that the arbitrator should not be influenced or told what to do by the disputing parties or arbitral institution. The arbitrator should be solely guided by its obligations under the relevant arbitration agreement, arbitration rules and arbitration law. She further argues that the parties retain control over their dispute while the arbitrator retains control over the arbitral proceeding upon accepting appointment. (accessed at https://eprints.soas.ac.uk/39075/1/Chapter%2030%20Emilia%20Onyema.pdf on 29/10/2024 at 11.39 a.m.)

[59] Under Section 1 (a) of the English Arbitration Act, the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. Parties favour arbitration because it offers is cost effectiveness and expediency.

[60] Section 19A of the Act calls upon the parties to do all things necessary for the proper and expeditious conduct of the arbitral proceedings.

[61] Section 19 and 19A

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List of Abbreviations

CIArb: Chartered Institute of Arbitrators

List of Cases

George Arunga Sino t/a Maywood Auctioneers v NCBA (Formerly Nic Bank Limited) [2022] eKLR

Kenya Medical Women's Association v Registered Trustees Gertrude's Gardens; Paul Ngotho, Arbitrator (Interested Party) [2021] KEHC 4454 (KLR)

Kenya Oil Company Limited & Kobil Petroleum Limited v Kenya Pipeline Company [2014] KECA 851 (KLR

Shree Haree Builders Limited v Bazara Alex Tabulo & another [2016] eKLR

Sonile Holdings Limited v Vinayak Builders Limited; Simon Saili Malonza (Interested Party) [2020] eKLR

Therapeutic Jurisprudence and ADR: Enhancing Legal and Psychological Outcomes in Family Disputes

By: ***Muthoni Njagi*** [*]

Abstract

In the context of family law, this paper examines the relationship between Alternative Dispute Resolution (ADR) and Therapeutic Jurisprudence (TJ), highlighting the potential for ADR procedures—particularly mediation—to improve the legal and psychological outcomes of family disputes. ADR can encourage emotional healing, reconciliation, and long-term cooperation by incorporating TJ principles, which centre on the therapeutic or anti-therapeutic effects of legal proceedings. This is especially true for vulnerable parties like children and estranged spouses. The article examines views from around the world, Africa, and Kenya regarding the application of alternative dispute resolution (ADR) in family law, emphasizing the increasing use of child-centered mediation models that put families' psychological health first. The Marriage Act and the Children Act, two pieces of Kenyan law that acknowledge alternative dispute resolution (ADR) as a valid method of settling conflicts, are the main focus of the analysis. Lack of mediator training and uneven application are two issues that arise when putting TJ principles into practice in Kenya. The paper concludes with recommendations for strengthening ADR processes in Kenya by integrating therapeutic jurisprudence to foster healing and sustainable family resolutions.

Abstract: This paper provides a theoretical rationale for using the constructs of procedural justice, trust and self-determination as a framework to guide the evidence-based practice of therapeutic jurisprudence (TJ). The overarching purpose of TJ is to provide therapeutic outcomes to all participants in the legal system. This paper proposes that in legal decision-making, running a procedurally just process that generates trust amongst participants and allows the parties to experience self-determination, creates a dynamic akin to the therapeutic alliance, which, in therapy, is a reliable predictor of therapeutic outcomes. The paper argues that when a legal therapeutic alliance forms in

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a legal decision-making process then positive therapeutic outcomes are possible, and the process can be classified as one that accords with the philosophy of TJ. A subsequent argument is that a therapeutic court can be defined as one that enacts such a process. The paper concludes by explaining how the framework can provide both a guide to courts in designing TJ processes and an assessment framework to analyse legal decision-making processes for their therapeutic value.

Keywords: Therapeutic jurisprudence; Legal therapeutic alliance; Therapeutic outcomes; Procedural justice; Trust; Self-determination Applying Alternative Dispute Resolution (ADR) techniques, like mediation, in family law creates a space for therapeutic interventions that improve both the psychological and legal results.* When paired with the ideas of therapeutic jurisprudence, ADR can enhance decision-making, promote healing, and guarantee that families' emotional health—particularly that of their children—is given first priority.*

Introduction

The integration of legal proceedings and mental health is known as therapeutic jurisprudence (TJ), which centers on the potential for the law to have either therapeutic or anti-therapeutic effects on individuals engaged in legal proceedings. (Jill A. Howieson, 2023)

This article demonstrates the potential of TJ to produce comprehensive solutions by examining views from around the world, Africa, and Kenya regarding its integration into ADR processes for family disputes.

Theoretical Framework: Therapeutic Jurisprudence

Therapeutic jurisprudence focuses on how people's emotional and psychological well-being is impacted by the law. The approach acknowledges that the judicial process and its consequences may have an impact on parties' mental health. (Wexler, 2010) TJ therefore urges legal systems to implement policies that resolve conflicts while also improving the mental health of individuals involved. (M.L. Perlin 2019) This is especially crucial in family law

because most disputes involve emotionally fragile parties, like children and estranged spouses. ADR can be enhanced by family courts by adding psychological perspectives that support therapeutic results. (Kariuki Muigua, 2018)

ADR in Family Disputes: A Global Perspective

ADR processes like arbitration, mediation, and collaborative law are becoming more and more popular worldwide, which is indicative of a growing emphasis on non-adversarial dispute resolution. Law Reform Commission (2010) In jurisdictions like Australia, the United ADR is frequently used in the United States and Canada to resolve family disputes amicably and prevent the negative consequences of going to court. The best interests of the child are the primary focus of these nations' integrated child-centered mediation models, which are consistent with therapeutic jurisprudence. ADR processes like arbitration, mediation, and collaborative law are becoming more and more popular worldwide, which is indicative of a growing emphasis on non-adversarial dispute resolution. The Law Reform Commission's report emphasized the advantages of ADR in resolving family disputes, noting its ability to reduce hostility between parties and lead to more satisfactory outcomes in comparison to adversarial litigation. Law Reform Commission, *(*98-2010). In jurisdictions like Australia, the United States, and Canada, ADR is frequently used to resolve family disputes amicably, aiming to prevent the negative consequences of going to court. (C Menkel-Meadow, 2016). For instance, the Family Law Act 1975 (Cth) in Australia encourages mediation in family disputes, particularly where children are involved, to promote cooperative parenting and prevent prolonged court battles. (Family Law Act 1975 (Cth) s 60I.) Similarly, in Canada, the Family Law Act of Ontario stresses mediation as a primary means of dispute resolution, with the "best interests of the child" being a fundamental principle, which aligns with the therapeutic jurisprudence framework (Family Law Act 1990 (Ontario) s 24). These child-centered mediation models ensure that the emotional and psychological needs of children are given top priority, in line with the growing

recognition of the law's potential to support healing and mental well-being. (David B Wexler, 2005)

Studies from the U.S. such as Tucker et al., (2017) demonstrate that family mediation leads to more satisfactory outcomes for parties, reducing hostility and fostering long-term cooperation between parents. One strategy to avoid the emotional damage that long court battles frequently cause is mediation. Through the application of open communication, empathy, and emotional healing, mediation can result in solutions that meet the needs of the parties involved—legal as well as emotional (Mnotho Ngcobo 2023)

African Context: ADR and Family Disputes

In Africa, ADR mechanisms have deep roots in traditional conflict resolution practices. Many African societies historically used mediation, conciliation, and negotiation to resolve family disputes, emphasizing reconciliation over punishment. Today, ADR is increasingly incorporated into formal legal systems across the continent. (Ernest Uwazie, 2011)

In South Africa, family mediation has been institutionalized as part of the legal framework governing divorce and child custody matters. Njane, Christine & Sebayiga, Vianney. (2024). The Children's Act (No. 38 of 2005) mandates that the best interests of the child be considered paramount in all matters concerning them, which aligns well with the principles of therapeutic jurisprudence. Furthermore, mediation centers across the country have developed child-inclusive models that allow children to express their needs and concerns during mediation. Vini Singh, (2010).

In Nigeria, ADR is also gaining traction in family law disputes. While challenges such as cultural resistance and limited resources remain, there is a growing recognition that ADR mechanisms can resolve disputes in a less adversarial and more psychologically supportive manner.

Kenyan Perspective: ADR in Family Law

In Kenya, ADR mechanisms have become increasingly integrated into the family law landscape. (Kariuki Muigua, Ph.D. 2019) The Kenyan Constitution of 2010 recognizes ADR as a legitimate way to resolve disputes. Additionally, the Marriage Act (No. 4 of 2014) and the Children Act (No. 8 of 2001) provide frameworks for resolving family disputes outside traditional litigation.

The incorporation of mediation into family law disputes in Kenya aligns with therapeutic jurisprudence by emphasizing non-adversarial methods that focus on healing and reconciliation. Family mediation centers in Kenya have increasingly adopted a child-centered approach, recognizing the importance of protecting the psychological well-being of children caught in disputes. (Njagi, 2019) For instance, child-inclusive mediation practices in Kenyan family law proceedings ensure that the voices of children are heard and their emotional needs considered during settlement processes.

However, the practical application of ADR in Kenyan family law faces challenges. These include insufficient training of mediators in psychological aspects of family disputes, limited public awareness of ADR processes, and inconsistent application of TJ principles. Despite these hurdles, there is an emerging interest in promoting ADR as a tool for promoting emotional well-being and creating sustainable family dispute resolutions. (James Ndungu Njuguna, 2020)

Methodology

To examine the intersection between ADR and therapeutic jurisprudence in family law, this study reviews existing literature, including case studies, legal frameworks, and ADR practices globally, across Africa, and within Kenya. Data from court-annexed mediation programs, legal reforms, and interviews with legal practitioners informed the findings.

