CIArb
evolving to resolve
Kenya Branch

Special Issue: Arbitrator Integrity

ALTERNATIVE DISPUTE RESOLUTION

JOURNAL VOLUME 13 ISSUE 2 2025

ALTERNATIVE DISPUTE RESOLUTION

Volume 13 Issue 2 **2025**

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

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

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

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

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

This Journal should be cited as (2024) 13(2) Alternative Dispute Resolution:

ISSN 3078-2120

Editor's Note

Welcome to the *Alternative Dispute Resolution (ADR) Journal*, Volume. 13, No.2, 2025.

The Journal is a peer-reviewed/refereed publication of the Chartered Institute of Arbitrators, Kenya, engineered and devoted to provide a platform and window for relevant and timely issues related to Alternative Dispute Resolution mechanisms to our ever growing readership.

This is a special edition journal with the theme 'Integrity in Arbitration' for the 2025 Nairobi Arbitration Week. Some of the papers in the Journal reflect this theme in addition to other pertinent issues in ADR including: *ADR and Access to Justice in Africa: Upholding Integrity in Arbitration; Evolution of Arbitration Integrity in Kenya; Enforceability of multi-tiered dispute resolution clauses: the Kenyan Experience; Balancing Innovation and Ethics: Addressing Challenges in AI-Driven Alternative Dispute Resolution; ESG Arbitration: A Noble Cause or The Next Billion-Dollar Sham?; Who Holds Arbitrators Accountable? Examining the Limits of Self-Regulation in Arbitration; Whisper of Bias on Impartiality of Arbitrators: How Tanzanian Courts Handle Bias Through the Prism of IBA Guidelines; Arbitrator Immunity in Kenya: Is Qualified Immunity Sufficient Protection? - Comparing Kenya's Legal Framework to the United Kingdom and the United States of America; Integrating Alternative Dispute Resolution in Tribunals' Case Management: Best Practices; My Experience as a Young Arbitrator: Lessons on Ethics Emergency Arbitration: A Quick Solution to Urgent Disputes?; The Role of the Prosecution in Facilitating ADR in Terrorism-Related Cases: A Means to Foster Disengagement, De-radicalization, Rehabilitation and Reintegration; Arbitration Practice in Kenya: Challenges, Opportunities and Future Perspectives; From Efficiency to Delay: Reimagining Arbitration in Kenya to Uphold Finality and Minimise Judicial Interference; AI and Blockchain in Arbitration; Trends in Digital Dispute Resolution in Kenya; Investor-State Dispute Settlement (ISDS) In Kenya: ISDS Arbitration and The Kenyan Experience; Post-Pandemic Arbitration: Have We Fully Adapted to The New Normal?; A Brief Response to Criticism against Arbitrators;* and *Constitutional Questions in Alternative Justice Systems: Adopting a Normative Framework to Aid AJS bodies in handling matters involving Constitutional Questions.* It also contains two case analyses in line with the theme: *Arbitrator Integrity Caselaw*

- *Kisumu National Polytechnic v Messrs Cell Arc System Limited [2019] eKLR* and *Arbitrator Integrity: Kenya Ports Authority v Base Titanium Limited [2021] eKLR.*

Papers submitted to the Journal undergo a critical, in depth and non-biased review by a team of highly qualified and competent reviewers to ensure adherence to the highest quality academic standards and validity of data.

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 info@ciarbkenya.org.

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.

Prof. Kariuki Muigua Ph.D, FCIArb,Ch.Arb, OGW.
Editor.
Nairobi, February 2025.

List of Contributors

Hon. Prof. Kariuki Muigua

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

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

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

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

Isaac Aluochier

Isaac Aluoch Polo Aluochier, FCIArb, CPM, is a distinguished arbitrator, mediator, litigator, and consultant with extensive expertise in dispute resolution, construction project management, and financial services. A Fellow of the Chartered Institute of Arbitrators (CIArb), Aluochier has built a formidable reputation in commercial, property, construction, employment, governance, and competition disputes across Kenya and the United Kingdom. His legal acumen and analytical prowess have seen him play a pivotal role in landmark constitutional cases, including successfully challenging Kenya's Building Bridges Initiative (BBI) and securing critical rulings on governance, state accountability, and election disputes. With decades of experience spanning alternative dispute resolution (ADR), litigation, and construction project management, he has become a key figure in shaping Kenya's legal and arbitration landscape.

Beyond his arbitration and litigation expertise, Aluochier has held leadership roles in various industries, from financial trading to microfinance and investment management. His construction and project management experience, both in Kenya and the UK, has involved high-value public-private partnership (PPP) initiatives and large-scale infrastructure projects. Academically, he holds an MSc in Project Management from Cranfield University, a BSc in Quantity Surveying from Reading University, and professional qualifications from the Royal Institution of Chartered Surveyors (RICS). As the founder of Aluochier Dispute Resolution (ADR), he continues to mentor and train professionals in arbitration and mediation, furthering Kenya's ADR framework. Currently, he is publishing two books he recently authored: Kenyan Arbitration: The Constitutional Guide and Inheritance Justice: Arbitration in Kenya's Constitutional Framework, solidifying his role as a thought leader in the field. Isaac Aluochier can be reached through aluochier@gmail.com or info@aluochier.co.ke.

Paul Ngotho HSC

Paul Ngotho HSC is a Chartered Arbitrator and full-time arbitration practitioner, author and tutor. He holds an LL.M in International Dispute Resolution from the University of London and an adjunct lecturer at the University of Nairobi. He is on numerous international arbitrator panels and has arbitrated a wide range of disputes as sole, wing or presiding arbitrator.

Paul has, for several years, been making conference presentations and writing articles on arbitrator integrity in Kenya and internationally. He recently started writing case notes on judgments related to arbitration cases - his two debut case notes are found in this issue. His 6th arbitration book is a consolidation of those writings into a separate book titled *Arbitrator Integrity* to be released in 2025. *"…a very detailed person who is very passionate about anything that he does"* Chambers & Partners 2020 Ranking.
His contact is ngothoprop@yahoo.com and www.ngotho.co.ke

Eric Thige Muchiri
Eric Thige Muchiri is a Partner in Muri Mwaniki Thige & Kageni LLP Advocates. He is a Member of the Chartered Institute of Arbitrators and holds an LL.M in International Trade and Investments Law from The University of Nairobi. Currently, he is pursuing a PhD with his focus being on banking regulation and litigation.

Thige's practice is majorly in Arbitration, Litigation and Dispute Resolution, and on which areas he also regularly writes. He is also involved regional integration efforts in the IGAD region in the development of the IGAD Protocols on Free Movement of Persons and Transhumance; Kampala Declaration on jobs, livelihood and self-reliance of refugees, returnees, and host communities; IGAD Refugee and Cross Border Health Initiatives; and Land and Conflict in the East and Horn of Africa.
You may contact him at thige@mmtklaw.com and www.mmtklaw.com

Charity Chepkoech
Charity Chepkoech is a finalist law student at University of Embu and a Research Assistant at the Center for Climate Change Adaptation and Mitigation (CCCAM) University of Embu. She is experienced in project research and implementation and serves as the Projects Director at International Students Environmental Coalition (ISEC) Kenya. With a passion for environmental law and sustainable development, Charity focuses on addressing the complex legal frameworks and policies needed to support climate action. Her academic background in law provides a unique perspective on the intersection of legal policy and climate justice, equipping her to explore innovative solutions to climate challenges.

In addition, Charity is an active advocate for youth involvement in sustainability, frequently participating in and moderating high-impact discussions on climate action and sustainable development. She has facilitated webinars, including the recent "Sustainable Development Goals: A Blueprint for Global Transformation," where she engaged youth and experts alike in exploring actionable steps toward a more resilient future. Charity's work exemplifies her commitment to fostering inclusive, informed dialogues on climate resilience and sustainable progress.
She can be contacted through chepkoechcharity185@gmail.com

David Onsare
David is an advocate of the High Court of Kenya. He is a Fellow of the Chartered Institute of Arbitrators and a partner who leads the dispute resolution team at Maina & Onsare Partners Advocates LLP. He holds a Master of Laws degree with a focus on corporate and finance.

He was named ADR Practitioner of the Year 2024 for his outstanding contributions to the field. He is an arbitrator and a PhD candidate, with research interests in arbitration, environmental social governance and third-party funding. David remains committed to advancing dispute resolution practice and academic excellence in Kenya and beyond.
onsareachochi@gmail.com

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

A Member of Chartered Institute of Arbitrators (MCIArb). He is a certified mediator by MTI East Africa.

A church Council Member, Worldwide Gospel Church of Kenya (Buruburu). James, has special interests in Alternative Dispute Resolution, Intellectual

Property and Constitutional law and conflict management and Sustainable Development.

His has published the following articles; Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice, Towards Effective Management of Community Land Disputes in Kenya for Sustainable Development, Mediation as a Tool of Conflict Management in Kenya: Challenges and Opportunities, Applicability of Arbitration in Management of Community Land Disputes, Arbitration as a Tool for Management of Community Land Conflicts in Kenya
James can be reached through ***njuguna@kmco.co.ke***

Murithi Antony
Murithi Antony is a dynamic and forward-thinking lawyer and an ardent researcher focusing on Climate Action and Environmental Sustainability, Alternative Dispute Resolution (ADR), Commercial Law, International Economic Law, Law and Development, Constitutional Law and Legal/Regulatory Compliance. His approach to complex legal challenges is strategic, driven by a commitment to achieving impactful, positive outcomes through innovative solutions and sound practices.

Murithi has undertaken extensive training and obtained certifications in climate change and environmental issues, leadership, project management and resource mobilization, and has served in various capacities in youth organizations dedicated to climate action. He has contributed to high-level research projects as a research assistant in prominent firms. Currently, he serves as a Graduate Research Assistant at Centre for Climate Change Adaptation and Mitigation (CCCAM) University of Embu, while undertaking the Advocates' Training Program (ATP) at Kenya School of Law.

Above it all, Murithi is committed to the principles of servant leadership, striving to make a positive impact in the world in every possible way.
He can be contacted through amurithi326@gmail.com.

Mark Malekela
Mark Malekela is a Government Liaison at Alistair Group, and a Committee

Member of TIArb's Young Members Club (TIArb-YMC). He holds a Bachelor of Laws (LL.B) from Mzumbe University, and a Master of Laws (LL.M) in International Commercial Arbitration Law from Stockholm University – Sweden. His Master's thesis explored the integration of AI in International Commercial Arbitration and its implications on confidentiality. Mark's professional experience spans training and working with several leading law firms. He began his legal career at Breakthrough Attorneys in Dar es Salaam, where he developed a solid foundation in corporate commercial law. He then worked in the international arbitration practice at De Brauw Blackstone Westbroek N.V in Amsterdam, the Netherlands where he trained and engaged in complex cross-border disputes and arbitrations. Mark also trained and worked at Clyde & Co, focusing on corporate-commercial law and regulatory compliance.

Mark is an Associate Member of CIArb (UK), a Johnny Veeder Fellow 2023/24, and an active participant in arbitration networks like Young ICCA and Young ITA. His engagement in virtual and in-person trainings and workshops under prominent arbitration practitioners reflects his commitment to enhancing ADR practices in Africa, particularly in Tanzania. Mark's academic work extends to research articles on critical issues such as AI, workplace surveillance and privacy, and the challenges of aligning privacy frameworks with technological advancements in Africa. His contributions in international arbitration and privacy law, and their practical applications in African legal systems aim to advance the discourse on the balance between innovation and regulatory compliance.
malekelamark@gmail.com

Muyodi Manyasa Silas
Muyodi Manyasa Silas is an Advocate Trainee at the Kenya School of Law where he successfully passed the Advocates Training Programme Examination administered by the Council of Legal Education. He is currently undertaking his pupilage at Prof. Albert Mumma & Company Advocates. He holds a Bachelors of Laws (LLB) Degree from Mount Kenya University. He is an adent legal researcher, contractor reviewer, writer, editor, and ADR enthusiast.

He is passionate about policy research and development, legislative research and drafting, human rights and humanitarian law, environmental law and ESDG and natural resource use and management. He has participated in a number of filed

research and report writing where acquired skills in interviewing, data collections, and focused group discussions. With keen interest on the role of ADR in resolving complex disputes in a way that promotes harmonious existence among disputant, Muyod Manyasa is committed to contribute to ADR, through research and writing and academic excellence.

Muyodi Manyasa can be reach via his email at muyodisilas@gmail.com or mobile at: +254721739257

Prince Kanokanga

Prince is a dynamic, young and proficient lawyer and arbitrator based in Harare, Zimbabwe. He has knowledge of both English Law and Roman – Dutch Law having gained experience and training in countries such as Mauritius, Namibia, Rwanda, Zambia and Zimbabwe. His research areas include aviation, corporate and commercial law, distribution and franchising, joint ventures, professional associations, real estate, retail and consumer products, social enterprises (non – governmental organisations) and tourism and hospitality.

He holds a Bachelor of Laws (Zambia) and a Postgraduate Degree in Procedural Law (Zimbabwe). Prince also sits on the board of several companies and other non –governmental organizations in Zimbabwe. He is a budding scholar and the co-author of an academic text entitled, UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwe Arbitration Act [Chapter 7:15] (Juta & Co, 2022). He is listed on the panel of the Alternative Dispute Solutions Centre ('ADSC') in Harare, the African Institute of Mediation and Arbitration ('AIMA') in Harare and the Commercial Arbitration Centre in Harare ('CAC') in Harare. Prince also sits on the Zimbabwe Football Association (ZIFA) Disciplinary Committee.

Prince can be reach through prince@kanokangalawfirm.co.zw

Michael Sang

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

The author is in charge of the **Department of Regional, County Affairs and Regulatory Prosecutions** and also the **Head of the Counter - Terrorism and Transnational Organized Crimes Division** at the Office of the Director of Public Prosecutions and is based in Nairobi.
The author can be contacted through emails ***sang7michael@gmail.com or michael.sang@odpp.go.ke***

Youngreen Peter Mudeyi
Youngreen Peter Mudeyi is a third-year law student at Kabarak University and a CB Madan Student Awardee of 2024. He is a passionate scholar in Constitutional and Public Law, with a keen focus on Afro-democracy, Children's Rights Law, Climate Change Litigation, and AI Governance. As a student author and editor, he has contributed extensively to legal scholarship through various publications and conferences. He has presented a paper titled "*Constitutional Limits on the Application of the Political Questions Doctrine: A Study of Kenya and South Africa*" at the Conference in Celebration of the Scholarship of Professor Charles Fombad, hosted by the University of Pretoria. His paper on presidential immunity, which critiques the Supreme Court's interpretation of Article 143(2) of the Kenyan Constitution, won the Best Kenyan Student Paper award by *The Platform Magazine.*

Beyond academia, Youngreen has gained extensive practical experience as a legal researcher and assistant to esteemed judges, law firms, and international law practitioners. He has worked with *Ronald Allamano & Associates Advocates*, providing legal research support and case analysis. He interned at the Nakuru Law Courts under the mentorship of Lady Justice Hedwig Ong'udi, where he gained hands-on experience in judicial processes. He has also served as a research assistant to Nyanje Wa Nyanje, an international law and arbitration practitioner. In addition to his legal research work, Youngreen has excelled in competitive legal forums, winning the *Kenya Universities Debate Championship (KUDC) 2024 (Novice Category)* and the *Pan African ICC Commercial Mediation Moot (2022)*. He was also the Second Best Individual Presenter at the Strathmore Tax Law Hackathon (2025). As a student editor for the East Africa Law Society Human Rights and Rule of Law Journal, he continues to contribute to legal scholarship while advocating for constitutionalism and the rule of law in Kenya and Africa.
Youngreen Peter can be reached via pyoungreen39@gmail.com

Ontweka Yvonne,
Kwamboka Yvonne Ontweka is a final year law student at the University of Embu. Administratively, she is the current vice president of the Legal Aid Clinic University of Embu and Country representative of Legal Torch International (current). She also servers as the commentator in the University of Embu law review. Yvonne is an an Ardent Legal researcher and writer. She is passionate about Alternative Dispute Resolution (ADR) and it's relation to various fields of law that includes Human Rights, Environment and climate justice, international law, commercial transactions and intellectual property law. She is a certified professional mediator and through it she got encouraged to pursue ADR fervently-fueled to be part of the dispute resolution as an Avid supporter of ADR.

Yvonne has participated in a number of Moot Court competitions that have sharpened her legal acumen especially in the Professor Musili Wambua moot court competition (2024) where she was recognized to be in the best team. She is a distinguished researcher courtesy of the mooting society. Yvonne believes in embracing the journey, being outstanding and realizing your path and following it. She is also a member of Kenya Model United Nations and Amnesty international.

She is determined in achieving the very best.
Yvonne Kwamboka can be contacted via email at ***yvonneontweka@gmail.com*** *or phone at+254740653172*

Christopher Kinyua
Christopher Kinyua is a finalist law student and an LLB candidate at the University of Embu. He serves as the Editor-in-Chief of the University of Embu Law Review. Passionate about legal research and writing and policy. His interests extend to governance, human rights, international law and environmental law, with a particular focus on legal reforms and their societal impact. As a certified professional mediator, he is also keen on alternative dispute resolution mechanisms, particularly arbitration.

Beyond academia, Christopher Kinyua is actively engaged in leadership and advocacy. He is a county youth ambassador for the SMACHS Foundation, where

he leads environmental initiatives. He has played a pivotal role in organizing mentorship programs, legal aid initiatives, and scholarly competitions.
He can be reached at christopherkinyuamwai@gmail.com

Aromo Marion
Aromo Marion is a dedicated and enthusiastic legal researcher currently pursuing her Bachelor of Laws (LL.B) degree in her fourth year at the University of Embu. She is deeply passionate about various areas of law, particularly Alternative Dispute Resolution, Human Rights, Environmental Law, and Criminal Justice. Her commitment to legal scholarship and advocacy has driven her to actively engage in research and initiatives that promote justice and sustainable legal solutions. With a keen interest in developing practical legal skills, she continuously seeks opportunities to contribute to legal discourse and positively impact society through her work.

In addition to her academic pursuits, Marion holds key leadership positions that demonstrate her dedication to the legal profession. She currently serves as the Campus Director of the Legal Torch Initiative, where she plays a crucial role in fostering legal awareness and mentorship among law students. Furthermore, she is a Senior Editor at the University of Embu Law Review, a platform that enhances legal scholarship by publishing well-researched and insightful legal analyses. Her editorial role allows her to contribute to the refinement of legal writing and discourse within the academic and professional legal community.
She can be reached at aromomarion12@gmail.com.

Sarafin Cherono
Sarafin is an LLB Candidate at the University of Nairobi with a strong passion for Alternative Dispute Resolution, Climate Justice, Environmental Law, Privacy and Data protection, International Human Rights Law etc. As an ardent Legal Researcher and Writer, Sarafin actively contributes to legal discourse through scholarly articles and advocacy. Sarafin is also an active member of the Moot Court Society and the Kenya Model United Nations, where she refines her advocacy and diplomatic skills.

Beyond academia, Sarafin has participated in the international legal round table during the COP 29 in Baku, Azerbaijan contributing insights on climate justice. As

a Privacy First Campaigner and Junior Researcher at Amnesty international, Sarafin works on advancing human rights protections in the digital age. Additionally, Sarafin is a volunteer at Jurisvista Writers.
Sarafin can be contacted through sarafin282@gmail.com

Miriam Rosasi
Miriam Kebondo Rosasi is a dedicated third-year law student at Kabarak University and a Certified Professional Mediator with a keen interest in Alternative Dispute Resolution (ADR), constitutional law, and climate justice. Her dedication to legal research is reflected in her co-authorship of the paper "*Constitutional Questions in Alternative Justice Systems: Adopting a Normative Framework to Aid AJS bodies in Handling Constitutional Questions,*" which explores the intersection of customary dispute resolution and constitutional law. In 2024, she was awarded Best Researcher in the Environmental Justice Moot Court and Research Competition, a testament to her exceptional analytical skills and commitment to environmental justice.