Global, African, and Kenyan Studies on ADR and Emotional Well-Being
Research from various jurisdictions highlights the positive impact of ADR on the emotional well-being of disputants, particularly in family law cases. A study conducted in the U.S. by Emery et al. (2005) found that mediation in divorce cases led to improved co-parenting relationships, reduced parental conflict, and better emotional outcomes for children. Similarly, studies from South Africa show that mediation in family law cases reduces post-divorce conflict and enhances parental cooperation (Bergman & Moore, 2011).

In Kenya, a report from the Judiciary's Mediation Accreditation Committee (Judiciary Mediation Accreditation Committee (2021) indicated that 80% of family law cases resolved through mediation resulted in more amicable settlements, with disputants expressing greater satisfaction compared to litigation outcomes. However, gaps remain in incorporating therapeutic jurisprudence principles fully, especially in ensuring that mediators are trained to address emotional and psychological aspects of disputes.

Statistics

- **Global Statistics**: In the U.S., mediation has proven to be an effective tool for resolving family law disputes. A 2018 report by the American Bar Association (ABA) found that 68% of family law cases referred to mediation resulted in settlements. The report also highlighted high rates of participant satisfaction, with parties expressing that mediation led to more amicable outcomes and reduced hostility, compared to traditional court proceedings. (ABA 2018). The ABA has long supported mediation as a method of reducing the emotional toll on families, particularly in disputes involving children, where therapeutic outcomes are crucial. (L Macfarlane, 2018)

- **African Statistics**: In South Africa, mediation has similarly demonstrated strong outcomes in family law disputes. A 2017 report by

the South African Mediation Association (SAMA) revealed that 75% of family disputes referred to mediation were successfully resolved. Furthermore, 60% of parties reported improved emotional outcomes for children involved in these disputes South African Mediation Association, *Annual Report 2017* (SAMA 2017). This is consistent with South Africa's legal framework, particularly the Children's Act 2005, which prioritizes the best interests of the child in all matters and encourages mediation as a means of resolving conflicts in a less adversarial and more supportive environment Children's Act 2005 (South Africa) s 28.

- **Kenyan Statistics**: In Kenya, the Judiciary's Mediation Accreditation Committee (JMAC) reported in 2021 that over 1,200 family law cases were successfully resolved through mediation programs. An impressive 80% of participants reported satisfaction with both the legal and emotional outcomes of the mediation process. (JMAC 2021). This reflects the growing integration of ADR in Kenya's family law system, in line with the Constitution of Kenya 2010, which encourages the use of ADR to promote justice while reducing the adversarial nature of legal proceedings. (Constitution of Kenya 2010 art 159(2).)

Recommendations for Practitioners in Kenya

- **Training Mediators in Psychological Aspects**: Kenyan mediators should receive specialized training in therapeutic jurisprudence to address the emotional and psychological needs of disputants, particularly children. Mediators who understand the psychological impact of legal disputes, such as stress, trauma, and emotional breakdowns, can provide a more holistic approach to family disputes. The incorporation of psychological training into mediation aligns with the principles of therapeutic jurisprudence, which emphasize the law's potential to have therapeutic outcomes. Studies have demonstrated that trained mediators are better equipped to manage high-conflict cases, leading to more sustainable resolutions and improved emotional well-being for participants, particularly in family law cases involving children.

(L Abrams and D Robinson, 2019). In Kenya, enhancing mediator training would help bridge the gap between legal processes and emotional healing, contributing to more effective family dispute resolutions. Judiciary's Mediation Accreditation Committee, *Mediation Report 2021* (JMAC 2021) 17.

 Public **Awareness Campaigns**: Public awareness campaigns play a crucial role in increasing the use of ADR mechanisms in family law disputes. Many individuals are unaware of the benefits of ADR, such as reduced conflict, faster resolutions, and better emotional outcomes. Raising public awareness through educational campaigns could encourage more people to choose mediation or other ADR methods over traditional litigation. According to a report by the Kenya Law Reform Commission, increased awareness and acceptance of ADR mechanisms would contribute to reducing the backlog of cases in Kenyan courts, while providing more satisfying resolutions for parties involved in family disputes. (KLRC 2019) Furthermore, public understanding of therapeutic jurisprudence and its focus on emotional healing in legal processes can foster broader support for non-adversarial resolution methods. (D Wexler and B Winick, 1996)

 Child**-Centered Mediation Models**: Developing child-centered mediation models is essential to ensuring that family mediation aligns with the principles of therapeutic jurisprudence. In disputes involving children, the focus should not only be on legal outcomes but also on the emotional and psychological well-being of the child. Child-inclusive mediation, which allows children to express their concerns and needs, has been successfully implemented in jurisdictions such as Australia and South Africa, where it is integrated into family law processes to ensure that the best interests of the child are paramount Children's Act 2005 (South Africa) s 28; (B Bergman, 2017). In Kenya, incorporating similar models would enhance the effectiveness of family mediation, ensuring that the voices of children are heard and their emotional needs addressed. Judiciary's Mediation Accreditation Committee (n 2) 19.

 Legislative Support: Kenyan policymakers should consider reforms that explicitly integrate therapeutic jurisprudence into ADR processes. Legal frameworks that emphasize the emotional and psychological healing of disputants, alongside the resolution of legal conflicts, can create more holistic and sustainable outcomes. For instance, reforms could include mandating child-inclusive mediation models in family law cases, ensuring that mediators are trained in psychological aspects, and requiring regular evaluations of the emotional well-being of disputants, especially children. The South African Children's Act (No. 38 of 2005) serves as a model, as it mandates that the best interests of the child be considered in all matters concerning them, promoting non-adversarial resolutions like mediation. Children's Act 2005 (South Africa) s 28. Similar reforms in Kenya could promote a more therapeutic approach to family law, aligning with both ADR principles and the evolving needs of the legal system. Kenya Law Reform Commission (n 3) 29.

Conclusion

The integration of ADR and therapeutic jurisprudence in family law offers significant potential for improving both legal and psychological outcomes.* (B Bergman 2019) By promoting reconciliation, promoting empathy, and ensuring that the emotional well-being of parties to a dispute is prioritized, ADR mechanisms can create more sustainable and healing resolutions for families.* For Kenya, adopting a therapeutic jurisprudence framework within ADR processes, alongside global and African best practices, can help address the complex emotional dimensions of family disputes while aligning with the evolving needs of the legal system. (Njagi 2019)

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B Bergman, 'Child-Inclusive Mediation Models in Family Disputes' (2017) 21(1) International Journal of Family Mediation 48, 50

Children's Act 2005 (South Africa) s 28;

C Menkel-Meadow, 'The Next Generation: Therapeutic Jurisprudence and ADR' (2016) 24 Journal of Law and Policy 51, 58

David B Wexler, 'Therapeutic Jurisprudence in a Comparative Law Context' (2005) 21 Behavioral Sciences & the Law 295, 298.

D Wexler and B Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press 1996) 78.

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James Ndungu Njuguna (2020) Journal of cmsd Volume 5(2)) in Kenya: Challenges and Opportunities:

Jill A. Howieson, 2023 A framework for the evidence-based practice of therapeutic jurisprudence: A legal therapeutic alliance, International Journal of Law and Psychiatry, Volume 89, https://doi.org/10.1016/j.ijlp.2023.101906. accessed on 23rd October 2024 https://www.sciencedirect.com/science/article/pii/S0160252723000493)

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Kariuki Muigua, Ph.D 12-14 February 2019, The Modernisation of other ADR Processes in Africa: Experience from Kenya and her 2010 Constitution. The Fifth SOAS Arbitration in Africa Conference, Khartoum,

Kenya Law Reform Commission, *Alternative Dispute Resolution in Kenya: A Review of Current Practice and Reforms* (KLRC 2019) 24

L Macfarlane, 'Mediation in Family Law: Principles and Practice' (2018) 54(3) Family Court Review 452, 460

Law Reform Commission REPORT on ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND CONCILIATION November 2010
Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation* (LRC 98-2010) para 3.12

L Abrams and D Robinson, 'The Role of Psychology in Family Mediation' (2019) 15(2) Family Law Quarterly 123, 126

M.L. Perlin 2019"Changing of the guards": David Wexler, therapeutic jurisprudence, and the transformation of legal scholarship International Journal of Law and Psychiatry, 63 (2019), pp. 3-7, 10.1016/j.ijlp.2018.07.001

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Njane, Christine & Sebayiga, Vianney. (2024). Enhancing child participation in family disputes through child inclusive mediation in Kenya. Kabarak Journal of Law and Ethics. 7. 69-105. 10.58216/kjle.v7i1.439

Tucker, J. S., Edelen, M. O., & Huang, W. (2017). Effectiveness of Parent-Child Mediation in Improving Family Functioning and Reducing Adolescent Problem Behavior: Results from a Pilot Randomized Controlled Trial. Journal of youth and adolescence, 46(3), 505–515. https://doi.org/10.1007/s10964-015-0412-z

Vini Singh, 'Compulsory mediation for family disputes' 2(9) Indian Institute of Arbitration and Mediation (2010) 2

Wexler, 2010, D.B. Wexler, Therapeutic jurisprudence and its application to criminal justice research and development Irish Probation Journal, 7 (2010), pp. 94-107

AI-ADR and the Algorithmic Divide: Closer or Further away from Justice?

By: ***Natasha Wanjiku Kahungi***[*]

Abstract

Artificial intelligence (AI) has emerged as a force in facilitating equitable justice, particularly in Alternative Dispute Resolution (ADR). AI speeds up the dispute resolution process by automating tasks like document review and providing predictive analytics into case outcomes. AI can also adopt a substitutive role in ADR, as evidenced by the introduction of robot arbitrators that undertake extensive data analysis, identify patterns, and render awards. This integration ushers in a new era of efficiency in dispute resolution. However, the promise of AI- ADR is tempered by the algorithmic divide, notable in Global South countries like Kenya. The algorithmic divide constrains AI-ADR processes by denying women, people with disabilities, and indigenous communities, among other marginalized groups an opportunity to utilize AI technologies to resolve disputes. Furthermore, the divide aggravates existing socio-economic and regional inequalities by restricting access to legal information, hindering communication with legal professionals, and impeding the use of online legal services. This study seeks to investigate the paradoxical relationship between AI's capacity to guarantee justice through ADR and its involvement in expanding inequities and injustices via the algorithmic divide. Through a critical qualitative evaluation of these issues, this piece attempts to suggest solutions to bridge the divide and promote inclusive access to AI-driven ADR in Kenya, ensuring the country ultimately accomplishes Sustainable Development Goal 16: Peace, Justice, and Strong Institutions.

Keywords: Artificial Intelligence, Alternative Dispute Resolution, digital divide, digital literacy, justice, algorithmic divide, AI-ADR, AI-ODR.

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Part I: Setting the Stage

The definition of Artificial Intelligence (hereinafter AI) continues to evolve owing to advancements in technology. According to the Organization for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD), AI is the ability of a machine to acquire and apply knowledge and carry out cognitive tasks such as reasoning and making decisions.[1] The European Commission High-Level Expert Group on Artificial Intelligence on the other hand defines AI as a system that displays intelligent behaviour by analysing their environment and taking action based on a degree of autonomy to achieve specific goals.[2] This definition is quite similar to the recently approved European Union's AI Act, which defines AI as a system designed to operate with a certain level of autonomy based on machine/human data and input and infers how to achieve a given set of human-defined objectives using machine learning, logic- and knowledge-based approaches, and produces system-generated outputs.[3]

Notably, these definitions capture two essential characteristics of AI: adaptability and autonomy. The adaptable nature of AI implies that they can continuously learn from their surroundings and improve their performance over time.[4] For instance, speech recognition AI such as Siri or Alexa becomes more accurate at understanding a user's voice and accent the more it interacts

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[1] --, *Information Economy Report*, (United Nations Conference on Trade and Development, 3 October 2017) <https://unctad.org/publication/information-economy-report-2017> Accessed 25 July 2024; --, *OECD Science Technology and Innovation Outlook, (*The Organization for Economic Cooperation and Development, 8 December 2016) <https://www.oecd-ilibrary.org/science-and-technology/oecd-science-technology-and-innovation-outlook-2016_sti_in_outlook-2016-en> Accessed 25 July 2024.

[2] --, *A definition of AI: Main Capabilities and Disciplines*, (Independent High Level Expert Group on Artificial Intelligence, 8 April 2019) <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=56341> Accessed 25 July 2024.

[3] EU Artificial Intelligence Act, 2021/0106 (COD), Article 113 (a) Chapter 1.

[4] Natasha Kahungi, 'Dawn Of Artificial Intelligence In Alternative Dispute Resolution; Expanding Access To Justice
Through Technology,' (2022) 10 University of Nairobi Law Journal, 23.

with a user.[5] AI systems are also autonomous. This autonomy allows AI-powered self-driving cars for example to navigate roads, avoid obstacles, and make real-time decisions without needing a driver.[6]

It is critical to note that AI is a scientific discipline and encompasses several subdomains.[7] Machine Learning (hereinafter ML) is one such subdomain. ML as a subset of AI enables computers to learn from data without explicit programming.[8] This is done through algorithmic processing which involves analysing large datasets to identify patterns and make predictions.[9] Data is therefore critical to power AI as it is used to train algorithms used in ML. Deep Learning (DL) is another subdomain of AI that operates within ML.[10] Under DL, many layers of neural networks that mimic the functioning of the human brain

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[5] Saliha Benkerzaz, Youssef Elmir and Abdeslem Dennai, 'A Study on Automatic Speech Recognition,' (2019) 10(3) Journal of Information Technology Review.

[6] Gourav Bathla, Kishor V. Bhadane, et al, 'Autonomous Vehicles and Intelligent Automation: Applications, Challenges, and Opportunities,' (2022) Mobile Information Systems.

[7] Mitchelle Kang'ethe, 'Me, Myself, and A.I.: Should Kenya's Patent Law Be Amended to Recognise Machine Learning Systems as Inventors?,' (2023) 8 (1) SLR.

[8] Nils Nilsson, *The Quest for Artificial Intelligence: A History of Ideas and Achievements,* (Cambridge University Press, 2009), 495; --, 'What is machine learning? A definition', (*Expert.AI*, 14 March 2022) <https://www.expert.ai/blog/machine-learning-definition/> Accessed on 10 June 2024:

> Machine Learning systems learn through supervised, unsupervised or reinforcement learning. Supervised learning is the most common type of ML where an algorithm is trained on data to map an input variable into an output. Under unsupervised learning, the algorithms identifies news data patterns and structures on its own while reinforcement learning is based on an experience mechanism where a machine must work out a solution through trial and error.

[9] Batta Mahesh, 'Machine Learning Algorithms- A Review,' (2020) 10 International Journal of Science and Research.

[10] Rajesh, Lakshmi Narasimhan & Moemedi Lefoane, 'Deep Learning-Based Legal System Architecture for Africa: An Architectural Study, in Karuppusamy, Perikos, García Márquez, (eds) *Ubiquitous Intelligent Systems. Smart Innovation, Systems and Technologies*, (Springer, Singapore, 2022).

analyse and interpret complex data such as images and speech.[11] Generative AI, an advanced form of DL, processes and understands complex data and uses it to create new content in realistic photos or coherent text.[12]

The African Union's High-Level Panel on Emerging Technologies (APET) has recognized AI's revolutionary potential across all sectors.[13] In the health sector, for example, AI has improved diagnosis accuracy and helped tailor treatment programs, as proven by platforms like Rology Connect and Diagnosoft.[14] The use of AI in agriculture has resulted in higher crop yields by monitoring crop health, which enhances food security.[15] Furthermore, in the education sector, AI-driven solutions enable tailored learning experiences and can give educators useful data about student performance.[16] Other AI applications include self-driving cars and fraud detection in the financial services industry.[17]

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[11] Hamed Taherdoost, 'Deep Learning and Neural Networks: Decision-Making Implications,' (2023) 15 Symmetry.

[12] Zhihan Lv, 'Generative artificial intelligence in the metaverse era,' (2023) 3 Cognitive Robotics, 208.

[13] --, *AI and the Future of Work in Africa - White Paper,* (AUDA-NEPAD, June 2024) <https://www.nepad.org/publication/ai-and-future-of-work-africa-white-paper-> Accessed 10 July 2024. This paper outlines the potential for generative AI in Africa, and some of the challenges including lack of training data, which may hinder its accessibility and efficacy in the global south.

[14] --, *Artificial Intelligence for Africa: An Opportunity for Growth, Development, and Democratisation,* (Access Partnership and the University of Pretoria, 2023), 10; https://rology.health/ on 11 June 2024; https://diagnosoft.io/ on 11 June 2024.

[15] Mohammad Hassan, Anna Kowalska and Hadeed Ashraf , 'Advances in deep learning algorithms for agricultural monitoring and management,' *Applied Research in Artificial Intelligence and Cloud Computing*, 6(1) (2023).

[16] Solomon Oyelere, Ismaila Sanusi I et al, *Artificial Intelligence in African Schools: Towards a Contextualized Approach*, (Proceedings of the 2022 IEEE Global Engineering Education Conference (EDUCON), 2022); Digital Transformation for Sustainable Engineering Education, 2022.

[17] Manish Bahety, 'Real World Examples of How Artificial Intelligence Is Being Used In Financial Services,' (*CIO Coverage*, 2024) < https://www.ciocoverage.com/real-world-examples-of-how-artificial-intelligence-is-being-used-in-financial-services/> Accessed on 24 October 2024.

Interestingly, the legal profession and the justice system as a whole, which is often chastised for its aversion to change, has also begun to embrace AI and other technologies.[18] Kenyan courts have adopted virtual hearings and online conferences since Covid 19, and law firms employ AI platforms like eSheria and WakiliAI to help with legal research and drafting submissions.[19]

AI is also being employed in Alternative Dispute Resolution (ADR) procedures.[20] ADR, also known as Appropriate Dispute Resolution procedures, is a broad group of methods that focus on resolving disputes through a variety of approaches outside litigation.[21] Article 159 of the 2010 Kenyan Constitution provides for ADR, which includes procedures ranging from negotiation and mediation, which are the least coercive, to arbitration, which is quite similar to litigation.[22] ADR leverages AI in a variety of processes, including legal drafting and award drafting, as well as robot arbitrators as will be discussed in subsequent sections.[23] Incorporating AI with ADR (AI-ADR, AIDR or AI-driven ADR) provides several advantages. These include speeding up the procedure and assuring its efficiency. Furthermore, AI improves decision accuracy by

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[18] Natasha Kahungi, 'Exploring the Transformative Nexus of Technology, Globalization and Client Expectation on the Legal System,' (*Parklands Diary,* 24 June 2024) <https://unlawjournal.blogspot.com/2024/06/exploring-transformative-nexus-of.html> Accessed on 25 July 2024; Neil Hamilton 'Empirical Research on the Core Competencies Needed to Practice Law: What Do Clients, New Lawyers, and Legal Employers Tell Us?' (2014) 83(3) The Bar Examiner, p 6; Michael Simon, Alvin Lindsay et al, '*Lola v. Skadden* and the Automation of the Legal Profession,' (2018) YJLT

[19] Nurus Putera, Hartini Saripan, et al. 'Artificial Intelligence for Construction Dispute Resolution: Justice of the Future,' (2021) 11(11) International Journal of Academic Research in Business and Social Sciences, p 139–151; <https://esheria.co.ke/> Accessed on 11 June 2024; <https://wakili.org/> Accessed on 11 June 2024..