With a rich background in legal research and human rights advocacy, Miriam has contributed to key projects such as the *ICJ Compendium of Election Petitions Volume V: Select Decisions, Issues, and Themes Arising from the 2022 Elections in Kenya* and the *Judiciary Case Digest on Emerging Jurisprudence from the 2022 General Elections in Kenya*. As a Millennium Fellowship Graduate and Vice President of the Center for Legal Aid and Legal Education (CLACLE), she has led youth-driven initiatives advocating for climate justice and community-based dispute resolution. Her growing body of work is driven by a deep commitment to creating impactful, African-centered solutions that address the unique needs and challenges of the continent, positioning her as a rising voice in shaping inclusive and transformative legal frameworks.
Miriam can be reached on rosasimirriam04@gmail.com

Alternative Dispute Resolution Journal – Volume 13 Issue 2

ADR and Access to Justice in Africa: Upholding Integrity in Arbitration

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

Abstract

This paper critically examines the importance of upholding integrity in arbitration in Africa. The paper argues that arbitration alongside other ADR techniques play a fundamental role in fostering access to justice in Africa. The paper notes that ADR and arbitration have been part and parcel of conflict management in Africa for many centuries. In addition, the paper asserts that despite ADR being widely embraced in Africa, its practice is associated with several challenges which can hinder access to justice. The paper also proposes interventions towards upholding integrity in arbitration and ADR for enhanced access to justice.

1.0 Introduction

The term Alternative Dispute Resolution (ADR) encompasses a wide range of dispute management techniques that function outside formal court processes[1]. Further, according to the United Nations, ADR comprises various approaches and techniques for resolving disputes in a non-confrontational way[2]. ADR has also been defined as a spectrum of less costly and more expeditious alternatives to litigation, where a neutral party assists the disputing parties in reaching

* *PhD in Law (Nrb), FCIArb (Chartered Arbitrator),OGW, LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. in Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; ESG Consultant; Advocate of the High Court of Kenya; Professor of Environmental Law and Conflict Management at the University of Nairobi, Faculty of Law; Member of the Permanent Court of Arbitration (PCA) [February, 2025].*

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

[2] United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Available at https://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_background_paper.pdf (Accessed on 12/02/2025)

resolution[3]. However, it has been noted that in some ADR processes such as negotiation, parties to a conflict meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party[4]. ADR covers a wide range of techniques and approaches raging from party-to-party engagement through *negotiation* as the most direct way to reach a mutually accepted resolution, to *arbitration* and *adjudication* where an external party imposes a solution upon the parties[5]. Further, it has been noted that somewhere along the axis of ADR approaches between these two extremes lies *mediation* which is a process by which a third party aids the disputants to reach a mutually agreed solution[6].

It has been observed that ADR offers numerous advantages in the administration of justice including a system with procedural flexibility, a broad range of remedial options, and a focus on individualized justice[7]. With the exception of binding arbitration, the goal of ADR is to provide a forum for disputing parties to work toward a voluntary, consensual agreement, as opposed to having a judge or other authority impose a determination upon them[8]. Further, ADR allows for more creative and collaborative solutions than those available through traditional

[3] JAMS ADR., 'What is ADR' Available at https://www.jamsadr.com/adr-spectrum/ (Accessed on 12/02/2025)
[4] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015
[5] United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Op Cit
[6] Ibid
[7] Main. T., 'ADR: The New Equity.' Available at https://www.researchgate.net/profile/ThomasMain/publication/228182886_ADR_The_new_equity/links/53d00e470cf2fd75bc5c57a5/ADR-The-newequity.pdf (Accessed on 12/02/2025)
[8] Alternative Dispute Resolution., Available at https://www.dol.gov/general/topic/labor-relations/adr#:~:text=Types%20of%20ADR%20include%20arbitration,%2C%20neutral%20factfinding%2C%20and%20minitrials. (Accessed on 12/02/2025)

litigation[9]. ADR mechanisms possess certain attributes which include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost effective management of disputes making them suitable in enhancing access to justice[10].

Due to their key attributes and advantages, ADR mechanisms are being widely embraced in the administration of justice at all levels. At the global level, the *Charter of the United Nations*[11] urges parties to a dispute to first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration,* judicial settlement, resort to regional agencies or arrangements, or other *peaceful means* of their own choice[12] (Emphasis added). At a national level, the *Constitution of Kenya*[13] mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and Traditional Dispute Resolution Mechanisms (TDRMs)[14].

It has been noted that ADR in Africa has risen as an increasingly popular alternative to the formal legal channels, particularly in managing civil disputes, promising efficiency and increasing the perception of justice[15]. However, the practice of ADR in Africa is also associated with several concerns key among them being the integrity and fairness of proceedings[16]. Upholding integrity is therefore crucial towards fostering access to justice through ADR.

---

[9] JAMS ADR., 'What is ADR' Available at https://www.jamsadr.com/adr-spectrum/ (Accessed on 12/02/2025)
[10] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[11] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI
[12] Ibid, article 33 (1)
[13] Constitution of Kenya., 2010., Government Printer, Nairobi
[14] Ibid, article 159 (2) (c)
[15] Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' *Pepperdine Dispute Resolution Law Journal*, Volume 18, Issue 3
[16] Muigua. K., 'Strengthening Ethics in Arbitration in Africa' Available at https://kmco.co.ke/wp-content/uploads/2023/10/Strengthening-Ethics-in-Arbitration-in-Africa-.pdf (Accessed on 12/02/2025)

This paper critically examines the importance of upholding integrity in arbitration in Africa. The paper argues that arbitration alongside other ADR techniques play a fundamental role in fostering access to justice in Africa. The paper notes that ADR and arbitration have been part and parcel of conflict management in Africa for many centuries. In addition, the paper asserts that despite ADR being widely embraced in Africa, its practice is associated with several challenges which can hinder access to justice. The paper also proposes interventions towards upholding integrity in arbitration and ADR for enhanced access to justice.

2.0 ADR and Access to Justice in Africa: Opportunities and Challenges

Access to justice refers to a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour[17]. It has also been defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice[18]. Access to justice can also be understood as the ability of an individual who seeks justice to access legal information, legal advice, legal assistance and legal representation[19]. It has been noted that accessing justice is a matter of supply and demand[20]. On one hand, it involves empowering people to seek it, and on the other hand it entails securing the mechanisms to deliver it[21]. Access to justice

[17] Ladan M.T, 'Access To Justice As A Human Right Under The Ecowas Community Law,' available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07- (Accessed on 12/02/2025)

[18] United States Institute of Peace., 'Necessary Condition: Access to Justice' Available at https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice (Accessed on 12/02/2025)

[19] Dereymaeker, G.,'Formalising the Role of Paralegals in Africa: A Review of Legislative and Policy Developments. Cape Town: Dullah Omar Institute (CSPRI), *Open Society Justice Initiative and Paralegal Advisory Service Institute*, (2016) pp.1-32.

[20] International Development Law Organization., 'Access to Justice' Available at https://www.idlo.int/what-we-do/access-justice (Accessed on 12/02/2025)

[21] Ibid

entails the ability of all citizens to seek and obtain legal remedies and prevent abuse of their rights[22].

According to the United Nations, access to justice is a basic principle of the rule of law[23]. In the absence of access to justice, people are unable to have their voice heard, exercise their human rights, challenge discrimination or hold decision-makers accountable[24]. Further, it has been observed that access to justice supports sustainable peace by affording individuals and groups a more attractive alternative to violence in resolving their conflicts and disputes[25].

Enhancing access to justice is necessary for Sustainable Development Agenda[26]. Access to justice ensures that legal systems are equitable, responsive, and accessible to all, therefore playing a critical role in achieving various aspects of Sustainable Development[27]. This could be in the context of gender equality, reducing inequalities, promoting peace, labour rights, or environmental protection among other various targets envisaged under the Sustainable Development Goals (SDGs)[28]. Under the United Nations *2030 Agenda for Sustainable Development*[29], SDG 16 seeks to promote peaceful and inclusive societies for Sustainable Development,

---

[22] Logan. C., 'Ambitious SDG goal confronts challenging realities: Access to justice is still elusive for many Africans' Available at https://www.afrobarometer.org/wp-content/uploads/2022/02/ab_r6_policypaperno39_access_to_justice_in_africa_eng.pdf (Accessed on 13/02/2025)

[23] United Nations., 'Access to Justice' Available at https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ (Accessed on 12/02/2025)

[24] Ibid

[25] United States Institute of Peace., 'Necessary Condition: Access to Justice' Op Cit

[26] SDG Resource Centre., 'Access to Justice.' Available at https://sdgresources.relx.com/tags/access-justice (Accessed on 12/01/2025)

[27] Ibid

[28] Ibid

[29] 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 12/02/2025)

provide access to justice for all and build effective, accountable and inclusive institutions at all levels[30](Emphasis added). It has been noted that SDG 16's emphasis on access to justice is critical in ensuring fairness and legal protection for all persons, and especially the most vulnerable since it calls for the establishment and strengthening of institutions at all levels to deliver justice effectively, transparently, and without undue delay[31]. Promoting access to justice is therefore crucial for Sustainable Development.

Despite its crucial role in Sustainable Development, accessing justice remains a significant challenge for many citizens in Africa due to several challenges including high legal costs, bureaucracy, complex legal procedures, illiteracy, corruption, distance from formal courts, backlog of cases in courts and lack of legal knowhow[32]. It has been noted that many African citizens have lost faith in the ability of national courts to provide timely and just management of their disputes[33]. Further, it has been observed that among African citizens, confidence in courts is weak and that only a small number of citizens have direct experience with the courts, and contact rates for some marginalised groups including women and the uneducated are even lower[34].

Due to the foregoing challenges, ADR has become a preferable and appropriate tool for accessing justice in Africa[35]. It has been observed that ADR mechanisms in Africa trace back to the very origin of mankind[36]. The notion of ADR in Africa fits

---

[30] Ibid
[31] SDG Resource Centre., 'Access to Justice.' Op Cit
[32] Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29
[33] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' Op Cit
[34] Logan. C., 'Ambitious SDG goal confronts challenging realities: Access to justice is still elusive for many Africans' Op Cit
[35] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[36] Laibuta. K., 'Contending with Multiple Legal Orders for Wholesome Dispute Resolution' Available at https://lc-adr.net/wp-content/uploads/2017/10/ADR-IN-AFRICA-2.pdf (Accessed on 13/02/2025)

comfortably within traditional concepts of African justice, particularly its core value of reconciliation[37]. Conflict management in African societies has since time immemorial taken the form of informal negotiation, mediation, reconciliation and arbitration among other techniques which are administered by institutions such as the council of elders[38]. These techniques are anchored in the culture and customs of the people of Africa and are considered appropriate in managing disputed by creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion and giving prominence to communal needs over individual needs in line with the African philosophy of *Ubuntu/Utu*[39]. ADR is therefore part and parcel of the African culture. It has been noted that culture plays an important role in conflict management and shapes the way in which individuals or groups frame and respond to conflicts[40]. Utilising ADR in Africa is therefore key in respecting the culture and customs of the people.

Due to their appropriateness, ADR mechanisms such as negotiation, mediation, and arbitration are being widely embraced in accessing justice in Africa[41]. It has been noted that ADR is used as the default dispute resolution method in Africa[42]. ADR projects in the continent have demonstrated that formal court litigation is in most instances reserved for cases of constitutional or legal interpretation, in instances where there is need to set precedence, in cases with major public policy implications, or as a last resort after ADR mechanisms have been exhausted[43]. ADR processes including customary, traditional or informal legal systems fill the gaps in formal court processes, particularly for the poor and those from rural areas

---

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

[38] Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf (Accessed on 13/02/2025)

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

[40] LeBaron. M., 'Culture and Conflict' Available at Available at https://www.beyondintractability.org/essay/culture_conflict (Accessed on 13/02/2025)

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

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

[43] Ibid

who do not have geographical access to formal courts[44]. ADR therefore plays a vital role in the provision of justice in Africa, as well as fostering social cohesion through its restorative nature[45].

However, despite its appropriateness, the practice of ADR in Africa faces several challenges. For instance, lack of consistency and standardisation of practices across ADR mechanisms can hinder its appropriateness in delivering justice[46]. It has been noted that ADR programs in Africa face several challenges, including inadequate political support, human resources, legal foundations, and sustainable financing undermining the ability of citizens to access justice[47]. The patriarchal nature of most African communities also raises the potential of human rights violations while utilising indigenous practices and institutions of conflict management including ADR and Alternative Justice Systems[48].

In addition to the foregoing challenges, there are fundamental concerns in individual ADR processes. For instance, the practice of arbitration raises several ethical concerns including integrity[49]. It has been noted that transparency and trust in the conduct of the arbitration proceedings is necessary to ensure the legitimacy

---

[44] Bowd. R., 'Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia' Available at https://www.files.ethz.ch/isn/112459/NO13OCT09.pdf (Accessed on 13/02/2025)
[45] Ibid
[46] International Development Law Organization., 'Enhancing Access to Justice through Alternative Dispute Resolution in Kenya' Available at https://www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya (Accessed on 13/02/2025)
[47] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' Op Cit

[48] Lee. S., 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' Available at Available at https://cic.nyu.edu/wp-content/uploads/2023/11/Multiple-Doors-to-Justice-in-Kenya-2023.pdf (Accessed on 13/02/2025)
[49] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Available at http://kmco.co.ke/wp-content/uploads/2022/05/Promoting-ProfessionalConduct-Ethics-Integrity-Etiquette-in-ADR.pdf (Accessed on 13/02/2025)

of the process and the awards rendered due to the final and binding nature of arbitral awards[50]. The parties must have confidence that the arbitrator has the necessary experience, is impartial, independent, possesses the relevant qualifications, is fair-minded and will be able to effectively dispense justice in awarding a fair and just award[51]. Promoting integrity is therefore crucial in strengthening access to justice through arbitration in Africa.

3.0 Upholding Integrity in Arbitration

ADR is part and parcel of conflict management in Africa. ADR processes including negotiation, mediation, arbitration, customary and traditional dispute resolution mechanisms are crucial in enhancing access to justice especially for the poor and those from rural areas who do not have geographical access to formal courts[52]. Harnessing these processes is crucial in building effective dispute settlement systems and bridging the gap between the formal legal system and traditional modes of African justice[53]. It is therefore necessary to strengthen ADR mechanisms in Africa including through enacting robust legislations to support ADR, building the capacity of all stakeholders in ADR, and fostering public awareness on ADR[54].

In addition, it is imperative to uphold integrity in arbitration and other ADR mechanisms[55]. Arbitration in Africa raises several ethical concerns. For instance, confidentiality is a pertinent issue that is fundamental to the integrity of arbitration proceedings[56]. Confidentiality is central to arbitration and ADR since it allows

---

[50] Rajoo. D., 'Importance of Arbitrators' Ethics and Integrity in Ensuring Quality Arbitrations.' *Contemporary Asia Arbitration Journal, Vol. 6, No. 2,* pp 329-347 (2013)
[51] Ibid
[52] Bowd. R., 'Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia' Op Cit
[53] Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' Op Cit
[54] Ibid
[55] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit
[56] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' *University of Miami Law Review*, Volume 56, No.4

parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute without concerns of such information leaking to third parties[57]. Where confidentiality is breached, information pertaining the process may be leaked to third parties therefore affecting the integrity of the process[58]. Ensuring confidentiality is therefore crucial in upholding integrity in arbitration.

Conflict of interest is another key issue that is crucial in promoting integrity in arbitration. It has been noted that the rules on conflict of interest in arbitration and other ADR processes are aimed at ensuring impartiality and preventing bias in management of disputes which could arise due to involvement by the arbitrator with the subject matter of the dispute or relationship between the arbitrator and either of the participants in the proceedings[59]. This is in line with the principles of natural justice and the right to a fair hearing[60]. It is therefore vital for arbitrators to avoid conflict of interest in all situations in order to ensure integrity and fairness in the determination of disputes.

Competence is also key in upholding integrity in arbitration[61]. Competence may be demonstrated through following due processes in arbitration proceedings, adhering to rules of conduct and evidence, and writing sound and logical awards[62]. Competence is necessary in upholding integrity in arbitration since it ensures that arbitrators have the requisite expertise and qualifications required to sufficiently discharge their duties[63].

---

[57] Ibid
[58] Ibid
[59] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit
[60] Ibid
[61] Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit
[62] Ibid
[63] Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' 28 *Fordham Urb. L.J.* 979-990 (2001)

Upholding integrity is therefore vital in fostering access to justice through arbitration and ADR. Parties to arbitration proceedings must have confidence that the arbitrator has the necessary experience, is impartial, independent, has the relevant qualifications, is fair-minded and will be able to effectively dispense justice through a fair and reasoned arbitral award[64]. It has been noted that ethical requirements in arbitration including independence, confidentiality, competence, and the rules on conflict of interest are aimed at maintaining the integrity and ensuring the success of arbitration proceedings[65].

There has been an attempt towards upholding integrity in arbitration with various institutions adopting codes of conduct aimed at achieving this goal. For example, the *International Bar Association (IBA)* has formulated guidelines on conflicts of interest in international arbitration[66]. The IBA guidelines are key in fostering integrity in arbitration by requiring arbitrators to be independent, impartial, and to avoid conflict of interest[67]. The *Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members*[68] further seeks to uphold integrity in arbitration and requires arbitrators to maintain integrity and fairness while managing disputes and withdraw from acting if they can no longer fulfill this obligation[69]. The Code of conduct also requires members to be competent and only accept appointments to manage disputes only when they are appropriately qualified or experienced[70]. At a national level, the Nairobi Centre for International Arbitration (NCIA) code of conduct for arbitrators requires arbitrators to avoid

---

[64] Rajoo. D., 'Importance of Arbitrators' Ethics and Integrity in Ensuring Quality Arbitrations.' Op Cit

[65] Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

[66] International Bar Association., 'IBA Guidelines on Conflicts of Interest in International Arbitration.' Available at https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 (Accessed on 13/02/2025)

[67] Ibid

[68] Chartered Institute of Arbitrators., 'Code of Professional and Ethical Conduct for Members.' Available at https://www.ciarb.org/media/4231/ciarb-code-of-professional-and-ethical-conduct-for-members.pdf (Accessed on 13/02/2025)

[69] Ibid, Rule 2

[70] Ibid, Rule 4

conflict of interest, to be independent, to ensure that they are competent to manage disputes, and to conduct proceedings with integrity and fairness[71].

Upholding integrity is therefore a fundamental concern in arbitration. It is necessary to comply with the ethical rules and standards of independence, confidentiality, competence, and the rules on conflict of interest in order to enhance access to justice through arbitration in Africa.

4.0 Conclusion

ADR is an appropriate tool of accessing justice in Africa ensuring that all people including the poor and the marginalized are able to exercise their rights. ADR mechanisms are playing a vital role in the provision of justice in Africa, as well as fostering social cohesion through their restorative nature[72]. However, it is necessary to strengthen ADR in Africa through putting in place legislations to support ADR, building the capacity of all stakeholders in ADR, and fostering public awareness on ADR[73]. It is also vital to uphold integrity in arbitration in order to enhance its suitability in fostering access to justice in Africa.

Promoting access to justice in Africa through ADR and arbitration is necessary and possible for Sustainable Development.