[20] Megha Shawani, 'Alternate Dispute Resolution and Artificial Intelligence; Boom or Bane?' (2020) (2) LexForti Legal Journal.

[21] Kariuki Muigua , 'Alternative Dispute Resolution and Article 159 of the Constitution,' (2020) Kariuki Muigua and Company Advocates.

[22] Constitution of Kenya, 2010, Article 159 (2).

[23] Megha Shawani (n 20).

evaluating large amounts of data, hence minimising human mistakes and bias.[24] It also cuts costs by automating repetitive processes, making ADR more pocket-friendly.[25]

It is worth noting that, while AI brings various benefits when integrated into ADR, AI-driven ADR also has considerable drawbacks. These include concerns about algorithmic bias, the opacity of AI systems, data privacy, and confidentiality.[26] These issues, however, pale in comparison to the digital divide. The digital divide refers to the disparity between those who can and those who are unable to utilize technology.[27] This discrepancy exists along a variety of dimensions, including rich-poor and literate-illiterate. In Kenya, this gap affects underprivileged groups such as rural residents, people living in urban slums, women, children, and people with disabilities.[28] According to a DataReportal analysis, despite Kenya's increasing digital literacy rate, many rural communities still lack the infrastructure required to fully benefit from digital tools, such as stable internet and electricity.[29] Furthermore, even when technology is available, these groups lack digital literacy, which hinders them

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[24] --, 'AI may help with alternative dispute resolution' (*Law Times*, 3 June 2019) <AI may help with alternative dispute resolution | Law Times (lawtimesnews.com)> Accessed on 11 June 2024; Wabia Karugu, 'Artificial Intelligence and Alternative Dispute Resolution' (*Strathmore Dispute Resolution Centre*, 27 January 2020) < Artificial Intelligence and Alternative Dispute Resolution – Strathmore Dispute Resolution Centre Blog (wordpress.com)> Accessed on 11 June 2024.

[25] Ibid.

[26] Hibah Alessa, 'The role of Artificial Intelligence in Online Dispute Resolution: A brief and critical overview' (2022) Information & Communications Technology Law, p 20; Natasha Kahungi, 'Culpability of AI in Kenya: An Overview,' (2023) 11 UNLJ.

[27] Frederick Okello, *Bridging Kenya's Digital Divide: Context, Barriers and Strategies,* (Digital Policy Hub, 2023) <https://www.cigionline.org/static/documents/DPH-Paper-Okello.pdf> Accessed on 11 June 2024.

[28] --, *Addressing the Digital Divide: Taking action towards digital inclusion,* (UN Habitat, 2021) <https://unhabitat.org/sites/default/files/2021/11/addressing_the_digital_divide.pdf> Accessed on 11 June 2024.

[29] Simon Kemp, 'Digital 2024: Kenya,' (*Datareportal,* 23 Februrary 2024) < https://datareportal.com/reports/digital-2024-kenya> Accessed on 11 June 2024.

from fully utilizing AI-ADR platforms.[30] Economic hurdles may also prevent poorer individuals from purchasing the devices or data required to participate in AI-ADR.[31] This disparity has a substantial impact on access to justice, as individuals without technology may be unable to engage in AI-driven ADR processes, resulting in unequal access to dispute resolution services.[32]

The algorithmic divide, which equates to the growing disparity between those who have access to and can efficiently use advanced algorithms in AI technologies, aggravates the digital divide.[33] Interestingly, whereas the digital gap mainly focuses on fundamental access to and use of digital technologies, the algorithmic divide reveals deeper inequities, particularly in the ability to harness AI.[34] This disparity is evident the availability of AI-powered legal tools,

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[30] Velibor Bozic, 'Risks of the Digital Divide in Using Artificial Intelligence,' (2023) Research Gate.

[31] Ibid.

[32] Susan Schiavetta, *Online Dispute Resolution, E-Government and Overcoming the Digital Divide*, (20th BILETA Conference, 2005).

[33] James Manyika and Jacques Bughin, 'Technology convergence and AI divides: A simulation appraisal,' (*Voxeu,* 7 September 2018) < https://cepr.org/voxeu/columns/technology-convergence-and-ai-divides-simulation-appraisal> Accessed on 10 June 2024; --, *Public Policy Statement of Algorithmic Transparency and Accountability,* (Association for Computing Machinery, United States, 12 January 2017) < https://www.acm.org/binaries/content/assets/public-policy/2017_usacm_statement_algorithms.pdf> Accessed on 10 June 2024- The U.S. Public Policy Council of the Association for Computing Machinery defines an algorithm as:

> An algorithm is a self-contained step-by-step set of operations that computers and other "smart" devices carry out to perform calculation, data processing, and automated reasoning tasks. Increasingly, algorithms implement institutional decision-making based on analytics, which involves the discovery, interpretation, and communication of meaningful patterns in data. Especially valuable in areas rich with recorded information, analytics relies on the simultaneous application of statistics, computer programming, and operations research to quantify performance.

[34] --, *The ethics of artificial intelligence: Issues and initiatives,* (Panel for the Future of Science and Technology, European Parliamentary Research Service, March 2020), p 37.

and the ability to truly influence and comprehend AI-based choices.[35] As a result, the algorithmic divide further marginalizes already digitally marginalized populations by reducing their ability to participate meaningfully in AI-ADR.

This paper argues that although AI-based alternative dispute resolution (AI-ADR) can revolutionize access to justice, the algorithmic divide poses a significant obstacle. It recognizes the need for policy and inclusive technological improvements to overcome the algorithmic divide in AI-ADR. As a result, the paper will be subdivided as follows: Part II will analyse how AI has been integrated into ADR while Part III will address the manifestations of the algorithmic divide in the context of AI-ADR and how they affect access to

[35] Peter Yu, 'The Algorithmic Divide and Equality in the Age of Artificial Intelligence,' (2020) FLR- The author highlights five attributes of the digital divide: Awareness, Access, Affordability, Availability and Adaptability. The author notes that while individuals accepted by the digital divide may be aware of their exclusion, those impacted by the algorithmic divide may not. This is because many of these individuals may not understand the significant influence these technologies have on their lives or the potential risks of biased algorithms. This situation is particularly true for third world countries. Access is the most discussed aspect of the algorithmic divide as it highlights the disparity in models35 for low-resource languages, the facilitation of machine learning with limited computational capabilities, and the utilization of decision support systems. Globally, the access gap is significant, with strong internet penetration in Japan, the United States, and the United Kingdom, but rates as low as 5% in Burundi and Eritrea. Women, the elderly, and people living in rural areas are particularly vulnerable. Affordability is tied to access but results in a different outcome. In the case of the algorithmic divide, affordability will determine the quality of products an individual will enjoy, his access to machine learning and ability to participate in the revolution. On availability, various scholars, including Ralph Hamann note that most AI technologies are developed in developing regions. Thus, locally developed AI technologies may not be available in Africa. This unavailability further deepens the algorithmic divide. Finally, to prosper in the age of AI, people must use algorithm-enhanced technologies and personalize them to their specific needs. However, doing so necessitates not only awareness, but also extensive knowledge and comprehension—essential components of algorithmic literacy. Thus, the level of adaptability to this technology directly corresponds to bridging or deepening of the algorithmic divide.

justice. Part IV will propose practical methods to bridge this divide. Finally, Part V will serve as the conclusion.

Part II: The AI-ADR Promise

Various studies reveal that the use of AI and other technology in ADR is more widespread than in traditional litigation systems.[36] This is because ADR procedures are not subject to governmental procurement and implementation processes, which put strain on the judicial system. AI can be used in ADR to perform various functions. Primarily, AI assists with document examination, research, and standard drafting.[37] Human decision-makers, such as arbitrators, can also use AI to evaluate damages and estimate outcomes using predictive analysis. AI can also be used as a substitute for the human decision-maker. In this scenario, participants in an arbitration proceeding, for example, submit their claims to a robot arbitrator, who is expected to generate a binding award. Fascinatingly, robot arbitrators are already in use outside of mainland China to resolve small-value cross-border matters.[38] Other uses of AI include appointing mediators and arbitrators and identifying and flagging corrupt practitioners. It is anticipated that advanced AI technologies, including the Metaverse, will increasingly be employed in resolving complex technical arbitration disputes, through augmented reality, further enhancing the efficiency and accuracy of the arbitration process.[39]

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[36] Tyrone Holt, 'Whither Arbitration – What Can be Done to Improve Arbitration and Keep out Litigation's Ill Effects' (2008) 7 DePaul Bus & Comm LJ, 455.

[37] Megha Shawani, (n 20); Natasha Kahungi, (n 5); Yogiraj Sadaphal, 'AI in ADR: An Analysis,' (2020) Indian Journal of Law and Legal Research.

[38] Zbyněk Loebl, 'Can a robojudge be fair?' (*Kulwer Arbitration Blog,* 16 December 2019) < https://arbitrationblog.kluwerarbitration.com/2019/12/16/can-a-robojudge-be-fair/> Accessed 10 June 2024; Henk Snijders, 'Arbitration and AI, from Arbitration to 'Robotration' and from Human Arbitrator to Robot,' (2021) 87 (2) IJAMDM, p 223-242.

[39] Geneva Sekula, 'ICCA Sydney: The Moving Face of Technology' (Kluwer Arbitration Blog, 2018) < http://arbitrationblog.kluwerarbitration.com/2018/04/18/icca-sydney-moving-face-technology/> Accessed 20 June 2024.

In addition to established ADR processes, AI is increasingly being applied in Online Dispute Resolution (ODR).[40] ODR is a dispute resolution process that uses technology and the internet in general to settle disputes swiftly and efficiently.[41] ODR techniques range from simple consumer ODR, which simulates face-to-face mediation via electronic means such as telephone or video conferencing, to more sophisticated ODR processes.[42] For instance, the Centre for Alternate Dispute Resolution Excellence (CADRE) is an ODR platform that allows parties to resolve disputes online via video chat and email.[43] Sophisticated ODR platforms, on the other hand, use algorithms to consider customers' interests and views and, using precedent, provide solutions to the issue at hand.[44] They achieve this purpose through ML. Other technologies applied to ODR include blockchain and distributed ledger technology, as well as chatbots, which help consumers navigate the process by delivering correct information and assisting with documentation.[45] These chatbots make conflict

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[40] Susan Schiavetta (n 32).

[41] John Zeleznikow, 'Using Artificial Intelligence to provide Intelligent Dispute Resolution Support' (2021) 30 Group DecisNegot, 790; Emilia Bellucci, Arno Lodder, John Zeleznikow, 'Integrating Artificial Intelligence, Argumentation and Game Theory to Develop an Online Dispute Resolution Environment' (2004) Proceedings of the 16th IEEE International Conference on Tools with Artificial Intelligence, 749.

[42] Samuel Hodge Jr, 'Is the Use of Artificial Intelligence in Alternative Dispute Resolution a Viable Option or Wishful Thinking?' (2024) 24 (1) PDRJ- Experts categorize ODR into two processes: party driven and adjucicative. Party driven ODR requires opposing parties to determine and consent to a solution. In this case, the parties must agree on a solution or the matter will be transferred to a different resolution technique. The adjudicative method on the other hand requires parties to allow a third person to decide on the outcome of the dispute. This method is applied in online arbitration proceedings and chargebacks. Chargebacks are a means of challenging payments online to vendors through credit and debit cards.

[43] Megha Shawani, (n 20); Natasha Kahungi, (n 5).

[44] Jeremy Barnett and Philip Treleaven, 'Algorithmic Dispute Resolution: The automation of professional dispute resolution using AI and Blockchain technologies,' (2018) 61 (3) TCJ, p 399-408.

[45] Riikka Koulu, 'Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement,' (2016) 13 (1) Scripted Journal of Law, Technology & Society.

resolution more accessible and user-friendly by encouraging more people to participate. In Kenya, the Utatuzi Centre helps small and medium-sized businesses settle economic disputes.[46] This platform is intended to resolve a variety of commercial conflicts, including e-commerce difficulties, in a timely, efficient, and cost-effective manner.[47]

AIDR, better known as AI-ADR is divided into two categories: AI-support-based ADR (AI as a tool for the neutral) and AI-based ADR.[48] According to Carneiro et al., there is a considerable increase in support-based ADR as opposed to AI-based ADR.[49] The primary reason for this is that the first method employs AI to assist human mediators and arbitrators. It accomplishes this by performing data analysis, identifying trends, and generating predicted insights.[50] This improves their decision-making process without sacrificing the human element. As a result, individuals are more likely to accept this strategy. It combines the benefits of AI with human judgment while maintaining the ethical and compassionate qualities of dispute resolution.[51] On the other hand, AI-based ADR seeks to replace the human decision-maker in the process by acting as the decision-maker. This method is heavily criticized due to ethical concerns such as bias, opacity, and the lack of empathy that the AI decision-maker may have.[52] Therefore, the rapid development and integration of AI-

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[46] James Ngotho Kariuki, 'Embracing Online Dispute Resolution in Kenya: Feasibility of an Online Dispute Resolution Portal for E-commerce Disputes in Kenya,' (2019) 3 (2) Journal of CMSD, 63; -- 'New Kenyan ODR Provider: Utatuzi Center' (*National Center for Technology & Dispute Resolution*, 10 February 2021) < New Kenyan ODR Provider: Utatuzi Center | odr.info> Accessed 10 June 2024.

[47] Ibid.

[48] Pablo Cortes, 'The Brave New World of Consumer Redress in the European Union and the United Kingdom,' (2016) 22 DRM, p 41.

[49] Pablo Cortes, 'Online small claims courts: the reform of the European small claims procedure,' (2016) Computer and Telecommunications Law Review.

[50] Ibid.

[51] Davide Carneiro et al. 'Online dispute resolution: An artificial intelligence perspective' (2014) 41 Artificial Intelligence Review 211, 212.

[52] Janet Rifkin, 'Online dispute resolution: Theory and practice of the fourth party' (2010) 19 Conflict Resolution Quarterly 117.

support-based ADR demonstrates a desire to incorporate AI to improve human capacities rather than automate the dispute resolution process.

AI-support-based ADR largely makes use of decision-support systems. In this context, AI systems examine a variety of options to discover the most optimal answer for a given situation.[53] This is comparable to how autonomous vehicles make decisions. Such support systems mainly provide procedural assistance. These technologies not only search for relevant materials but also process and present it rationally, allowing human decision-makers to make informed decisions.[54] The Family Winner system is an example of a decision-making support system in AI-ODR.[55] It enables parties to identify disputed issues and assign subjective priority ratings to each one. The system then uses algorithms to provide an ideal distribution solution, which may be approved or rejected.[56] Similar technologies, such as the Smart Settle system, assist mediators in determining the negotiating parties' degrees of satisfaction with various settlements.[57] These systems allow parties to express and adjust their preferences during discussions, much like classic negotiation dynamics.

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[53] Fernando Esteban & John Zeleznikow, *Making Intelligent Online Dispute Resolution Tools Available to Self-Represented Litigants in the Public Justice System*, (Presented at ICAIL 21, São Paulo, Association for Computing Machinery, 2021).
[54] Pablo Cortes, 'A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We are and How to Move Forward,' (2014) ULSL; Pablo Cortes, (n 42).
[55] Ibid; Marina Androulaki, 'Digital Justice: AI and Platform based Dispute Resolution,' (Master's Thesis, International Hellenic University 2023).
[56] Ibid; John Zeleznikow & Emilia Bellucci, 'Family-Winner: Integrating game theory and heuristics to provide negotiation support,' in Bourcier Daniele ed, *Frontiers in artificial intelligence and applications*, (IOS Press Amsterdam, 2003).
[57] David Larson, ''Brother, Can You Spare a Dime?' Technology Can Reduce Dispute Resolution Costs When Times are Tough and Improve Outcomes,' (2011) 11(2) NLJ, p 523- Smartsettle is an online dispute settlement platform that provides two programs: Smartsettle One and Smartsettle Infinity. Smartsettle One is intended for single-issue cases between two parties, but Smartsettle Infinity handles complicated multi-issue situations involving several parties by utilizing unique optimization methods to achieve fair and efficient results. The negotiation process is divided into sessions in which the parties establish settlement ranges and offer recommendations. An agreement is formed when the recognized values of both parties overlap. If not, the process continues with

AI-support-based ADR also utilizes knowledge-based support systems. These systems function like advanced search engines and analyze relevant data, laws, and precedents to provide pertinent information for resolving disputes.[58] They understand the context of a given scenario and offer insights by processing complex information, which is particularly challenging in less structured fields outside of law. Intelligent interface systems under AI support-based ADR, on the other hand, aim to bridge the communication gap between people and AI by permitting natural language inputs and outputs.[59] AI chatbots at Kenya's Utatuzi Centre, for instance, simplify dispute settlement by guiding users through the procedure, answering questions, and assisting with documentation.[60] These systems improve the interactions and translations between humans and AI, making ADR more accessible.

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subsequent sessions, during which parties might request system ideas or a compromise. Smartsettle Infinity allows parties in complex talks to assign quantitative values and satisfaction ratings to various topics, allowing for more subtle trade-offs and allowing the system to develop similar solutions based on each party's preferences. Another platform is Cybersettle which is a patented ODR platform that streamlines the settlement of financial disputes, primarily in the insurance business, by decreasing the time and expenses associated with traditional claims processes. Cybersettle's double-blind bidding procedure enables parties to submit settlement demands and bids in numerous rounds, with a settlement declared if there is an overlap. The technique has been successful in expediting up compensation for injured parties while also saving insurance companies money on administrative costs, allowing policyholders to pay lower premiums. Cybersettle's cost structure, which charges only if a settlement is made, has drawn over 150,000 US attorneys to their site. While efficient and cost-effective, Cybersettle's ability to support sophisticated negotiations or fruitful conversations is limited, making it best suited for conflicts requiring a speedy settlement.