---

[71] Nairobi Centre for International Arbitration., 'Code of Conduct for Arbitrators, 2021.' Available at https://ncia.or.ke/wp-content/uploads/2021/07/3.-NCIA-CODE-OF-CONDUCT-FOR-ARBITRATORS-2021.pdf (Accessed on 13/02/2025)

[72] Bowd. R., 'Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia' Op Cit

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

References

Alternative Dispute Resolution., Available at https://www.dol.gov/general/topic/labor-relations/adr#:~:text=Types%20of%20ADR%20include%20arbitration,%2C%20neutral%20factfinding%2C%20and%20minitrials. (Accessed on 12/02/2025)

Bowd. R., 'Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia' Available at https://www.files.ethz.ch/isn/112459/NO13OCT09.pdf

Chartered Institute of Arbitrators., 'Code of Professional and Ethical Conduct for Members.' Available at https://www.ciarb.org/media/4231/ciarb-code-of-professional-and-ethical-conduct-for-members.pdf

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

Dereymaeker, G.,'Formalising the Role of Paralegals in Africa: A Review of Legislative and Policy Developments. Cape Town: Dullah Omar Institute (CSPRI), *Open Society Justice Initiative and Paralegal Advisory Service Institute*, (2016) pp.1-32.

International Bar Association., 'IBA Guidelines on Conflicts of Interest in International Arbitration.' Available at https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918

International Development Law Organization., 'Access to Justice' Available at https://www.idlo.int/what-we-do/access-justice

International Development Law Organization., 'Enhancing Access to Justice through Alternative Dispute Resolution in Kenya' Available at https://www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya

JAMS ADR., 'What is ADR' Available at https://www.jamsadr.com/adr-spectrum/

JAMS ADR., 'What is ADR' Available at https://www.jamsadr.com/adr-spectrum/

Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf

Ladan M.T, 'Access To Justice As A Human Right Under The Ecowas Community Law,' available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07-

Laibuta. K., 'Contending with Multiple Legal Orders for Wholesome Dispute Resolution' Available at https://lc-adr.net/wp-content/uploads/2017/10/ADR-IN-AFRICA-2.pdf

LeBaron. M., 'Culture and Conflict' Available at Available at https://www.beyondintractability.org/essay/culture_conflict

Lee. S., 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' Available at Available at https://cic.nyu.edu/wp-content/uploads/2023/11/Multiple-Doors-to-Justice-in-Kenya-2023.pdf

Logan. C., 'Ambitious SDG goal confronts challenging realities: Access to justice is still elusive for many Africans' Available at https://www.afrobarometer.org/wp-content/uploads/2022/02/ab_r6_policypaperno39_access_to_justice_in_africa_eng.pdf

Main. T., 'ADR: The New Equity.' Available at https://www.researchgate.net/profile/ThomasMain/publication/228182886_ADR_The_new_equity/links/53d00e470cf2fd75bc5c57a5/ADR-The-newequity.pdf

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

Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' *University of Miami Law Review*, Volume 56, No.4

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

Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Available at http://kmco.co.ke/wp-content/uploads/2022/05/Promoting-ProfessionalConduct-Ethics-Integrity-Etiquette-in-ADR.pdf

Muigua. K., 'Strengthening Ethics in Arbitration in Africa' Available at https://kmco.co.ke/wp-content/uploads/2023/10/Strengthening-Ethics-in-Arbitration-in-Africa-.pdf

Nairobi Centre for International Arbitration., 'Code of Conduct for Arbitrators, 2021.' Available at https://ncia.or.ke/wp-content/uploads/2021/07/3.-NCIA-CODE-OF-CONDUCT-FOR-ARBITRATORS-2021.pdf

Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29
Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' *Pepperdine Dispute Resolution Law Journal*, Volume 18, Issue 3

Rajoo. D., 'Importance of Arbitrators' Ethics and Integrity in Ensuring Quality Arbitrations.' *Contemporary Asia Arbitration Journal, Vol. 6, No. 2,* pp 329-347 (2013)
SDG Resource Centre., 'Access to Justice.' Available at https://sdgresources.relx.com/tags/access-justice

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

United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

United Nations., 'Access to Justice' Available at https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/

United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Available at https://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_background_paper.pdf

United States Institute of Peace., 'Necessary Condition: Access to Justice' Available at https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice

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

Evolution of Arbitration Integrity in Kenya

By: ***Isaac Aluochier****

Abstract

Arbitration in Kenya is a constitutionally recognized exercise of sovereign judicial power, offering an efficient alternative to litigation while upholding fairness, transparency, and accountability. This article traces the evolution of arbitration integrity in Kenya, from indigenous dispute resolution methods through colonial and post-independence statutory reforms, to the present-day legal and institutional framework governing arbitration ethics.

Drawing from constitutional provisions – including Articles 1, 50, and 159 – this study highlights how Kenya's legal framework mandates integrity in arbitration by ensuring impartiality, independence, and due process. It examines contemporary challenges such as corruption, judicial interference, cost barriers, and inconsistencies in arbitrator ethics. The article further explores emerging reforms, including legislative amendments, enhanced regulatory oversight, technology-driven transparency, and public awareness initiatives, to fortify arbitration's legitimacy.

By aligning arbitration with Kenya's constitutional values and global best practices, the article underscores the need for continuous reforms to cement Kenya's position as a regional leader in alternative dispute resolution.

1. Introduction

1.1 Context and Rationale

Arbitration is a flexible and efficient dispute resolution mechanism that has gained prominence in Kenya, particularly with the 2010 Constitution promoting

* *Isaac Aluochier is a Fellow of the Chartered Institute of Arbitrators, as well as a Certified Professional Mediator. He is the Chief Executive of Aluochier Dispute Resolution, an upcoming arbitral institution. He has extensive experience in both Kenya and the United Kingdom in the dispute resolution, construction and financial services industries. He has a Masters in Project Management from Cranfield University in England and a Bachelors in Quantity Surveying from the University of Reading, England. He can be reached at aluochier@gmail.com, info@aluochier.co.ke and www.aluochier.co.ke.*

Alternative Dispute Resolution (ADR).[74] By appointing a neutral arbitrator, parties can resolve conflicts without the delays and costs of litigation.[75] Arbitration also alleviates pressure on the Judiciary, fostering trust in the legal system.[76] Beyond convenience, arbitration embodies Kenya's constitutional commitment to broadening access to justice.[77] With courts overwhelmed by caseloads, arbitration provides a viable alternative, preserving relationships while ensuring fair outcomes.[78] However, its legitimacy depends on arbitration integrity, encompassing impartiality, fairness, accountability, and transparency.[79] Arbitrators must be independent and demonstrably fair, ensuring that proceedings are free from bias or undue influence.[80] A transparent, well-documented process reinforces public confidence, ensuring arbitration remains a respected avenue for resolving disputes in line with Kenya's commitment to equitable justice.[81]

1.2 Focus on Integrity Issues

While procedural efficiency is often highlighted, this article delves into integrity in arbitration, tracing its evolution, evaluating current safeguards, and proposing future reforms.

Arbitration integrity is a constitutional concern, rooted in Articles 1(2) and 1(3)(c),

---

74 Article 159(2)(c) and 189(4) of the Constitution of Kenya, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

75 American Arbitration Association, "Measuring the Costs of Delays in Dispute Resolution," published at https://go.adr.org/impactsofdelay.html

76 "Here is the Judiciary's Solution to Case Backlog" published at https://judiciary.go.ke/here-is-the-judiciarys-solution-to-case-backlog/

77 Article 48 of the Constitution of Kenya, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

78 Judiciary of Kenya, "Here is the Judiciary's Solution to Case Backlog" published at https://judiciary.go.ke/here-is-the-judiciarys-solution-to-case-backlog/

79 Article 10 of the Constitution of Kenya, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

80 Article 50(1) of the Constitution of Kenya, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

81 Articles 10 and 165 of the Constitution of Kenya, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

which vest judicial power in both the courts and independent tribunals. This elevates arbitration beyond a private alternative to a direct exercise of sovereign judicial power. Article 50(1) further guarantees the right to a fair hearing before an independent and impartial tribunal, reinforcing the need for transparency and due process.

By examining past experiences, present realities, and potential reforms, this article underscores how arbitration integrity safeguards the people's judicial power and strengthens public trust in the process.

1.3 Structure of the Article

This article explores arbitration integrity through five key areas:

1. Constitutional Foundations – Examines arbitration's legal framework, emphasizing key constitutional provisions such as Articles 1(2), 1(3)(c), 50(1), 2, 10, 11, 19, 25(c), 27, 47, 48, 159, 165, 189, and Section 7(1) of the Sixth Schedule.
2. Historical Evolution – Explores how traditional dispute resolution methods intersected with colonial and statutory arbitration frameworks, shaping modern integrity concerns.
3. Present-Day Framework – Reviews laws, institutions, and professional regulations ensuring neutrality, fairness, and transparency in arbitration.
4. Contemporary Challenges – Identifies threats such as corruption, public disclosure concerns, and inconsistencies in arbitrator conduct.
5. Future Reforms – Proposes policy shifts, technological innovations, and enhanced oversight to strengthen arbitration integrity.

By weaving together legal precedents, constitutional mandates, and real-world examples, this article demonstrates that arbitration integrity is not just a procedural safeguard—it is the foundation of a justice system that upholds the will of the Kenyan people.

2. Constitutional Foundations of Arbitration Integrity

This section examines how the 2010 Constitution mandates integrity in arbitration,

ensuring accountability, fairness, and public trust.

2.1 Sovereignty of the People and Direct Exercise of Judicial Power

At the core of Kenya's constitutional design is Article 1, which vests all sovereign power in the people. This power can be exercised through elected representatives or directly, including through arbitration. Article 1(3)(c) further vests judicial power in both courts and independent tribunals, meaning arbitrators wield direct sovereign authority when resolving disputes.

Unlike elected officials, arbitrators derive legitimacy directly from the people, requiring the highest levels of impartiality, fairness, and accountability.[82] Any ethical lapse—bias, conflicts of interest, or procedural unfairness—erodes both individual awards and arbitration's credibility as a trusted judicial alternative.[83] Arbitrators must thus uphold public confidence and deliver justice transparently, safeguarding the Constitution's promise of equity.[84]

2.2 Right to Choose an Independent and Impartial Tribunal (Article 50(1))

Article 50(1) grants individuals the right to justice before either a court or an independent tribunal, positioning arbitration as a constitutionally protected forum. Choosing arbitration does not mean opting for a lesser form of justice—it remains bound by the same high ethical and procedural standards as formal courts.[85]

Arbitrators act as judges and must maintain absolute independence to prevent personal interests, covert influence, or ex parte communications from compromising proceedings.[86] Article 50(1) also enshrines the right to a public

82 Articles 10 and 50(1) of the Constitution, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03
83 Article 50(1) of the Constitution, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03
84 Articles 10 and 50(1) of the Constitution, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03
85 Article 50(1) of the Constitution, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03
86 Article 50(1) of the Constitution, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

hearing, often at odds with arbitration's traditional private nature. Confidentiality must be balanced with transparency, particularly in cases with public interest implications.[87] Article 50(8) permits private hearings under exceptional circumstances, such as national security or public order concerns, ensuring fairness without sacrificing scrutiny.

2.3 Other Key Constitutional Articles Informing Integrity

Kenya's constitutional framework embeds arbitration in national values and legal standards:

- Article 2: Constitution's supremacy ensures all arbitration procedures align with constitutional principles.
- Article 10: National values—integrity, transparency, and accountability—must guide arbitration.
- Article 11: Recognizes traditional dispute resolution, provided it adheres to constitutional fairness.
- Articles 19 & 25(c): Reinforce that the right to a fair trial cannot be limited in arbitration.
- Article 27: Guarantees equality and non-discrimination in arbitrator selection and proceedings.
- Articles 47 & 48: Mandate fair administrative action and broad access to justice, ensuring cost, language, and location barriers do not exclude parties from arbitration.
- Article 159: Encourages ADR while emphasizing minimal judicial interference, reinforcing arbitration's legitimacy.
- Article 165: Grants the High Court supervisory jurisdiction, ensuring arbitration upholds constitutional integrity.
- Article 189: Promotes ADR for intergovernmental disputes, reinforcing arbitration's role in governance.
- Section 7(1) of the Sixth Schedule: Requires that all arbitration laws conform with constitutional mandates.

87 Article 10(2)(a) and (c) of the Constitution, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

2.4 Synthesis: Constitutional Baseline for Arbitration Integrity

Kenya's constitutional provisions create a firm foundation for arbitration integrity, mandating independence, impartiality, fairness, and accountability.[88] These principles are not optional—they define arbitration's legitimacy as an extension of the people's judicial power.[89]

Opting for arbitration does not remove a dispute from public justice—it engages a constitutionally sanctioned mechanism.[90] Arbitrators, even when privately appointed, must uphold the same rigorous standards as judges, ensuring arbitration remains a trusted, fair, and transparent dispute resolution avenue.[91]

3. Historical Evolution of Arbitration in Kenya Through an Integrity Lens

This section traces the historical development of arbitration in Kenya, illustrating how past influences have shaped current integrity concerns.

3.1 Pre-Colonial Customary Systems

Before formal courts, Kenyan communities resolved disputes through councils of elders, relying on trust, consensus, and reputation rather than official appointments.[92] Elders mediated disputes, fostering social harmony and accountability.[93] Decisions were built on mutual agreement rather than imposed rulings, reducing resentment and reinforcing collective responsibility.[94]

Integrity was central to these processes—elders who displayed bias risked losing

88 Articles 10(2) and 50(1) of the Constitution, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03
89 Article 10 of the Constitution, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03
90 Articles 1(3)(c), 50(1) and 159 of the Constitution, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03
91 Article 50(1) of the Constitution, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03
92 Oral history and interactions with present-day elders of various communities in Kenya
93 Oral history
94 Oral history

credibility.[95] This informal yet structured system reflected core arbitration values: impartiality, fairness, and adherence to community norms.[96] These traditional principles continue to influence Kenya's arbitration framework, demonstrating that arbitration integrity is deeply rooted in indigenous practices.[97]

3.2 Colonial and Post-Independence Transformations

British colonial rule introduced statutory arbitration, imposing structured legal frameworks that contrasted with consensus-driven customary methods.[98] While colonial courts and formal arbitration applied to commercial and administrative disputes, local communities continued to rely on elders for family and inheritance matters.[99]

Post-independence, Kenya developed a hybrid arbitration system, incorporating both customary and statutory elements.[100] Private arbitration panels emerged, particularly in urban centres, offering expertise in commercial disputes.[101] However, lack of regulatory oversight led to inconsistent ethical standards, allowing unqualified or biased arbitrators to operate unchecked.[102]

---

95 Oral history

96 Oral history

97 Articles 10 and 11(1) of the Constitution, https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

98 Daniel S. McConkie Jr., Promoting and Reforming Kenya's Customary Justice Systems in Criminal Cases, 38 Emory Int'l L. Rev. 343 (2024). Available at: https://scholarlycommons.law.emory.edu/eilr/vol38/iss2/2

99 Daniel S. McConkie Jr., Promoting and Reforming Kenya's Customary Justice Systems in Criminal Cases, 38 Emory Int'l L. Rev. 343 (2024). Available at: https://scholarlycommons.law.emory.edu/eilr/vol38/iss2/2

100 Daniel S. McConkie Jr., Promoting and Reforming Kenya's Customary Justice Systems in Criminal Cases, 38 Emory Int'l L. Rev. 343 (2024). Available at: https://scholarlycommons.law.emory.edu/eilr/vol38/iss2/2

101 Kariuki Muigua, Ph.D., FCIArb, Chartered Arbitrator, "Settling Disputes Through Arbitration in Kenya", 2017. Available at https://kmco.co.ke/wp-content/uploads/2021/10/Arbitration-Book.pdf

102 Kariuki Muigua, Ph.D., FCIArb, Chartered Arbitrator, "Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking Into the Future", published in *Alternative Dispute Resolution (ADR) Journal,* Volume 10, No. 1, 2022, a publication of the Chatered Institute of Arbitrators – Kenya Branch (CIArb-K)

Legal reforms eventually introduced professional bodies and ethical guidelines, promoting impartiality and accountability.[103] Over time, colonial-era statutes and indigenous practices merged into a more harmonized arbitration landscape, setting the foundation for Kenya's modern arbitration system.[104]

3.3 Foundation for Modern Integrity Challenges

Despite progress, early statutory arbitration lacked a unified code of conduct, leading to ethical inconsistencies.[105] While some arbitrators adhered to global best practices, others exploited gaps in oversight, eroding public trust.[106]

Another challenge arose from the delayed integration of customary values with formal arbitration rules.[107] Community-based mediation prioritized harmony, often allowing flexible resolutions, whereas statutory arbitration required rigid procedural adherence.[108] This misalignment led to confusion over applicable standards—when was community-driven flexibility appropriate, and when did it violate procedural fairness?

---

103 NCIA Code of Conduct for Arbitrators, 2021 published by the Nairobi Centre for International Arbitration published at https://ncia.or.ke/wp-content/uploads/2021/07/3.-NCIA-CODE-OF-CONDUCT-FOR-ARBITRATORS-2021.pdf

104 Kariuki Muigua, Ph.D., FCIArb, Chartered Arbitrator, "Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya 2010", https://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf

105 NCIA Code of Conduct for Arbitrators, 2021 published by the Nairobi Centre for International Arbitration published at https://ncia.or.ke/wp-content/uploads/2021/07/3.-NCIA-CODE-OF-CONDUCT-FOR-ARBITRATORS-2021.pdf

106 NCIA Code of Conduct for Arbitrators, 2021 published by the Nairobi Centre for International Arbitration published at https://ncia.or.ke/wp-content/uploads/2021/07/3.-NCIA-CODE-OF-CONDUCT-FOR-ARBITRATORS-2021.pdf

107 Judiciary of Kenya, 2020, "Alternative Justice Systems Baseline Policy", https://www.unodc.org/documents/easternafrica//Criminal%20Justice/AJS_Baseline_Policy_2020_Kenya.pdf

108 Kariuki Muigua, Ph.D., FCIArb, Chartered Arbitrator, "Overview of Arbitration and Mediation in Kenya" available at https://kmco.co.ke/wp-content/uploads/2018/08/Overview-of-Arbitration-and-Mediation-in-Kenya.pdf

These gaps made arbitration vulnerable to misuse and perceived bias, underscoring the need for stronger ethical regulations.[109] Bridging the divide between traditional consensus-building and formal legal structures remains essential for ensuring arbitration integrity in Kenya.[110] A credible, constitutionally anchored system must preserve both the spirit of communal trust and the rigour of fair adjudication.[111]

4. Present-Day Legal and Institutional Framework for Arbitration Integrity

4.1 Arbitration Act, 1995 (and Amendments)

Kenya's Arbitration Act, 1995 provides a statutory framework ensuring impartiality, due process, and fairness in dispute resolution.[112] It aligns with Articles 1(2) and 1(3)(c), which vest judicial authority in courts and independent tribunals, making arbitration a direct exercise of sovereign judicial power. Article 50(1) reinforces this by guaranteeing the right to an impartial tribunal.

The Act upholds arbitral independence, with Article 165 allowing the High Court supervisory oversight to ensure awards meet constitutional and public policy standards. Judicial intervention remains minimal, preserving arbitration's efficiency while safeguarding due process.[113]

However, ambiguities remain, particularly the tension between confidentiality

109 NCIA Code of Conduct for Arbitrators, 2021 published by the Nairobi Centre for International Arbitration published at https://ncia.or.ke/wp-content/uploads/2021/07/3.-NCIA-CODE-OF-CONDUCT-FOR-ARBITRATORS-2021.pdf

110 Judiciary of Kenya, 2020, "Alternative Justice Systems Baseline Policy", https://www.unodc.org/documents/easternafrica//Criminal%20Justice/AJS_Baseline_Policy_2020_Kenya.pdf

111 Judiciary of Kenya, 2020, "Alternative Justice Systems Baseline Policy", https://www.unodc.org/documents/easternafrica//Criminal%20Justice/AJS_Baseline_Policy_2020_Kenya.pdf

112 Arbitration Act (Cap. 49), available at https://new.kenyalaw.org/akn/ke/act/1995/4/eng@2022-12-31

113 Arbitration Act (Cap. 49), available at https://new.kenyalaw.org/akn/ke/act/1995/4/eng@2022-12-31

and transparency.[114] While confidentiality often benefits disputing parties, it may obscure proceedings from public scrutiny in high-stakes disputes.[115] Clarifying these areas will help strengthen public trust in arbitration as a reliable avenue for justice.[116]

4.2 Institutional Arbitration and Codes of Conduct

Bodies such as CIArb-Kenya and NCIA shape arbitration integrity through accreditation, ethical standards, and disciplinary oversight.[117] Their codes emphasize impartiality, confidentiality, and accountability, ensuring arbitrators uphold the highest professional standards.[118]

However, not all arbitrators operate within these institutions, leaving gaps in oversight.[119] Additionally, questions arise regarding the transparency of disciplinary processes—whether sanctions against unethical arbitrators are sufficiently public to deter misconduct.[120] Strengthening universal ethical guidelines and ensuring broad enforcement can enhance arbitration credibility.[121]

---

114 Article 50(1) of the Constitution, available at https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

115 Article 10(2)(a) of the Constitution, available at https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

116 Articles 10(2)(a) and 50(1) of the Constitution, available at https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

117 Nairobi Centre for International Arbitration, "Training and Accreditation" published at https://ncia.or.ke/training-accreditation/

118 NCIA Code of Conduct for Arbitrators, 2021 published by the Nairobi Centre for International Arbitration published at https://ncia.or.ke/wp-content/uploads/2021/07/3.-NCIA-CODE-OF-CONDUCT-FOR-ARBITRATORS-2021.pdf

119 Kariuki Muigua, Ph.D., FCIArb, Chartered Arbitrator, "Strengthening Ethics in Arbitration in Africa", published in the *Alternative Dispute Resolution (ADR) Journal*, 2024, Volume 12(2), https://ciarbkenya.org/wp-content/uploads/2024/03/Vol-122.pdf

120 Article 50(1) of the Constitution, available at https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

121 Charlie Caher & Jonathan Lim, "Regulation of Counsel and Professional Conduct in International Arbitration" published in the International Comparative Legal Guide to International Arbitration 2019, available at https://www.wilmerhale.com/-

4.3 Role of the Judiciary and Supervisory Oversight

The High Court, under Article 165, plays a crucial watchdog role, stepping in when arbitration breaches constitutional principles. Courts aim for minimal interference, intervening only in cases of bias, corruption, or due process violations.[122]

Over time, case law has reinforced the balance between autonomy and accountability. Courts have upheld legitimate awards while setting aside those tainted by undue influence. This judicial oversight ensures arbitration remains a constitutionally sound and publicly trusted mechanism.[123]

4.4 Public Hearing Versus Confidentiality

A key debate in arbitration is privacy versus the constitutional right to a public hearing (Article 50(1)). Confidentiality fosters candid discussions, particularly in commercial or sensitive disputes, while public hearings ensure transparency and prevent misconduct.

Solutions to reconcile these include:

- Partial publication of awards, omitting confidential details.[124]
- Protective orders for highly sensitive information.[125]
- Party waivers, allowing disputants to decide the level of disclosure.[126]

/media/files/shared_content/editorial/publications/documents/20190827-iclg-regulation-of-counsel-and-professional-conduct-in-international-arbitration.pdf

122 Article 165(3)(c), (6) and (7) of the Constitution, available at https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

123 Article 165 of the Constitution, available at https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

124 International Centre for Settlement of Investment Disputes, "Confidentiality and Transparency – ICSID Convention Arbitration (2022 Rules)" available at https://icsid.worldbank.org/procedures/arbitration/convention/confidentiality-transparency/2022

125 "Protective Order Pursuant to the JAMS Artificial Intelligence Dispute Rules" available at https://www.jamsadr.com/artificial-intelligence-protective-order

126 Brodies LLP, "Arbitrator's Duties – Balancing Disclosure and Confidentiality", 1 April 2021, available at https://brodies.com/insights/arbitration/arbitrators-duties-balancing-disclosure-and-confidentiality/

Kenya maintains that public hearings are the default[127], with Article 50(8) permitting private hearings in cases involving witness protection, national security, or public order.

4.5 Public Confidence and Legitimacy

Public trust is critical to arbitration's integrity.[128] Article 1(3)(c) emphasizes that arbitral tribunals exercise sovereign judicial power, requiring them to be transparent, impartial, and accountable.

Key stakeholders—including the media, civil society, and professional bodies—help ensure arbitration remains ethical and free from corruption.[129] Investigative journalism exposes misconduct, while civil society advocacy and institutional oversight reinforce public confidence.[130]

When governed with integrity, arbitration is not just an efficient alternative to litigation, but a robust extension of Kenya's justice system, deserving of public trust and constitutional recognition.[131]

5. Contemporary Challenges and Threats to Arbitration Integrity

5.1 Corruption, Bribery, and Undue Influence

Despite constitutional safeguards, corruption remains a persistent threat to arbitration in Kenya.[132] Arbitrator appointments are often the first point of vulnerability, as well-resourced parties may push for sympathetic or pliable

127 Article 50(1) of the Constitution, available at https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03
128 Author's personal experience.
129 Author's personal experience.
130 Author's personal experience.
131 Articles 1(3)(c), 50(1) and 159 of the Constitution, available at https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03
132 World Duty Free Co. Ltd. V Republic of Kenya, ICSID Case No. ARB/00/7 published at https://www.iisd.org/itn/2018/10/18/world-duty-free-v-kenya/ with the full award published at https://www.italaw.com/cases/3280

individuals.[133] Ex parte communications—where one party interacts with the arbitrator privately—can distort proceedings, leading to biased outcomes.[134] Monetary bribes, gifts, or promises of benefits can turn arbitration into a bargaining process rather than an impartial adjudication.[135]

These issues persist due to weak regulatory oversight, allowing unethical arbitrators to operate unchecked. While institutions like CIArb and NCIA enforce ethical codes, many arbitrators operate outside these structures. Strengthening institutional oversight, mandatory disclosure rules, and enforcement mechanisms is crucial to curbing corruption and maintaining arbitration's legitimacy.[136]

5.2 Lack of Transparency and the Public's Right to Know

Arbitration's private nature often clashes with Article 50(1)'s right to a public hearing, raising concerns about accountability. While confidentiality protects commercial interests and sensitive family matters, it can also shield unethical practices, particularly in disputes involving public funds or infrastructure projects.

The risk of "secret settlements" in matters affecting public interest erodes trust and contradicts Kenya's constitutional commitment to open justice. To balance privacy and transparency, mechanisms such as limited publication of awards, redacted rulings, or court-supervised disclosures in high-stakes cases can ensure that

133 Larry P Schiffer, Party-Appointed Arbitrators on the Precipice, December 01, 2021 published at https://www.namadr.com/publications/party-appointed-arbitrators-on-the-precipice/

134 David W Gibbons, "The Apprehension of Bias in Arbitral Proceedings: A Cautionary Tale for Counsel and Arbitrators" published at https://adric.ca/en/the-apprehension-of-bias-in-arbitral-proceedings-a-cautionary-tale-for-counsel-and-arbitrators/

135 ICC Commission, "Red Flags or Other Indicators of Corruption in International Arbitration" published in the ICC Dispute Resolution Bulletin, Issue 2024-2, available at https://iccwbo.org/wp-content/uploads/sites/3/2024/12/2024-ICC-Red-Flags-or-Other-Indicators-of-Corruption_ICC-DRS-Bulletin.pdf

136 ICC Commission, "Red Flags or Other Indicators of Corruption in International Arbitration" published in the ICC Dispute Resolution Bulletin, Issue 2024-2, available at https://iccwbo.org/wp-content/uploads/sites/3/2024/12/2024-ICC-Red-Flags-or-Other-Indicators-of-Corruption_ICC-DRS-Bulletin.pdf

arbitration remains credible without compromising necessary confidentiality.

5.3 Cost Implications and Equality (Article 27, 48)

Although arbitration is faster and less formal than litigation, its costs remain prohibitive for small businesses, low-income individuals, and marginalized groups. High arbitrator fees, venue costs, and legal representation create financial barriers, conflicting with Article 27's guarantee of equality and Article 48's promise of access to justice.

Parties lacking financial resources may struggle to hire competent arbitrators or legal representation, widening the justice gap. To mitigate this, institutions should introduce sliding-scale fees, pro bono services, capped costs, and low-cost hearing options, ensuring arbitration remains accessible to all.[137]

5.4 Inconsistency in Arbitrator Ethics and Qualifications

A major challenge to arbitration integrity is the lack of uniform qualifications and ethical standards. While CIArb and NCIA enforce rigorous accreditation, many arbitrators operate independently without standardized benchmarks. Without mandatory ethics training, continuing professional development, and clear entry requirements, arbitration risks inconsistent rulings, conflicts of interest, and lack of impartiality. Establishing a national accreditation system, compulsory ethics training, and transparent disciplinary measures would help harmonize arbitrator qualifications and restore public confidence.[138]

5.5 Judicial Interference and Delay

A key advantage of arbitration is its finality, yet excessive judicial interference threatens its efficiency. Courts, under Article 165, are responsible for supervising arbitration to ensure compliance with constitutional standards. However,

137 American Bar Association, "Alternative Fee Arrangements" published at https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/alternative_fees/

138 Godliphas M Barasa, "Mediation Ecosystem in Kenya: Current Trends and Future Prospects" published by the Nairobi Centre for International Arbitration at https://ncia.or.ke/wp-content/uploads/2025/01/Mediation-Ecosystem-in-Kenya.pdf

overzealous scrutiny may lead to the re-litigation of issues already decided by arbitrators, undermining arbitration's speed and autonomy.

Delays in enforcement or setting aside of awards further reduce arbitration's attractiveness. Prolonged court proceedings weaken arbitration's appeal by increasing costs and uncertainty. Striking a balance between judicial oversight and minimal intervention is necessary to preserve arbitration's effectiveness while protecting due process.[139]

5.6 Cultural and Informational Gaps

A significant barrier to arbitration integrity in Kenya is public awareness. Many communities still rely on traditional dispute resolution mechanisms, unaware of arbitration as a constitutional right. Without legal literacy, parties may unknowingly accept unfair terms.

In inheritance disputes, disadvantaged individuals may surrender their claims due to legal misinformation. To counter this, Kenya must enhance public education campaigns, community outreach programs, and accessible arbitration resources to ensure that arbitration remains an informed process.[140]

By addressing these contemporary challenges—corruption, lack of transparency, cost barriers, ethical inconsistencies, judicial interference, and public awareness gaps—Kenya can strengthen arbitration as a trusted and constitutionally aligned

---

139 Onsare David Achochi, "Impact of Court Intervention on Arbitration in Kenya", A Thesis Submitted to the Faculty of Law of the University of Nairobi in partial fulfilment of the requirements for the Degree of Master in Law in Corporate and Financial Law, 10th October, 2023, available at https://erepository.uonbi.ac.ke/bitstream/handle/11295/166443/Onsare%20D_Impact%20of%20Court%20Intervention%20on%20Arbitration%20in%20Kenya%20a%20Thesis%20Submitted%20to%20the%20Faculty%20of%20Law%20of%20the%20University%20of%20Nairobi.pdf

140 Irene Nyamasi, Nairobi Centre for International Arbitration, "Research Report on Awareness, Perception and Uptake of Alternative Dispute Resolution in Kenya", June 2021 available at https://ncia.or.ke/wp-content/uploads/2021/08/2021-RESEARCH-REPORT.pdf

dispute resolution mechanism.

6. Future Outlook: Strengthening Arbitration Integrity in Kenya

6.1 Legislative Reforms

To maintain arbitration as a trusted judicial mechanism, Kenya must refine its legal framework. A priority is amending the Arbitration Act to clarify when hearings should remain private and when transparency must take precedence, ensuring that confidentiality does not become secrecy. Article 50 mandates open justice, necessitating clear provisions balancing privacy and public interest.

Ethics oversight also needs strengthening. Arbitrators, wielding judicial power under Article 1, should adhere to a standardized code of conduct, with automatic reviews for misconduct. Any amendments must align with Articles 159 (ADR promotion) and 165 (High Court oversight), ensuring courts supervise arbitration without encroaching on its autonomy. Legislative refinements will reinforce Kenya's commitment to constitutional arbitration principles.

6.2 Institutional and Regulatory Enhancements

Beyond legislation, institutional and regulatory measures must strengthen disciplinary mechanisms. CIArb and NCIA should enhance clear, efficient enforcement of ethical standards. Swift and transparent investigations into misconduct will deter unethical behaviour and bolster confidence in arbitration.

A universal code of conduct for all arbitrators—regardless of affiliation—should eliminate loopholes. Standardized rules on conflicts of interest, ex parte communications, and impartiality will level the playing field. Additionally, publishing awards in public-interest cases will enhance accountability, reinforcing public trust in arbitration.

6.3 Embracing Technology for Integrity

Online Dispute Resolution (ODR) platforms can modernize arbitration by recording hearings, storing evidence securely, and improving transparency. Real-time digital logs can track submissions, access history, and procedural decisions, enhancing arbitrator accountability.

Balancing privacy with Article 50(1)'s presumption of a public hearing, semi-public hearings could allow limited observer access without exposing sensitive details. Live feeds for registered stakeholders could maintain transparency while preserving discretion. These measures prevent evidence tampering and unethical practices, aligning arbitration with modern digital standards.

6.4 Capacity Building and Public Awareness

For arbitration to be effective, citizens must understand their rights.[141] National awareness campaigns can inform Kenyans that Article 50(1) grants them the choice between arbitration and courts. Radio, social media, and community outreach can clarify arbitration's constitutional foundations and practical benefits.

Training programs should equip arbitrators, judges, and legal practitioners with deeper knowledge of constitutional arbitration standards. Arbitrators must recognize their role as judicial actors, while courts should learn how to balance minimal interference with effective oversight. Widespread legal education ensures that all actors in arbitration uphold constitutional principles.

6.5 International and Regional Perspectives

Kenya aspires to be a regional ADR hub, drawing lessons from ICC, LCIA, and global best practices. Transparent appointment processes, ethical frameworks, and efficient case management will help Kenya attract cross-border disputes and bolster investor confidence.

However, any adoption of international standards must align with Kenya's constitutional framework. Arbitration in Kenya derives its authority from the people (Article 1), meaning global norms must harmonize with local principles of fairness, impartiality, and accountability. Kenyan arbitration should integrate global best practices while preserving its constitutional ethos, ensuring it remains a legitimate extension of sovereign judicial power.

141 Article 10(2)(a) of the Constitution, available at *https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03*

7. Recommendations

7.1 Constitutional Alignment and Legislative Action

To uphold arbitration as an extension of sovereign judicial power, Kenya must systematically review the Arbitration Act and related regulations.[142] Articles 1(2), 1(3)(c), and 50(1) affirm that arbitration must maintain transparency, impartiality, and accountability. Strengthening public hearing provisions, except where confidentiality is justified under Article 50(8), would prevent secrecy from facilitating misconduct. Additionally, a codified ethics framework should establish clear reporting and enforcement mechanisms, reinforcing that arbitrators—like judges—must operate under strict public scrutiny.

7.2 Institutional and Professional Reforms

Integrity in arbitration hinges on practitioner competency and accountability. While some institutions enforce codes of conduct, standardized accreditation, mandatory ethics training, and CPD programs should be universally required. A strengthened disciplinary board must swiftly investigate and penalize misconduct, ensuring consistent enforcement.

Inter-institutional collaboration is key. Aligning guidelines, training, and ethics enforcement across Kenya's ADR sector would deter "ethics shopping" and uphold uniform professional standards. A well-regulated arbitration system would enhance public confidence, ensuring arbitrators consistently exercise judicial power with integrity.[143]

7.3 Public Empowerment

For arbitration to be truly effective, public awareness campaigns must inform

142 Sessional Paper No. 4 of 2024 on "The National Alternative Dispute Resolution Policy" published by the Office of the Attorney General and Department of Justice, available at https://ciarbkenya.org/wp-content/uploads/2024/08/SP-7179-Sessional-paper.pdf

143 Sessional Paper No. 4 of 2024 on "The National Alternative Dispute Resolution Policy" published by the Office of the Attorney General and Department of Justice, available at https://ciarbkenya.org/wp-content/uploads/2024/08/SP-7179-Sessional-paper.pdf

citizens of their right to arbitration and how to identify qualified, ethical arbitrators. Easily accessible resources should highlight key arbitration principles, ethical safeguards, and dispute resolution red flags. Community-driven outreach is equally crucial. County governments, grassroots leaders, and ADR institutions should work together to integrate arbitration principles into local justice systems. This would enable communities to embrace arbitration as a culturally relevant, constitutionally supported alternative to court proceedings. Such initiatives would demystify arbitration, making it an accessible, credible avenue for resolving disputes.[144]

7.4 Ongoing Monitoring and Research

Kenya's arbitration system requires continuous assessment to maintain integrity. Systematic data collection on arbitration duration, costs, enforcement rates, and user satisfaction would help pinpoint areas requiring reform. Establishing oversight committees within ADR institutions or government agencies could enhance compliance monitoring, issuing regular transparency and accountability reports. Periodic evaluations would ensure that constitutional benchmarks—independence, fairness, and due process—remain upheld. A data-driven approach to arbitration integrity would foster public trust, regulatory consistency, and long-term sustainability in Kenya's evolving justice system.[145]

8. Conclusion

Arbitration in Kenya is not just an alternative to litigation but a direct exercise of the people's judicial power.[146] The Constitution mandates arbitrators, like judges, to uphold integrity, impartiality, and transparency, ensuring arbitration remains

144 Judiciary of Kenya, 2020, "Alternative Justice Systems Baseline Policy", https://www.unodc.org/documents/easternafrica//Criminal%20Justice/AJS_Baseline_Policy_2020_Kenya.pdf

145 Judiciary of Kenya, 2020, "Alternative Justice Systems Baseline Policy", https://www.unodc.org/documents/easternafrica//Criminal%20Justice/AJS_Baseline_Policy_2020_Kenya.pdf

146 Articles 1 and 159 of the Constitution, available at https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

a credible dispute resolution mechanism.[147]Kenya's arbitration history blends indigenous trust-based systems with modern legal frameworks, yet challenges persist—corruption, ethical oversight gaps, and transparency concerns. Addressing these issues requires continuous reforms, institutional collaboration, and public awareness to strengthen arbitration's role in delivering justice.

Kenya has the potential to be a leader in African ADR. By refining policies, integrating technology for transparency, and investing in capacity building, the nation can reinforce public trust and arbitration integrity. Aligning arbitration with constitutional principles ensures that arbitrators remain faithful stewards of the people's power, safeguarding fairness and justice for all.[148]

147 Article 10 of the Constitution, available at https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03
148 Articles 10, 50 and 159 of the Constitution, available at https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03

Bibliography

Books and Articles

McConkie Jr., D. S. (2024). *Promoting and Reforming Kenya's Customary Justice Systems in Criminal Cases*. *Emory International Law Review, 38*(2), 343-372. Retrieved from https://scholarlycommons.law.emory.edu/eilr/vol38/iss2/2.