[58] Davide Carneiro, Paulo Novais et al, 'Online Dispute Resolution: an Artificial Intelligence Perspective,' (2014) 41 AIR, p 211-240.

[59] Ibid.

[60] Muriuki Wanyoike, 'LETTERS: Kenya ripe for online dispute resolution' (*Business Daily*, 25 September 2019) < https://www.businessdailyafrica.com/bd/opinion-analysis/letters/letters-kenya-ripe-for-online-dispute-resolution-2265816> Accessed 10 June 2024.

AI-based ADR, on the other hand, combines both case reasoning and rule-based systems to speed up the resolution process. Case reasoning systems use past examples to identify comparable circumstances and recommend answers based on precedents, emulating human reasoning.[61] These systems examine previous data to uncover patterns and results that can be applied to present issues, improving consistency and fairness in decision-making. Rule-based systems, on the other hand, work by applying established rules and regulations to facts in a case.[62] They follow a logical structure and draft judgments per established legal concepts and regulations. Interestingly, whereas case reasoning systems provide a sophisticated grasp of context and precedent, rule-based systems provide a clear and structured application of the law. This combination helps in delivering precise, efficient, and fair outcomes in dispute resolution.

In sum, the integration of AI into ADR (and ODR) significantly improves the efficiency and accessibility of dispute resolution processes. AI serves dual roles in ADR: as a tool supporting human decision-makers (AI-support-based ADR) and increasingly, as an autonomous decision-maker (AI-based ADR).[63]* Interestingly, the uptake of AI into ADR has been quite slow, partly due to infrastructural limitations and partly due to the negative societal attitudes and hostility from the legal profession.[64] Traditionalists criticize AI-ADR on several grounds; including questions of bias, the digital divide, and most recently the algorithmic divide. The following section will provide a thorough examination of the digital and algorithmic divides, their manifestations, and the impact on achieving equitable justice for all.

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[61] John Zeleznikow, 'Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts' (2017) 8 International Journal for Court Administration, 82.
[62] Kevin Ashley, Edwina Rissland, 'Law, Learning and Representation' (2003) 150 Artificial Intelligence, 19.
[63] Davide Carneiro, Paulo Novais et al, (n 58).
[64] Pablo Cortes, *Online Dispute Resolution for Consumers in the European Union*, (Routledge, 2011).

Part III: Algorithms and Access: The AI-ADR Paradox

Kenya has made significant progress in digital transformation across the continent. As of 2023, the digital economy generated 7.7% of GDP, which is predicted to increase to 9.24% by 2025.[65] Nonetheless, Kenya still has a substantial digital divide problem. This digital divide significantly affects vulnerable populations such as women, the elderly, those with disabilities, and those living in rural areas.[66] The Global System evidences this for Mobile Communications (GSMA) Mobile Gender Gap Report 2019, which notes that women in Kenya have 39% less access to mobile internet than males.[67] Sadly, this gender digital divide has widened from 34% in 2019 to 42% in 2020.[68] In terms of the rural-urban gap, statistics demonstrate that 44% of the urban population has access to the Internet, compared to 17% in rural areas.[69] Additionally, according to the Kenya National Bureau of Statistics Monographic Analytical Report of 2019, people with disabilities continue to be excluded digitally. This further exacerbates the digital divide.[70]

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[65] UNDP, 'Why Kenya needs an inclusive digital transformation,' (*Medium,* 20 March 2023) < https://undp-kenya.medium.com/why-kenya-needs-an-inclusive-digital-transformation-ce8b162e9c94> Accessed 10 June 2024.

[66] Emily Royall, *Addressing the Digital Divide Taking Action towards Digital Inclusion,* (UNHABITAT HS/043/21E, 2021).

[67] Oliver Rowntree, *Connected Women: The Mobile Gender Gap Report, 2019,* (GSMA, 2019); Isabelle Carboni, *Connected Women: The Mobile Gender Gap Report, 2021,* (GSMA, 2021) By 2021, 83% of women in Low and Middle Income Countries owned a mobile phone. However only 58% use the internet. Despite the increase from previous years women are increasingly left behind as they are less likely to have mobile phones and access the internet.

[68] Ibid.

[69] Harrison Kioko and Beatrice Hati, *Unearthing the digital divide among the urban poor in Kenya's informal settlements,* (Nuvoni Centre for Innovation Research, 2023).

[70] --, *Monographic Analytical Report,* (Kenya National Bureau of Statistics, 2019); David Indenje, 'Bridging the Digital Divide: How Community Networks Can Empower Persons with Disabilities,' (*KICTANet,* 15 March 2024) <https://www.kictanet.or.ke/bridging-the-digital-divide-how-community-networks-can-empower-persons-with-disabilities/> Accessed 11 June 2024.

The simplest description of the digital divide is the difference between people who have access to Information and Communication Technology (ICT) and those who do not.[71] This discrepancy has a substantial impact on people's capacity to use technology effectively. Fascinatingly, the digital gap extends beyond a lack of access to computers and the internet. According to Lloyd Morriset, the impact of the digital divide is an imbalance in which the "information haves" benefit from the technology, resources, and opportunities that come with them, while the "have nots" fall behind.[72] This has been observed globally, where, despite 60% of the world's population having internet access, internet penetration in Africa was only 39.3 percent, compared to 87.2% for Europe.[73] As such, the disparity encompasses not only internet availability but also connection quality, device affordability, and digital literacy.

In the age of AI and other modern technologies, AI-ADR faces a substantial algorithmic divide. The algorithmic divide deepens existing and intertwined socio-economic, rural-urban, and gender disparities by limiting their access to AI-ADR technologies.[74] Wealthier individuals and communities for instance, who have access to better technology can harness AI-ADR platforms to resolve disputes as opposed to those in lower socio-economic brackets. Additionally, individuals and communities living in rural areas fall further behind than those living in urban areas due to a lack of critical ICT infrastructure.[75] Gender

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[71] Martin Hilbert, 'The bad news is that the digital access divide is here to stay: Domestically installed bandwidths among 172 countries for 1986–2014,' (2016) 40 (6) Telecommunications Policy, p 567-581; Bruce Mutsvairo, Massimo Ragnedda, *Mapping the Digital Divide in Africa: A Mediated Analysis,* (Amsterdam University Press, 2019).

[72] Benjamine Compaine, *The Digital Divide: Facing a Crisis or Creating a Myth?* (MIT Press, 2001); Maria Skaletsky, James Pick, et al, 'Digital Divides: Past, Present and Future,' in Galliers and Stein (eds), *The Routledge Companion to Management Information Systems,* (Routledge England, 2017).

[73] --, 'From Connectivity to Services: Digital Transformation in Africa,' (*World Bank Group,* 26 June 2023) < https://www.worldbank.org/en/results/2023/06/26/from-connectivity-to-services-digital-transformation-in-africa> Accessed 11 June 2024.

[74] Peter Yu, (n 30).

[75] Massimo Ragnedda, *The Third Digital Divide: A Weberian Approach to Digital Inequalities*, (Routledge, 2017).

disparities also hinder women from accessing AI-ADR tools for equitable justice.[76] The subsequent paragraphs will explain the two prominent manifestations of the algorithmic divide, demonstrating how they further deepen the inequalities outlined above, hindering access to justice through AI-ADR.

a. Unequal access to technology

One of the most evident manifestations of the algorithmic divide in Kenya is unequal access to technology.[77] This includes disparities in access to the internet, computing devices, and AI-powered platforms essential for ADR processes. According to recent data, internet penetration in Kenya stands at around 85%. While this figure is relatively high, a significant portion of the population, especially in rural and marginalized areas, still lacks reliable and affordable internet access.[78] This limits the ability of these communities to participate in AI-driven ADR processes, which often rely on robust internet connectivity for virtual hearings, document submissions, and real-time communication. Many Kenyans do not have access to the necessary devices such as computers, smartphones, or tablets required to engage with AI-driven ADR platforms.[79] Even when such devices are available, they might be outdated or lack the specifications needed to run AI applications efficiently.[80] The lack of access to modern technology perpetuates the algorithmic divide, making it difficult for certain segments of the population to benefit from advancements in AI-ADR.

Infrastructure plays a crucial role in the effective deployment and utilization of AI-driven ADR systems. In Kenya, infrastructural disparities further exacerbate the algorithmic divide.[81] There is a marked difference in the quality of infrastructure between urban and rural areas. Urban centers like Nairobi and

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[76] Raneta Lawson Mack, *The Digital Divide: Standing at the Intersection of Race and Technology,* (Carolina Academic Press, 2001).
[77] Peter Yu, (n 30).
[78] Frederick Okello (n 23).
[79] Ibid.
[80] Ibid.
[81] Lisa Poggiali, 'Digital futures and analogue pasts? Citizenship and ethnicity in technoutopian Kenya, (2017) 87 (2) Africa, p 253–77.

Mombasa boast better internet connectivity, more advanced technological infrastructure, and greater access to digital services compared to rural regions.[82] This urban-rural divide means that AI-driven ADR systems are more accessible to urban dwellers, leaving rural populations at a disadvantage. Moreover, reliable electricity is fundamental for the functioning of digital systems. In many rural areas, consistent power supply remains a challenge, impeding the use of computers and other digital devices necessary for participating in AI-driven ADR.[83] Without stable electricity, even those with access to technology may find it difficult to utilize these tools effectively.