Muigua, K. (2017). *Settling Disputes Through Arbitration in Kenya*. Available at https://kmco.co.ke/wp-content/uploads/2021/10/Arbitration-Book.pdf.

Muigua, K. (2022). *Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future*. *Alternative Dispute Resolution (ADR) Journal*, *10*(1), Chartered Institute of Arbitrators – Kenya Branch.

Muigua, K. (2018). *Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya 2010*. Retrieved from https://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf.

Muigua, K. (2024). *Strengthening Ethics in Arbitration in Africa*. *Alternative Dispute Resolution (ADR) Journal*, *12*(2), Chartered Institute of Arbitrators – Kenya Branch.

Caher, C., & Lim, J. (2019). *Regulation of Counsel and Professional Conduct in International Arbitration*. *International Comparative Legal Guide to International Arbitration 2019*. Available at https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/documents/20190827-iclg-regulation-of-counsel-and-professional-conduct-in-international-arbitration.pdf.

Onsare, D. A. (2023). *Impact of Court Intervention on Arbitration in Kenya*. Master's Thesis, University of Nairobi. Retrieved from https://erepository.uonbi.ac.ke/bitstream/handle/11295/166443/Onsare%20D_Impact%20of%20Court%20Intervention%20on%20Arbitration%20in%20Kenya.pdf.

Barasa, G. M. (2025). *Mediation Ecosystem in Kenya: Current Trends and Future Prospects*. Nairobi Centre for International Arbitration. Available at https://ncia.or.ke/wp-content/uploads/2025/01/Mediation-Ecosystem-in-Kenya.pdf.

Legislation and Policy Documents

Republic of Kenya. (2010). *Constitution of Kenya, 2010*. Nairobi: Kenya Law. Available at https://new.kenyalaw.org/akn/ke/act/2010/constitution/eng@2010-09-03.

Republic of Kenya. (1995). *The Arbitration Act (Cap. 49)*. Nairobi: National Council for Law Reporting. Available at https://new.kenyalaw.org/akn/ke/act/1995/4/eng@2022-12-31.

Nairobi Centre for International Arbitration (NCIA). (2021). *Code of Conduct for Arbitrators, 2021*. Available at https://ncia.or.ke/wp-content/uploads/2021/07/3.-NCIA-CODE-OF-CONDUCT-FOR-ARBITRATORS-2021.pdf.

Judiciary of Kenya. (2020). *Alternative Justice Systems Baseline Policy*. Available at https://www.unodc.org/documents/easternafrica//Criminal%20Justice/AJS_Baseline_Policy_2020_Kenya.pdf.

Office of the Attorney General and Department of Justice. (2024). *Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy*. Available at https://ciarbkenya.org/wp-content/uploads/2024/08/SP-7179-Sessional-paper.pdf.

International Arbitration Resources

International Centre for Settlement of Investment Disputes (ICSID). (2022). *Confidentiality and Transparency – ICSID Convention Arbitration (2022 Rules)*. Available at https://icsid.worldbank.org/procedures/arbitration/convention/confidentiality-transparency/2022.

ICC Commission. (2024). *Red Flags or Other Indicators of Corruption in International Arbitration*. *ICC Dispute Resolution Bulletin, Issue 2024-2*. Available at https://iccwbo.org/wp-content/uploads/sites/3/2024/12/2024-ICC-Red-Flags-or-Other-Indicators-of-Corruption_ICC-DRS-Bulletin.pdf.

Schiffer, L. P. (2021). *Party-Appointed Arbitrators on the Precipice*. *NAMADR Publications*. Available at https://www.namadr.com/publications/party-appointed-arbitrators-on-the-precipice/.

Gibbons, D. W. (2024). *The Apprehension of Bias in Arbitral Proceedings: A Cautionary Tale for Counsel and Arbitrators*. Available at https://adric.ca/en/the-apprehension-of-bias-in-arbitral-proceedings-a-cautionary-tale-for-counsel-and-arbitrators/.

World Duty Free Co. Ltd. v Republic of Kenya. *ICSID Case No. ARB/00/7*. Available at https://www.iisd.org/itn/2018/10/18/world-duty-free-v-kenya/.

American Bar Association. (n.d.). Alternative Fee Arrangements. Available at https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/alternative_fees/.

Arbitrator Integrity Caselaw - Kisumu National Polytechnic v Messrs Cell Arc System Limited [2019] eKLR

Analysed by Paul Ngotho, HSC, LL.M, Chartered Arbitrator
Arbitrator: Mr Festus Litiku.
Judge: Hon. Lady Justice Mary Kasango.
Court Ruling date: 28th February 2019

Abstract

One of the unforgivable sins is when an arbitrator meets one party secretly in the absence of the other one. Nothing erodes the other party's or the court's confidence in the arbitrator and in the arbitral proceedings faster or more fatally than the discovery of a pre-planned and undisclosed meeting between an arbitrator and one party.

Belated explanations and declarations of good intentions cannot undo the harm or attract any sympathy. Indeed, it seems like the oft-touted presumption of innocent until proven guilty does not apply: an arbitrator who takes part in an *ex-parte* communication is presumed to be guilty.

In this case, the court set aside the arbitration award. That decision, though well-grounded in itself, raises the issue of the court's jurisdiction as the arbitrator's conduct had not previously been challenged in the arbitration proceedings as stipulated in s. 14.(2) of the Act. Perhaps that angle was missed because there is no record of any defence being filed either by the respondents or the arbitrator.

Introduction

Kisumu National Polytechnic ("**the Applicant**") is a state corporation while Messrs Cell Arc System Limited is "**the Respondent**". They entered a contract, which had an arbitration agreement, on 30th September 2010.

Once a dispute arose, the Chartered Institute of Arbitrators, the designated default appointing authority, appointed Mr Festus Mukunda Litiku as the sole arbitrator

("**the Arbitrator**" or "**Mr Litiku**"), who heard the parties and published an award dated 4th May 2018. The Applicant filed a Notice of Motion dated 5th July 2018 to set-aside that award in the High Court.

The Applicant alleged that the Arbitrator's award was:

> "tainted with gross *mala fides*, undue influence, fraud, dishonesty and was in flagrant breach of the common law and common decency." (Emphases added.)

It accused the Arbitrator of:

> "i. Personally visiting the applicant's (the Polytechnic) premises during the pendency of the Arbitration contrary to the Arbitration Rules with a view to solicit for inducement.
> ii. Inordinate delay in releasing the award despite communication to the parties eight months prior vide a letter dated 10th May 2017 indicating that the Final Award was ready.
> iii. The Sole Arbitrator unreasonable attributing the delay in publication to supposed changes he was making to the final award pursuant to the visit to the applicant (the Polytechnic) premises." (Emphases added.)

The case was decided purely on the finding with respect to issue no. (i) above. The court ruling dated 28th February 2019 ("**the Ruling**") rendered unnecessary the determination of the two other issues above and of the Respondent's chamber summons dated 17th September 2018 for the adoption of the award.

The Facts

The Arbitrator, on receiving a letter dated 23rd May 2018 from the Applicant's advocate objecting to the visit, responded in a letter dated 28th May 2018 ("**Mr Litiku's Letter**") to the Applicant or to the parties - it is not clear from the Ruling whether that letter was copied to the Respondent.

Mr Litiku's Letter was filed in Court, which reproduced part of it *verbatim* in Para 9 of the Ruling as follows:

> "The visit to Kisumu Polytechnic was not a solicitation visit as you allege but rather was prompted by the fact that despite **my letters**, no response was being received and it was not clear whether **my letters** were being received.
> When I happened to be in Kisumu on other business, I decided to check on whether the institution was aware of its obligations under the arbitration to avoid possible accusation of not having made sufficient effort to communicate with them.
>
> **I saw the principal in the presence of the principal's son**, and, upon the principal's assurance that the respondent (the Polytechnic) would attend to them, I left while **her son was still in her office**." (Emphases added.)

The three statements above are in fact in one paragraph, which the reviewer has broken into three for ease of reading. We learn that the meeting took place in the principal's office. Ms. Joyce Nyanjoni, principal, filed an affidavit deponing that the Arbitrator:

> "unprocedurally visited the Polytechnic premises with a view to solicit inducement which the principal flatly declined to give the Sole Arbitrator."

The Arbitrator was not a party in the court proceedings and did not appear or file an affidavit. However, Mr Litiku's Letter served as his defence in court for all practical purposes.

The Law
The Court considered that:

> "The Arbitrator confirmed having visited the Polytechnic premises. Not only is that against the CIArb (Kenya Branch) Arbitration rules but it creates an impression of biaseness.
>
> The Arbitrator should not have visited the Polytechnic premises in the absence of Cell ARC. Such a contact of one party in the absence of the other before the Arbitral Award is published no doubt contrary to section 35 (2) (vi) of the Arbitration Act, which provides:-
>
> > "An Arbitral Award may be set aside by the High Court if:-
> > (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption."'

The Court relied on *Chania Gardens Limited v. Gilbi Construction Company Limited & Another (2015) eKLR* and *Muriithi Wanjao T/A Wanjao & Wanjau Advocates v. Samuel Mundati Gatabaki & Another (2015) eKLR* in which the courts stated as follows, respectively:

> ""The test whether a person is in a position to act judicially and without any bias has been suggested to be: *do there exist grounds form which a reasonable person would think that there was a real likelihood that the Arbitrator could not or would not fairly determine…(the dispute)… on the basis of the evidence and arguments to be adduced before him*."
>
> "… where a party alleges the way in which award was procured was contrary to public policy, it will normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct on part of … either Respondent or the Arbitrator acted in any manner that would lead the Court to the determination that there was interference with the final Arbitral Award." (Emphases added.)

Incidentally, Mr Litiku was the 2nd respondent in the *Chania Gardens case* above, which was a double-barreled application for his for removal of the arbitrator under s. 14 and a challenge of his jurisdiction under s. 17 of the Arbitration Act 1995. The

application was dismissed on 5th March 2015 for numerous reasons and technicalities, including the fact that his alleged bias and misconduct had not first been raised before him as stipulated in s. 14. (2) of the Act.

The Court Decision

The Court noted that the Applicant did not have to prove the Arbitrator's visit since the Arbitrator had admitted, in his letter of 28th May 2018, to having visited the Applicant. The ratio is found at Para 16 of the Ruling where it states that:

> "Although there is no evidence before me that the Arbitrator was fraudulent or that he received a bribe, however in the eyes of those who may know that he visited the Polytechnic there may be suspicion that **something untoward occurred**. That alone proves, on a balance of probability, a basis to set aside the Arbitral Award." (Emphases added.)

The Court, on its own motion, dismissed the allegation that the arbitrator had been fraudulent.

As for bribery, no such allegation had been made that the arbitrator had received a bribe – the case as captured in the Ruling does not state exactly what the Arbitrator is alleged to have solicited and what the principal, had, according to her affidavit, "flatly declined to give the Sole Arbitrator."

The Court was kind enough to the Arbitrator to dismiss the baseless allegation that he had been fraudulent. It also cleared his name from having "received" a bribe. However, it did not make a finding or comment on whether he had solicited for inducement. Ms Nyanjoni was emphatic, in her affidavit, that the arbitrator's visit was a solicitation mission. The statement was made in court on oath and not controverted.

The Court set aside the award. Each party was ordered to bear its own cost "since the setting aside of the Arbitral Award cannot be attributed to any party".

Commentary

The Court took a very dim view of the *ex parte* meeting between the Arbitrator and one party. It was not impressed by Mr Litiku's declaration of good intentions or his claim that Ms Nyanjoni was accompanied by her son during the Arbitrator's unsolicited and most unwelcome visitation.

This is not a case where a party looks for an arbitrator to hold a *tête-à-tête*. Mr Litiku himself initiated the *ex parte* meeting, which was admittedly to discuss the arbitral proceedings. The reluctant hostess, who rightly officially complained of the Arbitrator's unsolicited visit, told court in an uncontroverted affidavit, that Mr Litiku's visit was for solicitation, which she flatly refused, but does not state what exactly the Arbitrator had asked for.

His allegation that he just "happened to be in Kisumu on other business" and claims that he had the best of intentions carried no weight in court. He says twice in his letter of 28th May 2018 that Ms. Nyanjoni's son was present during the meeting. The Court did not consider that significant.

It is the party which held a meeting with the Arbitrator which is complaining, not the absent party. It is also worth noting that it appears like the *ex parte* meeting took place just before, or was discovered soon after, the release of the Award. Therefore the parties did not have an opportunity to challenge the Arbitrator in the arbitral proceedings under s. 14. (2) of the Act as in the *Chania Gardens case.*

The Judge refers to the Applicant's counsel as "Learned Advocate" on the only occasion where she refers to his or her. She does not extend the corresponding courtesy to the Arbitrator. She confidently refers to him as "the Arbitrator" and "the Sole Arbitrator" 15 times in her short ruling and not as the "Honourable Arbitrator" or "Honourable Sole Arbitrator" even once. That must be deliberate.

S. 35. (2)(a)(vi) gives the High Court powers to set aside arbitral awards "where the making of the award was induced or affected by fraud, bribery, undue influence or corruption." S. 37. (1)(a)(vii) has a similar provision on refusal to

recognise or enforce such an award. However, generally, the setting aside of an award does not prove or even suggest any wrongdoing by the arbitrator.

Epilogue & Legacy

Mr Litiku says refers twice to "my letters" in his letter of 28th May 2018. That is odd. Judges and arbitrators issue directions, rulings and orders etc, not letters.

The Court did not identify or record the nature of inducement allegedly sought by the Arbitrator. Ms Nyanjoni does not give details of the inducement, which she swears that Mr Litiku sought from her and which she claims to have "flatly declined". The Ruling does not go there either. Three things are worth noting in this regard. First, Mr Litiku states, not once but twice, in one paragraph, that her son was present throughout their meeting. Second, Ms Nyanjoni has not confirmed that his son was present throughout the meeting. Third, the statement from Mr Litiku is in a letter to Ms Nyanjoni and not in an affidavit.

The case stands out for many reasons. The top three are that the *ex parte* meeting was initiated by the Arbitrator, the uncontroverted sworn evidence that the purpose of the meeting was solicitation and that the goods or services which were allegedly solicited remain unidentified. This is perhaps the most disgusting reported case of arbitrator misconduct anywhere in the world.

It could be that some of the disturbing features of this case led the judge to write a a particularly short decision, which has 1221 words and runes to 3 pages - more than half of the first page is made up of the citation while the third page merely has the date, the judge's signature. In effect, the ruling is in 1.5 pages and 19 short paragraphs.

Mr Litiku, who passed away on 17th April 2024, was a pioneer Quantity Surveyor and an experienced arbitrator. His conduct in this case is inexcusable. However, as other Kenyan court cases show, arbitrator misconduct, corruption and lack of integrity have been found among seasoned lawyers and retired judges. Analyses

of such cases will be presented to this Journal for publication and will in any event be published in one of the reviewer's upcoming arbitration books. Stay tuned.

Enforceability of multi-tiered dispute resolution clauses: The Kenyan Experience

By: ***Eric Thige Muchiri****

Abstract

Multi-tiered dispute resolution clauses are clauses in contracts which provide for distinct stages, involving separate procedures, for dealing with and seeking to resolve disputes. Such clauses typically provide for certain steps and efforts to be taken by the parties prior to arbitration or litigation. Typically, the initial tiers provide for negotiations, mediation or expert determination processes. If such tiers fail, the clause usually provides for either litigation or arbitration. Enforceability of multi-tiered dispute resolution clauses entails holding parties to their bargains as stipulated in their contract.

Some recent court cases indicate that litigants institute arbitration references or court cases without considering and exhausting the steps stipulated in the dispute resolution clauses in their contracts. Some Courts or Tribunals do strike out or stay suits or references because of failure to follow the steps provided. The article elucidates the enforceability of such multi-tiered dispute resolution clauses as informed. Are they mandatory and enforceable? Are they binding as conditions precedent before the arbitration or litigation?

A contract binds parties to their bargains and if it includes a multi-tiered dispute resolution clause, then a Tribunal or a Court ought to hold the parties to follow the said clause. The same is akin to party autonomy in arbitration that gives parties the right to choose how their disputes will be resolved through arbitration. The article argues that both Courts and Tribunals ought to hold parties to their contract unless reasons exist that erode such binding nature of a contract.

---

* *Partner, Muri Mwaniki Thige & Kageni LLP Advocates*
Telephone: 0724 405 924
Email address: thigeric@gmail.com
Postal address: P.O. Box 105570 – 00101, Nairobi

I wish to thank Prof. Bernard Murumbi Sihanya. and Dr. Agnes Meroka for their invaluable comments to the initial drafts of the article.

The article is informed by an analysis of decisions from the Courts on enforceability of multi-tiered dispute resolution clauses. Such decisions render an insight on how Courts have handled either the litigation cases or arbitration cases in which a party may not have followed the set procedures.

The article is a guide to any party that is involved in a dispute in which a contract has a multi-tiered dispute resolution clause, and when drafting such a clause. It will also be of assistance to Courts and Tribunals when called to decide on such an issue. It will also add to the knowledge on dispute resolution.

1. Introduction

Multi-tiered dispute resolution clauses are clauses in contracts which provide for distinct stages, involving separate procedures, for dealing with and seeking to resolve disputes.[1] Such clauses typically provide for certain steps and efforts to be taken by the parties prior to arbitration or litigation.[2] Typically, the initial tiers provide for negotiations, mediation, or expert determination processes.[3] If the dispute cannot be resolved through such initial tiers, the clause usually provides for escalation to either litigation or arbitration.[4]

The tiers start with non-adjudicative methods of dispute resolution and ends with adjudicative methods. The initial tiers such as negotiations, mediation, or expert determination processes are aimed at attempting to resolve the dispute cordially.[5] In that way, the dispute can be resolved cheaply and timeously.[6] Furthermore, cordial resolution of disputes permits the parties to maintain their business relationship devoid of animosity.[7] This is key to long term business relationships

[1] Alexander Jolles, 'Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement', (2006) 72 Arbitration 4, 329, at 329
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses' (2010) 27 (6) Journal of International Arbitration, 551, at 553.
[7] Ibid.

that may be broken down if any dispute has to be settled through acrimonious, costly and lengthy arbitration or litigation.[8] Also, the initial tiers are advantageous in complex contracts where disputes can be referred for settlement to structures and offices within the projects.[9] In this way, disputes are resolved at the bud and the contract can be carried out smoothly and cost-efficiently.[10]

Multi-tiered dispute resolution clauses pose the risk of delaying prompt access to justice especially if not properly drafted.[11] A party may be seeking finality of a dispute, but such a clause may be binding him to proceed through the initial tiers before accessing the adjudicative tiers.[12] Whereas such delay can be cured by interim measures either from the arbitrator or judge, the time and cost involved in applying for, and obtaining, the measures may be inimical to the advantages of having had the multi-tiered clause in the first place.[13]Thus, instead of achieving efficiency in resolving disputes, the clauses may be used to delay and deny justice.[14]

Issues on enforcement of such clauses arise when a party does not comply with the non-adjudicative part of the dispute resolution and jumps straight to the adjudicative part.[15] For example, when a party files suit or commences an arbitration without having attempted to negotiate or mediate the dispute. The question turns to whether the initial tiers are mandatory or not, and how the adjudicative tiers of arbitration or litigation should determine the issue.

---

[8] Klaus Peter Berger, 'Law and Practice of Escalation Clauses', (2006) 22 (1) Arbitration International 1 at 3.
[9] Hazron Maira, 'Enforcement of Multi-tiered Dispute Resolution Clauses', (2020) 8 (2) Alternative Dispute Resolution 110, at 111 to 112.
[10] Kayali, note 6.
[11] Jolles note 1 at 332 – 337.
[12] Ibid.
[13] Gary Born and Marija Šćekić, 'Pre-Arbitration Procedural Requirements 'A Dismal Swamp', (2015) Practising Virtue – Inside International Arbitration, at 250 to 251 available at <https://www.wilmerhale.com/insights/publications/2016-11-12-pre-arbitration-procedural-requirements-a-dismal-swamp > as accessed on 16 June 2024
[14] Ibid at 228.
[15] Ibid.

2. The tiers

The various tiers included in a multi-tiered dispute resolution clause are methods of alternative dispute resolution and include negotiation, mediation, and expert determination.[16]

2.1. Negotiation

Negotiation is a method that enables parties solve their disputes and reach an agreement without the help of a third party and in an informal setting.[17] It involves the managers of the disputants - or their representatives - having discussions on the dispute and creating solutions "that satisfy both the mutual and individual interests".[18] Usually, the negotiations will be carried out on a without prejudice basis, which enables the parties to negotiate freely and without fear that any statements or admissions they make in an attempt to reach a settlement may be used against them in subsequent litigation or arbitration.[19]

In a multi-tiered dispute resolution clause, negotiation if used well can effectively solve any dispute at its infancy and thereby sustain a business relationship.[20] It offers a win-win solution for the parties and also allows for "cooling-off" which can save the parties on costs and time of escalating the dispute to other resolution mechanisms.[21]

---

[16] Kariuki Muigua, 'Alternative Dispute Resolution and Article 159 of the Constitution' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADRAND-ARTICLE-159-OF-CONSTITUTION.pdf> as accessed on 17 June 2024, 2.
[17] Ibid.
[18] Ibid at 8.
[19] See Court of Appeal of Kenya in *Heineken East Africa Import Company Limited & another v Maxam Limited* [2024] KECA 625 (KLR) at paras 85 and 87; also, Supreme Court of the United Kingdom in *Oceanbulk Shipping and Trading SA vs TMT Asia Limited and 3 others* [2010] UKSC 44 at para 19.
[20] Born and Šćekić, note 13 at 230.
[21] Ibid at 234.

2.2. Mediation

Mediation is a voluntary, non-binding dispute resolution process in which a third party (mediator) assists the parties in negotiating a written and signed settlement of a dispute.[22] A mediator may assist to break a deadlock between parties who had been previously negotiating, and further the negotiations in a way that the parties reach a settlement.[23] In a multi-tiered dispute resolution clause, mediation can be used as the second tier after negotiations, that is if negotiations on a dispute fail, the dispute can be referred to a mediator to try and see if the parties can settle the dispute. In this way, mediation is seen as "continuation of the negotiation process in the presence of a third party".[24]

Similar to negotiation, it offers a win-win solution to both parties; it is a cost-effective and flexible dispute resolution method; and it provides a "cooling off" forum for the parties.[25] On the other hand, since it depends on the cooperation of the parties, and it is non-binding, it may be used as a dilatory tactic leading to delay and denial of justice.[26]

2.3. Expert determination

In contracts that may involve technical disputes such as engineering, quantity surveying, accounting, expert determination offers a method of resolution in which the parties may refer the dispute to an expert in that field for quick resolution.[27] The expert decides the dispute according to his expertise in the area and gives a decision which is binding.[28] Unlike an arbitrator who is immune from his actions carried out in good faith, an expert determinant may be liable for negligence while carrying out his duties.[29] Expert determination has been implemented in the construction industry where in major construction contracts

[22] Muigua, note 16 at 9.
[23] Ibid at 10.
[24] Ibid at 10.
[25] Born and Šćekić, note 13 at 234
[26] Muigua, note 16 at 10.
[27] Ibid at 19.
[28] Kayali, note 6 at 554
[29] Ibid.

disputes are referred to adjudication by an expert whose preliminary finding may be subject to review by arbitration.[30] These dispute boards operate throughout the contract to settle disputes as and when they occur.[31]

2.4. Arbitration

Arbitration is a consensual process by which parties choose a person (arbitrator) to determine their dispute and issue a decision with a final and binding effect.[32] It is an adversarial process that results in an award that is binding on both parties and can only be set aside on specific grounds in the Arbitration Act.[33] The Act also provides for the recognition and enforcement of the arbitral award as an order of the Court in case a party refuses to abide by the determinations by the arbitrator.[34] With such recognition and enforcement, the award mutates into a decree of the court through which a state's enforcement mechanism such as attachment of property and garnishee proceedings may be used against the defaulting party.[35]

Arbitration offers flexibility, confidentiality and privacy during dispute resolution.[36] Parties can also choose an expert to arbitrate their dispute and through less formalities, there is a heightened focus towards resolving a dispute.[37]If managed well, arbitration can lead to an expeditious resolution of a dispute.[38] Conversely, arbitration has at times turned out to be an expensive and arduous method of resolving disputes defeating the very purpose why the parties

---

[30] Ibid at 555.
[31] Ibid.
[32] Muigua supra note 16 at page 3. See also David Sutton, Judith Gill, Matthew Gearing, *Russell on Arbitration*, (23rd Ed., Sweet & Maxwell, 2007) at page 5.
[33] Arbitration Act, Cap. 49 of the Laws of Kenya, Government Printer. Available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2049> as accessed on 10 July 2024.
[34] Sections 36 and 37 of the Act.
[35] Ibid.
[36] Muigua supra note 16.
[37] Ibid.
[38] Ibid.

chose it as was demonstrated by the Court of Appeal in ***Nyutu Agrovet Limited v Airtel Networks Limited***[39] when it remarked that,

> "It has been variously said that the reasons parties choose arbitration is to save time, money and resolve disputes in an "amicable' way. The jury may still be out on those reasons because some arbitration proceedings take long and cost colossal sums of money and many still find their way back into the courts the parties desired to avoid in the first place."[40]

In a multi-tiered dispute resolution clause, arbitration is usually put as the last tier of the dispute resolution.[41] It is final and the award thereof is binding unlike the initial tiers.[42] Furthermore, arbitration is not a step before litigation because the arbitration award is final and binding.[43]

2.5. Litigation

Litigation is the process of resolving disputes through the court system through filing of pleadings, trial, judgment and appeal if any.[44] The judgment of a magistrate or a judge is final and binding unless set aside or appealed against to a higher Court.[45] Unlike the other consensual processes, litigation does not depend on the consent of all the parties to a contract as Courts serve all people.[46] Barring any contrary contractual provisions, courts will hear and determine matters within their jurisdiction in accordance with the laws of the land.

---

[39] [2015] eKLR
[40] Ibid at pages 5 and 6. See also Robert N. Dobbins, 'The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity', (2005) 1 Hastings Bus. L.J. 159 at 174 Available at <https://repository.uchastings.edu/hastings_business_law_journal/vol1/iss1/6> as accessed on 10 July 2024.
[41] Jolles, note 1 at 329.
[42] Ibid.
[43] Section 32 of the Arbitration Act.
[44] Kariuki Muigua, *Settling Disputes through Arbitration in Kenya*, (4th Ed., Glenwood Publishers Ltd, 2022) at page 19.
[45] Ibid.
[46] Ibid.

Furthermore, parties do not get to choose the judge for their matter. Moreover, privacy concerns in a dispute are subject to the principle that justice must be seen to be done[47], which is also captured in the constitutional right to a public hearing.[48] Thus, subject to a few exceptions, court hearings must be conducted in the public and their judgments must be published.[49]

In a multi-tiered dispute resolution clause, the parties may provide for litigation as the last resort.[50] Nevertheless, even if they do not, any party that suffers loss in a contract is at liberty to approach the Court as access thereof does not depend on the consent of the other party.[51] It is unlikely that parties would insert a multi-tiered resolution clause with negotiation and mediation initial tiers affording them with the appurtenant benefits only to have litigation as the final tier which reverses such benefits.[52] It is likely that the parties would have arbitration as the final and binding tier as it affords many of the benefits akin to the initial tiers.[53]

3. Models and practical examples of multi-tiered dispute resolution clauses in Kenya

In Kenya, some dispute resolution centres have developed model multi-tiered dispute resolution clauses that parties can insert into their contracts.

---

[47] Per Lord Hewart CJ in R v Sussex Justices, ex parte McCarthy [1924] KB 256, "*But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done*".

[48] Article 50 (1) of the Constitution of Kenya provides that "*every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body*".

[49] Lord Burnett of Maldon, Lord Chief Justice, 'Open Justice Today' (Commonwealth Judges And Magistrates Conference 2023, Cardiff, 10 September 2024). Available at< https://www.judiciary.uk/wp-content/uploads/2023/09/Open-Justice-CMJA-2023-FINAL-11-Sep.pdf> accessed 10 January 2025.

[50] Jolles, note 1 at 329.

[51] Ibid.

[52] Kayali, note 6.

[53] Ibid.

3.1. Strathmore Dispute Resolution Centre

The Strathmore Dispute Resolution Centre formulated 2 model mediation clauses that has tiered dispute resolution methods.[54] These are as follows:

3.1.1. Simple core mediation clause including time, plus reference to no court or Arbitration proceedings until mediation terminated:

"If any dispute arises in connection with this agreement, the parties will attempt to settle it by mediation in accordance with the SDRC Mediation Guidelines. Unless otherwise agreed between the parties, the Mediator will be nominated by SDRC within fourteen (14) days of notice of the dispute. To initiate the mediation a party must give notice in writing to the other party[ies] to the dispute requesting a mediation. A copy of the request should be sent to SDRC. Unless otherwise agreed, the mediation will start not later than twenty eight (28) days after the date of receipt of such notice. No party may commence any court proceedings/ arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay."

3.1.2. Multi-tiered process

"If any dispute arises in connection with this agreement, Directors or other senior representatives of the parties with authority to settle the dispute will, within fourteen (14) days of a written request from one party to the other, meet in a good faith effort to resolve the dispute.

If the dispute is not resolved at that meeting, the parties will attempt to settle it by mediation in accordance with the SDRC Mediation Guidelines. Unless otherwise agreed between the parties, the Mediator will be nominated by SDRC within fourteen (14) days of notice of the dispute. To initiate the mediation a party must give notice in writing to the other party(ies) to the dispute requesting a mediation. A copy of the request should be sent to SDRC. Unless otherwise agreed, the mediation will start not later than twenty eight (28) days after the date of receipt of such notice."

[54] Available at <https://sdrc.strathmore.edu/resources/model-documents/> as accessed on 10 July 2024.

> *The draftsperson has the choice to add Version 1 below, referring to court proceedings in parallel, or Version 2: no court proceedings until the mediation is completed.*
>
> *Version 1: "The commencement of a mediation will not prevent the parties commencing or continuing court proceedings/ arbitration."*
>
> *Version 2: "No party may commence any court proceedings/ arbitration in relation to any dispute arising out of this agreement until it has attempted to settle the dispute by mediation and either the mediation has terminated or the other party has failed to participate in the mediation, provided that the right to issue proceedings is not prejudiced by a delay."*

The two clauses bar any court or arbitral action unless and until the parties have attempted mediation. However, the wording of the clauses show that mediation is not mandatory or a bar to the court or arbitral process. They may have been worded so in underlining the voluntariness of mediation, but they may end up being used as dilatory tactics by parties intending to delay resolution of disputes despite the clauses stating otherwise.

3.2. Joint Building Council

In the construction industry in Kenya, the Architectural Association of Kenya and the Kenya Association of Building and Civil Engineering Contractors have developed a standard contract which is applicable to private construction projects. The contract is known as the Agreement and Conditions of Contract for Building Works of 1999 (the 'Joint Building Council' (JBC) '1999'). Clause 45 of the Contract provides as follows,

> *45.0 SETTLEMENT OF DISPUTES*
> *45.1 In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an*

> *Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of The Architectural Association of Kenya or by the Chairman or Vice Chairman of The Chartered Institute of Arbitrators, Kenya Branch, on the request of the applying party.*
> *45.2 The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this contract to the discretion of the Architect, or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation referred to in clause 34.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of contract.*
> *45.3 Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.*
> *45.4 Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without the assistance of third parties.*
> *45.5 In any event, no arbitration shall commence earlier than ninety days after the service of the notice of a dispute or difference.*
> *...*
> *45.10 The award of such Arbitrator shall be final and binding upon the parties.*

This clause mandates the parties to settle their disputes amicably (negotiations) with or without the assistance of third parties (akin to mediation). Other than those conditions precedent to the arbitration, the clause prescribes time-bound notices that a party needs to issue before it can commence arbitration. These notices support the attempts by the parties to settle the matter amicably failing which they can commence arbitration.

3.3. Architects and Quantity Surveyors (Amendment) By-laws, 2023.

The Board of Registration of Architects and Quantity Surveyors is established under the Architects and Quantity Surveyors Act.[55]The Board is mandated to make by-laws for the scale of fees charged by architects and quantity surveyors in their professional work. The current by-laws are the Architects and Quantity Surveyors (Amendment) By-laws, 2023[56]. In any dispute on conditions of engagement and scale of professional charges for an architect, or for a quantity surveyor, By-laws A-6 and A-7 provide for dispute resolution thus,

CV

> *"A.6 Disputes*
> *(a) Any difference or dispute arising out of the Conditions of Engagement and Scale of Professional Fees and Charges shall be referred to the Board in writing by either party, for determination.*
> *...*
> *(h) The Board shall communicate its findings to the parties in the dispute within a period not exceeding thirty (30) days after the parties have supplied the Board with all relevant documents.*
> *A.7. Arbitration*
> *(a) Where any difference or dispute arising out of the Conditions of Engagement and Scale of Professional Fees and Charges cannot be determined in accordance with clause A.6 of this Schedule, it shall be referred to arbitration.*
> *(b) The arbitration shall take place in Kenya and shall be conducted in accordance with the provision of the Arbitration Act (Cap. 49) of the Laws of Kenya.*
> *(c) The arbitrator shall be a person to be agreed between the parties, or failing agreement within fourteen days after either party has given the other a written request to concur in the appointment of an arbitrator, who may be nominated at the request of either party by the Chairman of the Board, President of the*

[55] Architects and Quantity Surveyors Act, Cap 525 of the Laws of Kenya, Government Printer. Available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20525> as accessed on 18 July 2024.
[56] Architects and Quantity Surveyors (Amendment) By-laws, 2023, Government Printer. Available at <https://boraqs.or.ke/wp-content/uploads/2023/09/L.-N.-188-THE-ARCHITECTS-AND-QUANTITY-SURVEYORS-ACT.pdf> as accessed on 18 July 2024.

> *Architectural Association of Kenya (AAK) or by the President of the Institute of Quantity Surveyors of Kenya (IQSK). The person shall be an architect, quantity surveyor or an engineer."*

3.4. Economic Partnership Agreement between the United Kingdom and Kenya

In 2020, Kenya and UK entered into a bilateral Agreement to facilitate trade in goods and increase access by Kenya to the UK market, while Kenya liberalises its market for goods in phases.[57] Part VII of the Agreement is on dispute avoidance and settlement and Article 109 (2) expressly provides and acknowledges that,

> The objective of this Part is to avoid and settle any dispute between the Parties concerning the interpretation and application of this Agreement in good faith and to arrive at, where possible, a mutually agreed solution.[58]

Part VII goes on to provide for a multi-tiered dispute resolution clause as follows:

a) Consultations in good faith as per Article 110,

b) Mediation, in case consultations fail, as per Article 111, and

c) Arbitration, in case mediation fails, as per Article 112.

Nevertheless, Article 111 (2) provides that either Party may proceed to arbitration under Article 112 without recourse to mediation.

---

[57] International Agreements Committee, *Scrutiny of International Agreements: Economic Partnership Agreement with Kenya, Trade in Goods in Agreement with Norway and Iceland, and Free Trade with Vietnam* (House of Lords, 2019 -2021) paras 1 – 3 available at < https://committees.parliament.uk/publications/4547/documents/46039/default/> as accessed on 13 July 2024.

[58] Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Kenya available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945516/MS_9.2020_Economic_Partnership_Agreement_UK_Kenya_Member_of_East_Africa_Community.pdf as accessed on 13 July 2024.

4. Issues on enforcement of multi-tiered dispute resolution clauses

Whereas enforcement of the final and binding tiers i.e., arbitration and litigation rarely raise any issues in enforcement, the contrary holds for the initial tiers of negotiations and mediation.[59] Sometimes parties ignore the negotiations and mediation tiers and leap to the final and binding arbitration or litigation tiers.[60] The question before an arbitrator or a judge turns to whether the reference or award is properly before him and whether he has jurisdiction to handle the matter.[61] If he has no jurisdiction, the award of an arbitrator would be set aside upon application to the High Court, or the judgment of the judge or magistrate would be set aside on appeal.[62]

Some commentators argue that as the initial tiers are voluntary and non-binding, the coercive powers of arbitration or litigation should not be made to bear on the parties.[63] By ruling that negotiations or mediation are mandatory, it strips the tiers of their voluntariness and their effectiveness.[64]Parties should be free to negotiate or mediate without undue influence and without the obligation to tick a box of the multi-tiered dispute resolution clause so as to reach the arbitration or litigation tiers.[65] Moreover, by the time parties commence an arbitration or file a suit, they may have taken such *rigid stands* through correspondence and informal discussions that arbitration or litigation is the only way to efficiently resolve the case.[66] In ***Visa International Ltd vs Continental Resources (Usa) Ltd***[67]**,** the

[59] Kayali supra note 6.
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Jacob, Kuruvila M, 'Multi -Tier Dispute Resolution Clauses and its Enforcement - Assessing the Indian Position' (2018). Available at < https://ssrn.com/abstract=3643455> as accessed on 10 January 2025.
[67] *Visa International Ltd vs Continental Resources (Usa) Ltd* Arbitration Petition No. 16 of 2007 available at https://indiankanoon.org/doc/1765502/ as accessed on 18 July 2024

Supreme Court of India while considering a multi-tiered dispute resolution clause that required amicable settlement before arbitration held thus,

> "[f]rom the correspondence exchanged between the parties at pages 54-77 of the Paper-book, it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other...The exchange of letters between the parties undoubtedly discloses that attempts were made for an amicable settlement but without any result leaving no option but to invoke arbitration clause."[68]

Furthermore, breach of the initial tiers can be treated as breach of any other term of contract and can be compensated by way of damages.[69] Also, an arbitrator or judge can consider such breach of the initial tiers in the award and assessment of costs of arbitration or the suit.[70]

The voluntariness of negotiation and mediation has also led to some jurisdictions viewing the tiers as "agreements to agree" which are unenforceable.[71] Thus, for example in the United Kingdom, in the case of ***Watford v. Miles***[72], the Court held that an agreement to negotiate, just like an agreement to agree, was unenforceable simply because it lacked the necessary certainty. In the words of the Court, "a bare agreement to negotiate has no legal content".[73]

There is also a view that parties should be held to their bargain as contained in the multi-tiered dispute resolution clause, and it is not for the Court to rewrite such bargains.[74] According to this view, the arbitrator or judge is to refuse to hear the matter unless and until the parties comply with, or exhaust, the initial tiers. Thus,

---

[68]*Ibid* at para 36.
[69] Kuruvila note 66.
[70] Kayali supra note 6.
[71] Ibid.
[72] *Watford v. Miles* [1992] 2 A.C. 128
[73] Ibid at 139.
[74] Kayali supra note 6 at 560. See also Stefan Krennbauer, 'Enforceability of Multi-Tiered Dispute Resolution Clauses in International Business Contracts' (2010) Vol. 1 Yearbook on International Arbitration 199 at 206.

the matter becomes admissible only when the initial tiers are complied with. For example, in ***C v. D***[75] the Court of Appeal of the High Court of Hongkong held that "*non-compliance with procedural pre-arbitration conditions such as a requirement to engage in prior negotiations goes to admissibility of the claim rather than the tribunal's jurisdiction*".[76]

5. Relevant cases in Kenya

Courts in Kenya have addressed themselves on multi-tiered dispute resolution clauses in several cases. Some of the cases are highlighted and discussed below.