Socio-economic inequalities also significantly perpetuate the algorithmic divide through unequal access to technology. According to the Kenya National Bureau of Statistics in 2020, 15.9 million out of 44.2 million Kenyans, or about 36% of the population, were monetary poor.[84] This level of poverty has a stark disparity, with adults in rural areas earning less than Kshs 3,252 monthly, compared to Kshs 5,995 in urban areas.[85] Low-income levels limit an individual's capacity to purchase necessary technology or afford internet services, which hinders them from accessing AI-ADR services. To put this into perspective, a study in Mathare revealed that due to the high cost of new devices such as smartphones and laptops, most residents use second-hand digital devices, dumb phones, or borrowed devices from neighbours.[86] Consequently, many residents are digitally excluded as their devices cannot connect to the internet or frequently malfunction. Additionally, the high cost of internet bundles further limits connectivity as many residents can only afford to subscribe to mobile broadband for Kshs 5- Kshs 20, which provides just two hours of internet per

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[82] Salemink Koen, Gary Bosworth et al, 'Rural development in the digital age: A systematic literature review on unequal ICT availability, adoption, and use in rural areas,' (2017) 54 Journal of Rural Studies, p 360–71.

[83] Ibid.

[84] --, *Kenya Poverty Report,* (Kenya National Bureau of Statistics, 2023).

[85] Ibid.

[86] Harrison Kioko and Beatrice Hati (n 61).

day.[87] These socio-economic disparities affect the affordability and accessibility of AI-ADR tools, which deprives vulnerable groups of access to equitable justice.

b. AI and Digital literacy gap

According to statistics, despite increased internet connectivity in Kenya, only 29% of the population has a basic level of literacy.[88] This digital illiteracy compounds the algorithmic divide in AI-ADR as it hinders the understanding of critical digital tools and services.[89] In the context of rural and urban slums in Kenya, the digital literacy gap means that individuals cannot leverage AI-ADR platforms as they may struggle to access and navigate them due to inadequate digital skills. Women, who already face significant barriers to digital access, are particularly disadvantaged. This is as per a 2020 GSMA report that highlighted that women in Kenya are 39% less likely to have mobile internet access compared to men.[90] This disparity restricts their ability to engage with AI-ADR services, perpetuating gender inequities in access to justice. Even among legal professionals and ADR practitioners, there is a varying degree of familiarity and comfort with AI technologies.[91] Without adequate training and exposure, these key stakeholders may be hesitant to adopt AI-driven ADR tools, limiting their overall utility and acceptance.

Cultural and societal attitudes also significantly increase the algorithmic divide in AI-ADR by influencing both the acceptance and implementation of technology within different communities. In some groups, there may be resistance toward AI technologies due to concerns about privacy, mistrust in automated systems, or a preference for traditional methods of dispute resolution.[92] These attitudes can hinder the training and adoption of AI-ADR

[87] Harrison Kioko and Beatrice Hati (n 61).
[88] --, *Covid 19 in Africa One Year on: Impact and Prospects,* (MO Ibrahim Foundation, 2021).
[89] Peter Yu, (n 30).
[90] Oliver Rowntree, *Connected Women: The Mobile Gender Gap Report, 2020,* (GSMA, 2020).
[91] David Larson, (n 50).
[92] Frederick Okello (n 23); Natasha Kahungi, (n 5).

platforms, especially in communities that value face-to-face interactions and human judgment over digital solutions. Additionally, the exclusion of cultural norms may affect the design and functionality of AI-ADR systems, leading to solutions that do not fully address the needs or values of diverse cultural groups.[93] This marginalization can result in reduced effectiveness and acceptance of AI-ADR tools among those who feel that these systems do not align with their cultural practices or legal traditions. Gender roles and expectations can also play a role in reduced digital literacy, as cultural biases may limit the participation of women and other marginalized groups in the development and use of AI technologies.[94] Consequently, the algorithmic divide is widened as certain cultural attitudes prevent equitable access and engagement with AI-driven legal services.

Part IV: Way forward

Bridging the algorithmic and digital divide in AI-ADR requires concerted efforts by the state and private actors. It is prudent to note that Kenya has been quite proactive in improving digital infrastructure and technology. This is through the Kenya National Digital Master Plan 2022-2032 whose provisions align with the Kenya Vision 2030 and build upon previous initiatives.[95] The plan centers around four pillars, Digital Infrastructure, Digital Government Services, Product and Data Management, Digital Skills, Digital Innovation, Enterprise, and Digital Business.[96] The plan also introduces several themes such as Policy, Legal, and Regulatory Framework, and Research and Development, as well as cross-cutting themes like Information Security and Cyber Management, and Emerging Technologies.[97] This plan reflects the government's efforts to bridge the divide. Consequently, this piece delves into five key recommendations that the state and private actors can take up to bridge the digital divide.

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[93] Frederick Okello (n 23).
[94] Frederick Okello (n 23).
[95] Kenya National Digital Master Plan 2022-2032.
[96] Ibid.
[97] Ibid.

Primarily, the state and private entities should prioritize addressing the ICT infrastructure gap.[98] To remedy weak internet connectivity, Kenya should invest in increasing dependable and inexpensive internet access throughout the country. The state has already started this process by working with private companies to install fiber optic cables and satellite-based internet solutions. Google's Project Loon, for example, works with Telkom Kenya to bring internet to inaccessible areas using high-altitude balloons.[99] Similar projects should be expanded to include rural communities, Arid and Semi-Arid Lands, and urban slums. Furthermore, the government should subsidize internet expenses for low-income households, ensuring that economic differences do not prevent access to the internet.[100] Improving access and reducing internet costs will reduce the rural-urban gap and socioeconomic disparities, allowing for fair involvement in AI-ADR processes.

In addressing limited ICT hardware, Kenya can borrow from India's Digital India initiative, which has focused on providing affordable devices through government and private sector partnerships.[101] In this case, the government could implement subsidy schemes to lower the cost of necessary technologies for low-income citizens and other marginalized groups. Recent Kenyan initiatives, such as the Digital Literacy Programme, which provides schoolchildren with tablets, should also be expanded to include people with disabilities, women, and indigenous communities.[102] Additionally, establishing

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[98] Samuel Lusweti and Kelvin Omieno, 'Using I-Hubs for Bridging the Gap of Digital Divide in Rural Kenya,' BIT&CS.

[99] --, 'Telkom and Loon announce progressive deployment of LOON technology to customers from July,' (*Telkom,* 7 July 2020) < https://telkom.co.ke/press-release/telkom-and-loon-announce-progressive-deployment-of-loon-technology-to-customers-from-july/> Accessed 16 June 2024.

[100] Frederick Okello (n 23).

[101] Gajanan Haldankar, 'Digital India- A Key to Transform India,' (2018) 6 (2) IJCRT.

[102] Kennedy Ogolla, 'Digital Literacy Programme in Kenya; Developing IT Skills in Children to align them to the Digital World and Changing Nature of Work,' (WorldBank); Austin Odera and Alex Matiy, *Advancing Kenya's Digital Literacy Initiatives*

e-waste recycling programs to refurbish and redistribute functional devices could also help bridge the hardware gap.[103]

To remedy the shortage of data and AI-ADR systems developed for Kenya, the government and private industry should collaborate to create localized AI solutions.[104] To do so, Kenya, inspired by Estonia's digital governance model, should implement and incentivise national data-gathering frameworks that assure equality and representation.[105] Initiatives like the Kenya Open Data Initiative, for example, can be rejuvenated to help with data-driven AI research.[106] Investment in local technology firms and innovations will also help to accelerate the development of AI-ADR platforms adapted to Kenya's specific demands. However, it is important to note that women, indigenous communities, and other marginalized groups ought to be involved to increase accessibility and further bridge the algorithmic divide.[107]

Another key strategy for bridging the algorithmic divide is digital literacy initiatives. Kenya has previously adopted various digital literacy programs,

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in Arid and Semi-Arid Lands, (Kenya Institute for Public Policy Research and Analysis No 8/2023-2024).

[103] --, *Addressing the Digital Divide: Taking action towards digital inclusion,* (UN Habitat, 2021) <https://unhabitat.org/sites/default/files/2021/11/addressing_the_digital_divide.pdf> Accessed on 11 June 2024; IT Recycle, 'The Digital Divide and the Role of IT Recycling,' (*Medium,* 18 December 2023) <https://itrecycle2020.medium.com/the-digital-divide-and-the-role-of-it-recycling-e89446b8bb93> Accessed 16 June 2024.

[104] Doreen Abiero and Allan Kipkoech, 'Kenya's Digital Deserts,' (*CIPIT,* 27 September 2023) <https://cipit.strathmore.edu/kenyas-digital-deserts/> Accessed 16 June 2024.

[105] Cecilia Maundu, 'Kenya draws inspiration from Estonia in its journey toward e-governance,' (*Global Voices,* 3 July 2023) < https://www.everand.com/article/656898311/Kenya-Draws-Inspiration-From-Estonia-In-Its-Journey-Toward-E-Governance> Accessed 16 June 2024.

[106] https://www.opendata.go.ke/ This site makes public government data acessible to the people of Kenya. It contains high quality national census data, government expenditure, parliamentary proceedings and public service locations.