5.1. *Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited*[77]

In this case, the parties entered into a Joint Building Council Contract whose dispute resolution clause was quoted above at 3.2, and which provides that arbitration can be commenced only if the parties have attempted "*to settle such dispute or difference amicably with or without the assistance of third parties.*" The parties did not make such an attempt, and the plaintiff filed a suit in Court which the defendant applied to stay and refer to arbitration as per Section 6 of the Arbitration Act and the dispute resolution clause in the contract. Upon considering the dispute resolution clause, the court held that,

> "It is very clear parties from the aforesaid clause cannot proceed for determination in an arbitral proceeding before an amicable settlement had been attempted. Attempt of an amicable settlement was a condition precedent before the dispute was referred to arbitration. Neither the Plaintiff nor the Defendant provided the court with any evidence to show that they had indeed attempted such amicable settlement. On this ground alone, the Defendant's application would automatically fail as referral to arbitration would be premature.

[75] [2022] HKCA 729
[76] Ibid at paragraph 43.
[77] [2014] eKLR

> Notwithstanding the above, it does not, however, mean that the Court would be powerless to refer the dispute to amicable settlement. The Supreme law and enacted legislation clearly show that the Court has power to refer dispute to Alternative Methods of Dispute Resolution."[78]

The Court refused to refer the matter to arbitration as it found that there was no dispute which could be referred to such a forum in which case the Court assumes jurisdiction.[79]

5.2. *Acme Apartments Limited v Deepak Krishna t/a Team 2 Architects & another* [80]

This case involved the Architects and Quantity Surveyors By-laws. The plaintiff brought a suit against its architect and quantity surveyor claiming, among other reliefs, damages for professional negligence and breach of contract in the construction of its apartments. The defendants applied to refer the dispute to arbitration as per Section 6 of the Arbitration Act arguing that the case was challenging their engagement in their professional capacities. Thus, they argued that the dispute ought to be referred to arbitration in accordance with the Architects and Quantity Surveyors By-laws. The Court interpreted the By-laws and found that a dispute to be referred to arbitration only the dispute resolution was sequentially followed, and a party could not refer a dispute to arbitration without exhausting the initial tiers of reference to the Board. In the words of the Court,

> 35. In the event of any question arising out of the conditions of engagement and scale of fees and charges the first port of call is a referral to the Board for advice by either the Architect or client (A.5). However, if the questions

[78] Ibid at paras 22 and 23.
[79] See also *West Mount Investments Limited v Tridev Builders Company Limited* [2017] eKLR in which the Court held that "the intention of clause 45.3 of the JBC Agreement, in my view was also to ensure that parties do not move to an adversarial process without first exploring an amicable avenue of resolving any identified and existing dispute".
[80] [2017] eKLR

> escalate to a difference or dispute then they shall be determined in accordance with clause A.6 or A.7.
> 36. Under clause A.6 any difference or dispute may be referred to the Board for an opinion. But there are three conditions to this referral. The reference must be by agreement of the parties. The opinion sought is on a joint statement of undisputed facts and lastly the parties undertake to accept it as final. In the matter before Court there is no agreement by the parties that this Dispute Resolution Mechanism be activated.
>
> 37. That has a clear implication as to whether A.7 on Arbitration can be triggered. This is because that Arbitration mechanism can be invoked or commenced only where any difference or dispute cannot be determined in accordance with paragraph (a) of clause A6 (See the provisions of clause A.6 reproduced in paragraph 34 of this Decision). As there is no agreement to actuate a reference under clauses A.6, a Referral to Arbitration cannot be reached.[81]

The Court went on to find that the dispute could not be referred to arbitration.

5.3. Southern Shield Holdings Limited v Tandala Investment Company Limited & 2 others[82]

The plaintiff and defendants were parties to a shareholders' agreement that had a dispute resolution clause which provided that any dispute would be resolved sequentially through consultations in good faith, mediation and arbitration. A dispute arose and the plaintiff filed a suit against which the defendants filed an application to refer to arbitration pursuant to Section 6 of the Arbitration Act.

In allowing the application, the Court held that the plaintiff had ignored a step in the dispute resolution process which they had agreed, and that the Court

[81] Ibid at 8.
[82] [2018] eKLR

would "*not allow a party, who is out to frustrate the agreement to take advantage of the other to avoid alternative dispute mechanism, that he/she agreed to bind him/her in case of any dispute, or claim or controversy*".[83]

The Court referred the parties to settle their dispute in accordance with the sequential consultation, mediation and arbitration as per their agreement.

5.4. Jatin Shantilal Malde & 9 others v Transmara Investment Limited & 2 others[84]

In this case, the petitioners petitioned the Court alleging and claiming damages for violations of their constitutional rights arising from a company they were shareholders in with the respondents. The respondents applied to refer the matter to arbitration under Section 6 of the Arbitration Act. The two parties had an agreement whose dispute resolution clause provided that,

> "17.1.1. In the event of any dispute, controversy or claim arising out of or in connection with this Agreement, either party (the "Requesting Party") may serve a formal written notice (the "Notice of Dispute") on the other Party that a dispute has arisen.
> 17.1.2 The Parties shall use their best endeavours to settle such dispute amicably within a period of thirty (30) days from the date on which the Notice of Dispute was served by the Requesting Party on the other Party.
> 17.1.3 If the Parties are unable to resolve the dispute within the period referred to in Clause 17.1.2, they shall refer the matter to arbitration as provided for in clause 17.2.
> 17.2 Any dispute which cannot be amicably resolved by the parties pursuant to clause 17.1 shall be referred to and finally settled by Arbitration in South Africa in accordance with the Rules of Arbitration of the International Chamber of Commerce, which Rules are deemed to be incorporated in reference to this into this clause."

[83] Ibid at 4.
[84] [2018] eKLR.

In allowing the application, the Court observed that a party which has not complied with the sequential steps of a dispute resolution clause should not be allowed to use such failure to its advantage in resisting an application to refer a dispute to arbitration. The Court held that,

> "I identify with this view otherwise Arbitral Agreements which have to be preceded with an attempt at amicable settlement will easily be circumvented by a party rushing to Court without first attempting amicable settlement and then resisting an application for Referral to Arbitration on the grounds that it is premature because amicable settlement was not given a chance. A party who ignores a step in a Dispute Resolution Process which has been freely agreed will not be allowed to take advantage of his/her misfeance to avoid an Arbitral Agreement."

5.5. County Government of Kirinyaga v African Banking Corporation Ltd[85]
The parties entered into an agreement which had a dispute resolution clause that read,

> "(a dispute) shall be (A) initially settled within 10 days by mutual discussions, negotiations and agreement between a negotiation team comprising of persons nominated by either party in the event that such discussions do not resolve the dispute within the said terms period the dispute shall (B) finally settled by the most current rules of Arbitration.

The plaintiff filed a suit against the defendant which the latter sought to refer to arbitration pursuant to the dispute resolution clause and Section 6 (1) of the Arbitration Act. In its decision, the Court found that the defendant did not tender evidence of any discussions or negotiations or an attempt thereof. Further, the court held that the discussions and negotiations were conditions precedent to the arbitration, and it would be premature to refer the matter to arbitration. In dismissing the application, the Court added,

[85] [2020] eKLR.

> The parties had agreed that the first step was to attempt negotiations in an attempt to reach an amicable resolution of the dispute if any. Strict enforcement of clause 26 would require that negotiations be done and before that is done the matter is not ripe for referral to arbitration. The prayer to refer the matter to arbitration must fail.[86]

5.6. ***Burn Manufacturing USA LLC v Sage South Africa (PTY) Limited***[87]

The parties to this suit were in a professional business services agreement which provided for a 3-tiered dispute resolution clause of negotiations in good faith in a Commercial Engagement Team; mediation; and arbitration. A dispute arose and the plaintiff filed suit claiming damages to which suit the defendant respondent by applying to refer it to arbitration.

The plaintiff opposed the application arguing that the dispute resolution clause was inoperative and incapable of being performed because there was no definition of the Commercial Engagement Team. In dismissing that argument and referring the matter to arbitration, the Court held that,

> 40. The question which then arises is whether the above clause is capable of performance and whether under the Agreement the arbitration is optional and not mandatory...
> 42. My finding is that Clause 20 of the agreement cannot be read in isolation but must be read in conjunction with Clause 12.3.1 which provides that disputes be referred to arbitration by a single arbitrator in the event that mediation fails. In the present case, the respondent did not demonstrate that it had initiated the mediation process or made efforts to refer the dispute to arbitration before opting for the court process. I further find that Clause 12.3.1 binds the parties herein and this court cannot in the circumstances be invited to depart from the parties' clear intentions. Furthermore, Article 159 (2) (c) of the Constitution mandates this court to

[86] Ibid at 7.
[87] [2020] eKLR

promote alternative forms of dispute resolution including mediation and arbitration. For the above reasons I find that the dispute herein ought to be subjected to arbitration.[88]

5.7. ***Agnes Waruguru Gaita & another v RSM Eastern Africa LLP & another***[89]
This was an employer-employee dispute arising from an employment contract that had an arbitration clause. The Claimant sued the Respondent and one of its partners alleging discrimination on grounds of pregnancy and sexual harassment. The employment contract had the following dispute resolution clause,

"Any dispute, controversy or claim arising out of or relating to this Contract or a termination hereof, or the interpretation, breach or validity hereof, shall be resolved by way of consultation held in good faith between the parties. Such consultation shall begin immediately after one party has delivered to the other a written request for such consultation. If within fifteen (15) days following the date on which such notice is given, the dispute cannot be resolved, the dispute, controversy or claim shall be submitted to arbitration upon request of any party by written notice to the other party."

The Respondents filed an application to refer the matter to arbitration pursuant to that clause, and Section 6 of the Arbitration Act. The Court dismissed the application holding that,

"Having already brought the matter to court and considering the nature of the accusations made by the Claimants against the Respondents being sexual harassment and discrimination on grounds of pregnancy, as well as the exchanges in the affidavits and in court, it is doubtful that the parties would be in a position to consult in good faith.

[88] Ibid at 8.
[89] [2021] eKLR

> As I have already observed, the process of arbitration commences with a request for consultation in writing which none of the parties has put in motion. Further, none of the parties has made a request for referral to arbitration as contemplated in the arbitral clause.
>
> It is for these reasons that I find that the application herein is premature. I also find that the conditions precedent to the arbitration being consultation in good faith, is incapable of being met by the parties at this stage of the proceedings."

5.8. Rabadia Enterprises Limited v Mayfair Insurance Company Limited[90]

In this insurance suit, the plaintiff sued the defendant alleging that it had breached their insurance policy by failing to pay the plaintiff upon loss of its insured vehicles. Clause 9 of the policy provided that,

> "Disputes between You and Us
> If any dispute arises between you and us on any matter relating to this policy such dispute will be referred to: a. A single mediator to be agreed between you and us within thirty (30) days of the dispute arising and the mediation process to be finalized not later than thirty (30) days thereafter or
> b. A single arbitrator agreed between us, to be appointed within thirty (30) days of the dispute arising. If we cannot agree, either party will refer the dispute to the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) whose decision will be binding on you and us. The arbitral award will be final. If the dispute is not referred to the arbitration process within twelve (12) months we will assume you have abandoned the claim."

The defendant filed an application to refer the matter to arbitration, which the plaintiff opposed arguing that it was for the Court to decide on the validity of the dispute resolution clause. In allowing the application, the Court held that,

[90] [2022] KEHC 14470 (KLR)

> "The parties herein entered into the agreement willingly and consciously. They voluntarily agreed to the timelines set for the settlement of the disputes between them and I find that there is nothing illegal in the set timelines.
> It is trite that under the doctrine of Kompentenze – Kompentenze, the arbitrator is competent to rule on the issue of his own jurisdiction...
> This court should not allow respondent to ignore the contractual steps. A mere allegation that the arbitral agreement is illegal, unconstitutional and or void cannot be sufficient to oust an arbitration agreement."

5.9. *Wanjala & 2 others v Registrar of Companies & 2 others; Okoa Finance Limited*[91]

The parties in this suit had a shareholders' agreement with the following dispute resolution clause,

> "This Agreement shall be governed by the substantive law of Kenya If any dispute, controversy or claim arises out of or in connection with this Agreement and/or the Subscription Agreement, or the breach, termination or invalidity thereof, the parties shall seek to resolve it on an amicable basis.
>
> They shall, if appropriate, consider the appointment of a mediator to assist in that resolution. No party shall commence legal or mediation proceedings unless 30 days' notice has been given to the other party.
> If the dispute cannot be resolved pursuant to Section 14.2, it shall be finally settled by arbitration administered by the applicable Court in Nairobi. The language of the proceedings (including documentation) shall be English."

The petitioners filed a suit in Court alleging breach of the shareholders agreement, to which the respondents replied by filing an application to refer the matter to arbitration as per the said dispute resolution clause and section 6 of the Arbitration Act. The Court found that the clause was vague as to the

[91] [2022] KEHC 48 (KLR)

mode and process of appointment of the arbitrator, and thus the dispute could not be referred to arbitration. Nevertheless, the Court found that,

> The arbitration agreement is also couched in mandatory terms that "no party shall commence legal or mediation proceedings unless 30 days' notice has been given to the other party". The dispute resolution clause contains two condition precedents before legal proceedings are taken. First, an attempt to resolve the matter amicably and second, the issue of the 30-day notice before proceeding to mediation or instituting any suit. In this case, there is no evidence that the Petitioners attempted to mediate this dispute or served a 30-day notice on the Respondents prior to instituting this suit. I therefore hold that for this reason the application is premature.[92]

6. Overview of the jurisprudence on multi-tiered dispute resolution clauses

Based on the foregoing decisions made in the last decade, there appears to be a split in the jurisprudence on how a case involving such a clause should be handled. On the one hand, there are Courts that hold that parties must be held to their bargain, and they must follow their agreed dispute resolution clause. Under this view, if the Court is approached at the correct time under section 6 (1) of the Arbitration Act[93], it will refer the parties to the tiered dispute resolution clause in their contract. Thus, the court proceedings would be stayed, and the parties would have to commence negotiations, mediation and finally arbitration should that be provided in their clause. On the same footing, it would appear that an arbitrator or mediator faced with parties who have not negotiated as per their agreement, then the arbitration or mediation proceedings ought to be stayed pending the said negotiations.

---

[92] Ibid at 5.

[93] The Section provides that "*the court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration…*"

This view is fortified by Article 159 (1) (c) of the Constitution that enjoins courts and tribunals to be guided by the principle that "alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted". Indeed, the Court of Appeal in ***Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others***[94] agreed with such view and stated,

> It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.[95]

On the applicability of Article 159 (2) (c), the Supreme Court of Kenya in ***Geoffrey M. Asanyo & 3 others v Attorney General***[96] held that,

> "[W]e repeat that Article 159 of the Constitution is the foundation of the exercise of judicial authority as donated by the people. This Article outlines principles that guide any person/body who or which exercises that

[94] [2015] eKLR
[95] Ibid at p.9. On the doctrine of exhaustion, see also the decisions of the Supreme Court of Kenya in ***Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)*** [2019] eKLR and ***Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others*** [2023] KESC 14 (KLR).
[96] [2018] eKLR

> delegated judicial authority. Alternative Dispute Resolution is one such principle as provided by Article 159(2)(c)."[97]

The jurisprudence that parties should be bound by their clauses is further fortified by the freedom of contract with parties being held to their bargains, and that it is not for the Court to rewrite the contracts of parties unless coercion, fraud or undue influence is proven.[98] Parties are to be left to agree on how they want to structure their dispute resolution clause with the knowledge and certainty that the Courts will enforce the clause as agreed.[99] The Court will not allow a party to resile from such a clause unless it can be shown that there was coercion, fraud or undue influence.[100]

On the other hand, there is the view that parties which have skipped the tiers of their dispute resolution clause and filed a suit, they are presumed to have done away with the tiered clause. Thus, if parties do not engage in the negotiations and mediation, the Court will take it that there is no dispute capable of reference to arbitration. This is because a dispute is only ripe for arbitration when there have been negotiations and mediation, or otherwise been taken through the dispute resolution clause. This view seems not to accord with the principles that courts should not rewrite contracts, parties should be held to their bargains, and that alternative dispute resolution should be promoted. The view also does not give enough or credible reasons as to why such principles should be discarded in favour of the Courts handling the dispute. Moreover, my research on decisions awarding damages for breach of dispute resolution clauses or denying costs - which would otherwise be a reasonable sanction for a party that is in breach - has not been fruitful. Nevertheless, given the small number of decisions adopting it, this view appears to be on the minority side.

---

[97] Ibid at p. 18 and 19.
[98] See *National Bank of Kenya Ltd. v. Pipeplastic Samkolit (K) Ltd. and another* [2001] KLR 112 at p. 118.
[99] Ibid.
[100] Ibid.

7. Conclusion

Multi-tiered dispute resolution clauses involve several steps in the resolution of a dispute flowing from the non-determinative procedures such as negotiations and mediation to the determinative procedures such as arbitration and litigation. Examples of such clauses can be found in the model dispute resolution clauses by the Strathmore Dispute Resolution Centre; standard agreement by the Joint Building Council, Bylaws by the Board of Registration of Architects and Quantity Surveyors; and international bilateral treaties such as the Economic Partnership Agreement between the United Kingdom and Kenya.

The enforcement of such clauses is dependent on whether either of the party has taken steps under the Arbitration Act indicating that they have accepted the jurisdiction of the Court. Otherwise, courts refer such disputes for settlement in accordance with the clauses with a minority view favouring settlement of the disputes by the court.

Bibliography

Books

Sutton D., Gill J., Gearing M., *Russell on Arbitration*, (23rd Ed., Sweet & Maxwell, 2007)

Muigua K., *Settling Disputes through Arbitration in Kenya*, (4th Ed., Glenwood Publishers Ltd, 2022)

Articles

Berger K.P., 'Law and Practice of Escalation Clauses', (2006) 22 (1) Arbitration International 1

Born G., and Šćekić M., 'Pre-Arbitration Procedural Requirements 'A Dismal Swamp', (2015) Practising Virtue – Inside International Arbitration, at 228 available at <https://www.wilmerhale.com/insights/publications/2016-11-12-pre-arbitration-procedural-requirements-a-dismal-swamp > as accessed on 16 June 2024.

Dobbins R., 'The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity', (2005) 1 Hastings Bus. L.J. 159. Available at <https://repository.uchastings.edu/hastings_business_law_journal/vol1/iss1/6> as accessed on 10 July 2024.

Jolles A., 'Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement', (2006) 72 Arbitration 4, 329

Kayali D., 'Enforceability of Multi-Tiered Dispute Resolution Clauses' (2010) 27 (6) Journal of International Arbitration, 551

Kuruvila M, 'Multi -Tier Dispute Resolution Clauses and its Enforcement - Assessing the Indian Position' (2018). Available at < https://ssrn.com/abstract=3643455> as accessed on 10 January 2025.

Krennbauer S., 'Enforceability of Multi-Tiered Dispute Resolution Clauses in International Business Contracts' (2010) Vol. 1 Yearbook on International Arbitration 199

Maira H., 'Enforcement of Multi-tiered Dispute Resolution Clauses', (2020) 8 (2) Alternative Dispute Resolution 110

Muigua K., 'Alternative Dispute Resolution and Article 159 of the Constitution' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADRAND-ARTICLE-159-OF-CONSTITUTION.pdf> as accessed on 17 June 2024.