[107] Doreen Abiero and Allan Kipkoech, (n 96).

resulting in enhanced digital literacy in the country.[108] Nonetheless, these initiatives focus on certain groups, such as children, and are primarily conducted in urban areas with easy access to ICT infrastructure.[109] The state should expand these programs to include adults in rural and urban slums, women, people with disabilities, and other overlooked groups. Public-private partnerships can also establish community training centers that provide courses in fundamental and advanced digital skills. In the context of AI-ADR, legal professionals and ADR practitioners require specialized training in AI technologies to better assist clients with AI-ADR processes. To this end, legal technology courses should be included in the university curriculum and at the Kenya School of Law. Rigorous and regular digital literacy initiatives help to bridge the algorithmic divide by providing more people with the skills they need to interact with AI tools, which increases participation in AI-ADR.

Resolving cultural biases around AI-ADR necessitates a multidimensional strategy involving education, community participation, and inclusive design. Kenya should run awareness efforts to increase trust in AI technology, emphasizing their benefits with success stories and evidence-based results. Kenya can learn from Japan's use of AI in traditional contexts to create AI-ADR platforms that respect and incorporate cultural customs.[110] Using community leaders and influencers to promote these platforms can assist in overcoming skepticism. Tailoring AI-ADR solutions to local customs and values will also improve their acceptance and effectiveness. Special care should be taken to incorporate varied cultural viewpoints into the design process, ensuring that the platforms satisfy the needs of all populations.[111] This approach will assist in bridging the algorithmic barrier, making AI-ADR tools available and meaningful to everyone, regardless of cultural background.

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[108] Austin Odera and Alex Matiy, (n 94).
[109] Doreen Abiero and Allan Kipkoech, (n 96); Frederick Okello (n 23).
[110] Sanat Rao, 'When robots and culture collide,' (*Linkedin,* 22 September 2023) < https://www.linkedin.com/pulse/when-robots-culture-collide-sanat-rao/> Accessed 16 June 2024.
[111] Doreen Abiero and Allan Kipkoech, (n 96).

Finally, establishing and implementing policies that promote digital inclusion and protect users' rights in AI-powered ADR systems is critical to closing the algorithm gap. The government and the private sectors should support legislative frameworks that incentivize the use of AI in dispute resolution while also protecting privacy and data security.[112] These policies should also address the ethical usage of AI by requiring transparency and responsibility in decision-making processes. Furthermore, creating guidelines for AI-powered ADR platforms can ensure their accessibility, dependability, and fairness.[113] By doing so, Kenya can increase the adoption and effectiveness of AI-driven ADR systems by creating a more inclusive and protective regulatory environment.

Conclusion

Whereas AI-ADR has the potential to facilitate equitable justice, the algorithmic divide represents a significant impediment. This piece provides a comprehensive examination of the integration of AI into ADR and ODR processes, indications of the algorithmic divide and its impact on achieving justice. As a result, this paper offers a multidimensional approach to bridging the divide, including digital literacy campaigns and ICT infrastructure upgrades. These initiatives necessitate coordination among government, corporate sector, and other stakeholders, as well as a multidisciplinary approach to closing the gap. By implementing these strategies and policies, Kenya can finally move towards a more inclusive and efficient dispute resolution landscape.

[112] Natasha Kahungi, (n 5).
[113] Peter Yu, (n 30).

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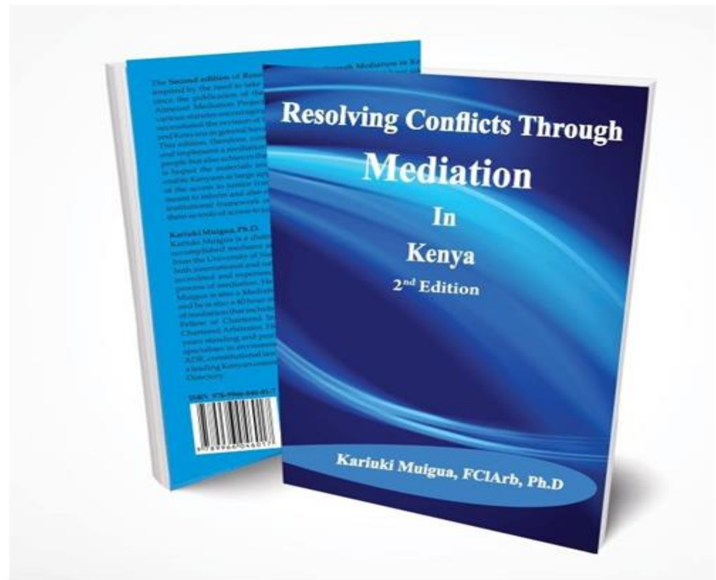

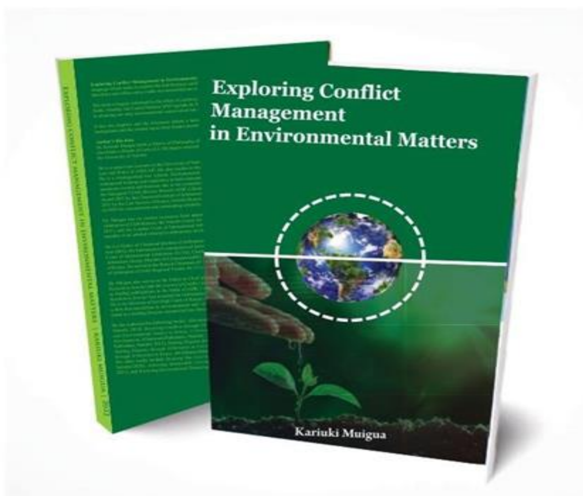

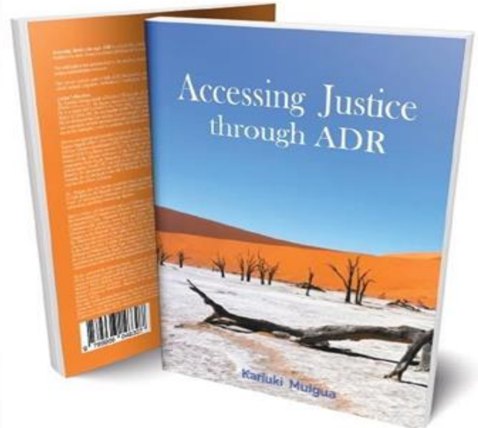

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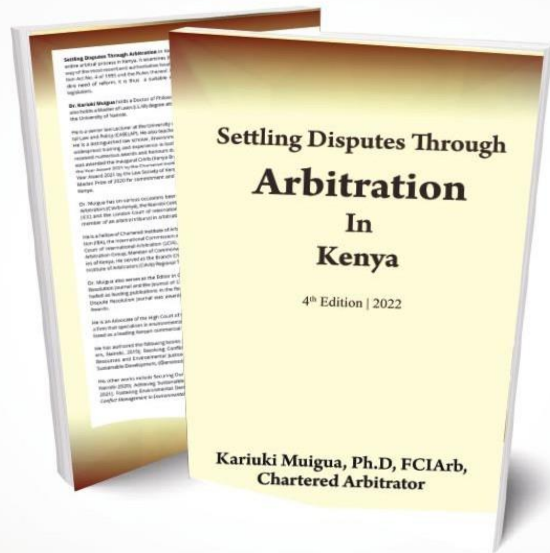

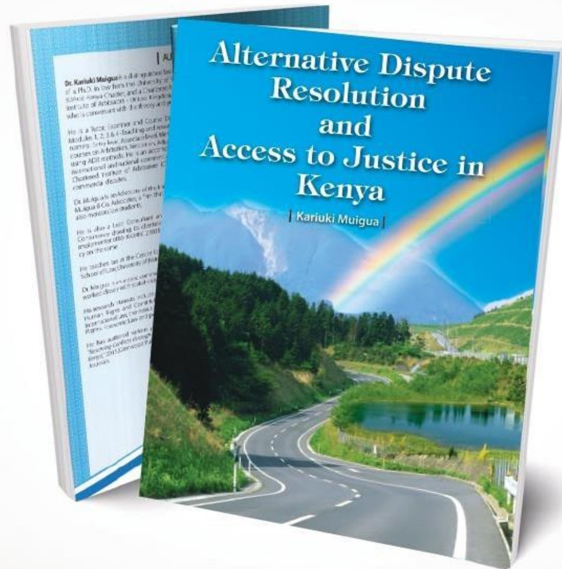

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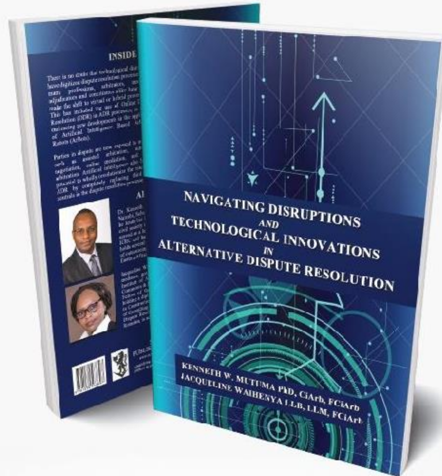

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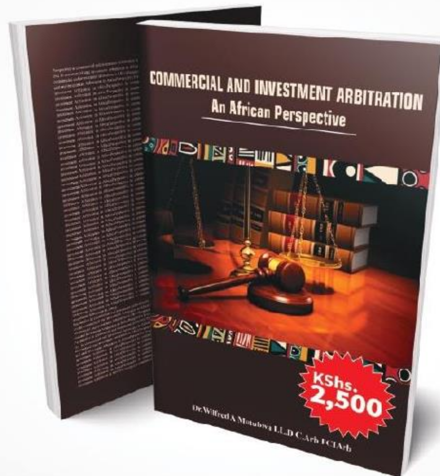

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