Legislation

Arbitration Act, Cap. 49 of the Laws of Kenya, Government Printer. Available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2049> as accessed on 10 July 2024.

Architects and Quantity Surveyors Act, Cap 525 of the Laws of Kenya, Government Printer. Available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20525> as accessed on 18 July 2024.

Constitution of Kenya, 2010, Government Printer.

Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Kenya available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945516/MS_9.2020_Economic_Partner

ship_Agreement_UK_Kenya_Member_of_East_Africa_Community.pdf a s accessed on 13 July 2024.

Parliamentary reports

International Agreements Committee, *Scrutiny of International Agreements: Economic Partnership Agreement with Kenya, Trade in Goods in Agreement with Norway and Iceland, and Free Trade with Vietnam* (House of Lords, 2019 -2021) paras 1 – 3 available at < https://committees.parliament.uk/publications/4547/documents/46039/default/> as accessed on 13 July 2024.

Websites

<https://sdrc.strathmore.edu/resources/model-documents/> as accessed on 10 July 2024.

Cases

Acme Apartments Limited v Deepak Krishna t/a Team 2 Architects & another [2017] eKLR

Agnes Waruguru Gaita & another v RSM Eastern Africa LLP & another [2021] eKLR

Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR

Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others [2023] KESC 14 (KLR).

Burn Manufacturing USA LLC v Sage South Africa (PTY) Limited [2020] eKLR

County Government of Kirinyaga v African Banking Corporation Ltd [2020] eKLR

Heineken East Africa Import Company Limited & another v Maxam Limited [2024] KECA 625 (KLR)

Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR

Geoffrey M. Asanyo & 3 others v Attorney General [2018] eKLR

Jatin Shantilal Malde & 9 others v Transmara Investment Limited & 2 others [2018] eKLR

Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited [2014] eKLR

National Bank of Kenya Ltd. *v*. Pipeplastic *Samkolit* (K) Ltd. and another [2001] KLR 112

Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR

Oceanbulk Shipping and Trading SA vs TMT Asia Limited and 3 others [2010] UKSC 44

R v Sussex Justices, ex parte McCarthy [1924] KB 256

Rabadia Enterprises Limited v Mayfair Insurance Company Limited [2022] KEHC 14470 (KLR)

Southern Shield Holdings Limited v Tandala Investment Company Limited & 2 others [2018] eKLR

Visa International Ltd vs Continental Resources (USA) Ltd Arbitration Petition No. 16 of 2007 available at https://indiankanoon.org/doc/1765502/ as accessed on 18 July 2024

Wanjala & 2 others v Registrar of Companies & 2 others; Okoa Finance Limited [2022] KEHC 48 (KLR)

Watford v. Miles [1992] 2 A.C. 128

West Mount Investments Limited v Tridev Builders Company Limited [2017] eKLR

Balancing Innovation and Ethics: Addressing Challenges in AI-Driven Alternative Dispute Resolution

By: ***Charity Chepkoech****

Abstract

The integration of Artificial Intelligence into Alternative Dispute Resolution is gradually turning the tide in the field of mediation, negotiation, and arbitration. This is as a result of its unparalleled efficiency and cost reductions with the necessary streamlining of processes. Despite these, major ethical issues arise from the use of AI-driven ADR tools, ranging from algorithmic bias, lack of transparency to accountability gaps and data security concerns. These challenges raise questions on the fundamental principles of neutrality, fairness, and justice, which have grounded ADR. This paper discusses the ethical reviews of AI in ADR, analyzing how such developments may undermine trust and thus neutrality. The paper explores the current legal frameworks, identifies the regulatory gaps and suggests remedies that are implementable based on the identified issues. The proposed remedies include the implementation of XAI principles, robust accountability mechanisms and improvement in data protection. Finally, this paper underscores the importance of balancing innovation with safeguards to ensure that ADR remains fair and just in an increasingly digital world.

1. Introduction

Alternative Dispute Resolution (ADR) has over time proved to be an efficient, cost-effective alternative to traditional litigation, offering parties the opportunity to resolve disputes amicably through negotiation, mediation, or arbitration.
[1] In recent years, improvements in Artificial Intelligence (AI) have changed ADR processes, with tools that offer faster resolutions, enhanced decision-making, and

* ***LL.B (Cnd), UoEm, Research Assistant at Centre for Climate Change Adaptation and Mitigation (CCCAM) – University of Embu; Projects Director at the International Students Environmental Coalition (ISEC) – Kenya.***

[1] Kariuki Muigua and Jeffah Ombati, 'Achieving expeditious Justice: Harnessing Technology for Cost Effective International Commercial Arbitral Proceedings' (2018) 7(1) Alternative Dispute Resolution, 11.

greater accessibility for individuals and businesses alike.[2] AI platforms such as ArbiLex and Modria use algorithms to detect underlying issues and mediate on the disputes between the parties.[3]

Despite this, significant ethical challenges have arisen in the integration of AI into ADR.[4] These include risks of undermining ADR's core values of neutrality, fairness, and transparency while streamlining operations.[5] Algorithmic bias, opaque decision-making processes, accountability gaps, and privacy concerns are major concerns that threaten public trust in AI-driven ADR systems.[6] It is important to address these challenges in order to ensure that AI promotes access to just and does not hinder it.[7]

This paper critically analyses the ethical implications of AI in ADR, explaining how such systems interact with core principles of justice and equity. Further, it discusses strategies to mitigate risks through the establishment of regulatory frameworks, the adoption of industry standards, and the development of transparent, explainable AI models. The paper seeks to find a balance between the efficiency of AI and the ethical safeguards that are needed to uphold ADR's credibility.

---

[2] Abbott, Ryan, and Brinson S. Elliott. "Putting the Artificial Intelligence in Alternative Dispute Resolution: How AI Rules Will Become ADR Rules." *Amicus Curiae* 4 (2022): 685.
[3] Rajendra, Josephine Bhavani, and Ambikai S. Thuraisingam. "The deployment of artificial intelligence in alternative dispute resolution: the AI augmented arbitrator." *Information & Communications Technology Law* 31, no. 2 (2022): 176-193.
[4] Duger, Chloe J. "AI: Increasing Alternatives in Alternative Dispute Resolution Resolved: Journal of Alternative Dispute Resolution." *Resolved: J. Alternative Disp. Resol.* 12 (2024): 21.
[5] Carneiro, Davide, Paulo Novais, Francisco Andrade, John Zeleznikow, and José Neves. "Online dispute resolution: an artificial intelligence perspective." *Artificial Intelligence Review* 41 (2014): 211-240.
[6] *Ibid*.
[7] Barnett, Jeremy, and Philip Treleaven. "Algorithmic dispute resolution—The automation of professional dispute resolution using AI and blockchain technologies." *The Computer Journal* 61, no. 3 (2018): 399-408.

2. Overview of AI in Alternative Dispute Resolution

Artificial intelligence has had a significant impact in ADR, changing the way disputes are resolved for both commercial and individual disputes.[8] Tools that use machine learning algorithms to predict case outcomes, recommend settlement options, and automate large parts of the arbitration process are already at work.[9] For instance, ArbiLex uses predictive analytics to assess risks and optimize settlement strategies, while Modria offers an end-to-end online dispute resolution service that handles everything from minor consumer disputes to the most complex commercial claims.[10] Such innovations have been of great value in handling a high volume of cases, reducing delays, and cutting costs.[11]

Despite its potential, the application of AI in ADR raises concerns about preserving fairness and justice. As Paisley and Sussman argue;[12]

"Whether we like it or not, artificial intelligence is going to play a major role in international arbitration in the near future. The amounts at issue are too high and the benefits from artificial intelligence too great to avoid it. Al has significant potential benefits for international arbitration, but as members of the international arbitration community we must ask ourselves for whom, at what cost, and how this might impact international arbitration more generally in ways that may not be obvious."

---

[8] *Ibid*.

[9] Bresso, Emmanuel, Pierre Monnin, Cédric Bousquet, François-Élie Calvier, Ndeye-Coumba Ndiaye, Nadine Petitpain, Malika Smaïl-Tabbone, and Adrien Coulet. "Investigating ADR mechanisms with explainable AI: a feasibility study with knowledge graph mining." *BMC medical informatics and decision making* 21, no. 1 (2021): 171.

[10] *Ibid*

[11] Kahungi, Natasha. "Dawn of Artificial Intelligence in Alternative Dispute Resolution; Expanding Access to Justice through Technology." *University of Nairobi Law* 2, no. 2 (2023).

[12] Paisley, Kathleen, and Edna Sussman. "Artificial intelligence challenges and opportunities for international arbitration." *New York Dispute Resolution Lawyer* 11, no. 1 (2018): 35-40.

While AI tools may be more efficient, they do not necessarily guarantee fair outcomes.[13] For instance, the use of historical data to guide machine learning models can reinforce the biases that already exist against the least advantaged groups.[14] Moreover , most AI systems operate like "black box" , which in turn hinders transparency and makes it harder to discern whether the outcomes are consistent with the rule of law or are procedurally fair.[15] As a result, there is need for a closer look into the ethical risks associated with AI-driven ADR and strategies that may be used to address such risks.[16]

3. Key Ethical Concerns in AI-Driven ADR

3.1. The Risks of Algorithmic Bias

One of the main dilemmas in AI-driven ADR is the risk of algorithmic bias.[17] The AI systems operate on historical datasets that may contain hidden biases that reflect the societal inequities.[18] For instance, if the training data leans more towards corporate interests at the expense of less endowed individual claimants, AI tools may inadvertently generate results in favor of well-endowed parties.[19] This is no hypothetical phenomenon, a study by the National Bureau of Economic Research

---

[13] Madaio, Michael, Lisa Egede, Hariharan Subramonyam, Jennifer Wortman Vaughan, and Hanna Wallach. "Assessing the fairness of ai systems: Ai practitioners' processes, challenges, and needs for support." *Proceedings of the ACM on Human-Computer Interaction* 6, no. CSCW1 (2022): 1-26.

[14] Shraddha, S. "Role of Information Technology and the Future of AI in Alternative Dispute Resolution." *Issue 5 Indian JL & Legal Rsch.* 4 (2022): 1.

[15] Zeleznikow, John. "Using artificial intelligence to provide intelligent dispute resolution support." *Group Decision and Negotiation* 30, no. 4 (2021): 789-812.

[16] *Ibid*

[17] Brooks, Wensdai. "Artificial bias: the ethical concerns of AI-driven dispute resolution in family matters." *J. Disp. Resol.* (2022): 117.

[18] Nedeva, Stanislava. "Summary of young-OGEMID symposium No. 17:" The role of artificial intelligence in shaping ADR practices"." *TDM-Transnational Dispute Management* (2024).

[19] Ebers, Martin. "Automating due process-the promise and challenges of AI-based techniques in consumer online dispute resolution." In *Frontiers in Civil Justice*, pp. 142-168. Edward Elgar Publishing, 2022.

on predictive policing algorithms showed significant racial disparities, thereby illustrating how discriminatory data may perpetuate injustice.[20]

In the ADR context, such biases can play out in arbitrations where one party, systematically, the less resourced, is put at a disadvantage.[21] The case of *The State of Wisconsin v. Loomis*, 2016, while not involving ADR as such, demonstrated a more general risk of algorithmic bias.[22] The COMPAS sentencing algorithm came under attack in the case for producing racially biased results.[23] The case showed that should similar biases make their way into AI-driven ADR, then it will face serious credibility setback.[24] To address such concerns, regular auditing of the AI models has to be carried out with particular emphasis on identifying and eliminating biases before their implementation.[25]

The Problem of Explainability

The lack of transparency in AI decision-making processes brings out another critical challenge.[26] Most AI driven systems used in ADR operate using "black boxes," a situation where the developers cannot understand the logic behind its decisions.[27] The lack of explainability and transparency erodes public trust, especially where parties are unable to evaluate whether outcomes are fair or

---

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid*

[23] Schmitz, Amy J. "Responsible Use of AI in Civil Dispute Resolution." *Responsible Use of AI in Civil Dispute Resolution (July 23, 2024). Ohio State Legal Studies Research Paper* 870 (2024).

[24] Tiamiyu, Oladeji M. "The Impending Battle for the Soul of ODR: Evolving Technologies and Ethical Factors Influencing the Field." *Cardozo J. Conflict Resol.* 23 (2022): 75.

[25] *Ibid.*

[26] Alhasan, Tariq K. "Integrating AI Into Arbitration: Balancing Efficiency With Fairness and Legal Compliance." *Conflict Resolution Quarterly* (2025).

[27] Alisha, Mr SK, and Bellamkonda Roshini Jyothi. "Explainable Artificial Intelligence For Patient Safety A Review Of Application In Pharmacovigilance." <https://ijarst.in/public/uploads/paper/123111716356087.pdf.> Accessed on 20th January 2025.

legally sound.[28] For instance, in arbitration, parties may be unable to ascertain whether an AI-generated award has its basis on relevant precedents or arbitrary calculations.[29]

The introduction of Explanatory AI, known as XAI, would enable stakeholders understand and perhaps even be able challenge the rationale behind such AI decisions.[30] Tools such as Google's What-If Tool, which analyzes algorithmic decisions for bias, could be adapted for ADR disputes.[31] Implementation of XAI in ADR would give way to more transparency so that parties can assess and be able to evaluate the decision-making process.[32]

3.2. Determining Liability for AI Errors

Accountability in AI-driven ADR is unclear.[33] If an AI tool generates a defective decision or in some other way violates ethical considerations, it can be very difficult to determine where liability should lie, should it lie with the developer, the operator, or the party relying on the tool.[34] This is an issue that lies within international arbitration and often increases as the complexity of jurisdiction often increases.[35] Where there is lack of clear accountability mechanisms, aggrieved

---

[28] Choudhary, Ashiv, and Adya Surbhi. "AI arbitration–Charting the ethical and legal course." In *AIP Conference Proceedings*, vol. 3220, no. 1. AIP Publishing, 2024.
[29] *Ibid.*
[30] *Ibid.*
[31] Hamida, Sayda Umma, Mohammad Jabed Morshed Chowdhury, Narayan Ranjan Chakraborty, Kamanashis Biswas, and Shahrab Khan Sami. "Exploring the Landscape of Explainable Artificial Intelligence (XAI): A Systematic Review of Techniques and Applications." *Big Data and Cognitive Computing* 8, no. 11 (2024): 149.
[32] *Ibid.*
[33] Brooks, Wensdai. "Artificial bias: the ethical concerns of AI-driven dispute resolution in family matters." *J. Disp. Resol.* (2022): 117.
[34] *Ibid.*
[35] Singh, Bhupinder, and Christian Kaunert. "Intelligent Machine Learning Solutions for Cybersecurity: Legal and Ethical Considerations in a Global Context." In *Advancements in Intelligent Process Automation*, pp. 359-386. IGI Global, 2025.

parties may find themselves unable to resolve their disputes, undermining their trust in AI-driven ADR systems.[36]

There is a need for robust accountability frameworks to be established. Arbitration agreements could also include contractual clauses that specify liabilities for AI errors, while regulatory bodies may require developers to furnish transparency reports detailing system limitations and risks.[37] Such measures would outline responsibilities and provide redress for the affected parties.[38]

3.3. Safeguarding Sensitive Information

ADR usually involves the use of sensitive personal and commercial data, making the protection of such information a vital concern.[39] AI systems deal with extensive data and hence create more risks for unauthorized access or data breaches.[40] According to a 2021 report by IBM Security, legal data ranks among the most attacked in cyberattacks, with average breach costs over $4 million.[41] Within the ADR context, a data breach could result in the leakage of confidential settlement details, thus harming the parties and reducing trust in the process.[42]

These risks hinder the effective implementation of AI-powered ADR platforms and hence necessitate for data governance practices to be strict and to include encryption technologies, regular audits, and observance of data protection

---

[36] Zafar, Ammar. "Artificial Intelligence (AI) Influence in Law: Balancing Technological Advancements with Ethical Considerations." *Available at SSRN 4656578* (2023). <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4656578.> Accessed on 20th January 2025.

[37] Scherer, Maxi. "Artificial Intelligence and Legal Decision-Making: The Wide Open?" *Journal of international arbitration* 36, no. 5 (2019).

[38] Reddy, Jeeri Sanjana, and Vinita Singh. "Soft Law, Hard Justice: Regulating Artificial Intelligence in Arbitration." *Contemp. Asia Arb. J.* 17 (2024): 191.

[39] Singh, Bhupinder, and Christian Kaunert. "Supremely Explainable Artificial Intelligence (XAI) in Education 5.0: Articulating Constructive Alignment." *Explainable AI for Education* 19: 131.

[40] *Ibid.*

[41] *Ibid.*

[42] *Ibid.*

legislation such as the General Data Protection Regulation.[43] This will ensure the protection of sensitive information and avoid the undermining of privacy concerns with regards to the integrity of ADR processes.[44]

4. Legal and Regulatory Gaps

The existing regulatory frameworks in AI-driven ADR are inconsistent and fragmented.[45] While frameworks such as the European Union's AI Act create a framework for high-risk applications of AI, these initiatives do not address ADR specifically.[46] This creates a regulatory vacuum in which unethical practices are allowed to continue, especially in jurisdictions with weak enforcement mechanisms.[47] International collaboration should set consistent standards while institutions such as UNCITRAL and the ICC are required to play a pivotal role in that process.[48] The challenges of integrating AI into ADR are further highlighted by the lack of universally accepted ethical guidelines.[49] Standards that prioritize fairness, transparency, and accountability are critical and should be developed.[50] This will be realized if ADR bodies could for instance, collaborate to create a certification system for AI tools, ensuring they meet ethical and technical benchmarks before deployment.[51]

---

[43] *Ibid.*

[44] Yu, Ronald, and Gabriele Spina Alì. "What's inside the black box? AI challenges for lawyers and researchers." *Legal Information Management* 19, no. 1 (2019): 2-13.

[45] Zeleznikow, John. "Can artificial intelligence and online dispute resolution enhance efficiency and effectiveness in courts." In *IJCA*, vol. 8, p. 30. 2016.

[46] *Ibid.*

[47] Carneiro, Davide, Paulo Novais, Francisco Andrade, John Zeleznikow, and José Neves. "Online dispute resolution: an artificial intelligence perspective." *Artificial Intelligence Review* 41 (2014): 211-240.

[48] *Ibid.*

[49] *Ibid.*

[50] *Ibid.*

[51] Schmitz, Amy J. "Expanding access to remedies through e-court initiatives." *Buff. L. Rev.* 67 (2019): 89.

5. Strategies for Ethical AI Integration in ADR

Unless pro-active strategies that actively address these ethical challenges associated with technology are provided, successful integration of AI in Alternative Dispute Resolution will be unattainable.[52] The strategies should balance the level of innovation with safeguards designed to enhance fairness, accountability, and trust.

5.1. Facilitate Explainability and Transparency

Of the concerns of AI-powered ADR is its opaque nature in its algorithms.[53] Explainable AI will, therefore, provide a pathway for fostering transparency, making its decision-making processes understandable to its users.[54] Applications of the principles of XAI in ADR mean that the parties in dispute can be in a position to understand how an algorithm derived a given conclusion.[55] It enhances trust in the process and reduces friction related to perceived fairness of the outcome.[56] Explainability for instance, can enable disputing parties to assess whether the AI-generated settlement proposal reflects the relevant legal principles and their interest.[57]

---

[52] Hagemann, Ryan, Jennifer Huddleston Skees, and Adam Thierer. "Soft law for hard problems: The governance of emerging technologies in an uncertain future." *Colo. Tech. LJ* 17 (2018): 37.

[53] Davies, Ben. "Ethics in Artificial Intelligence and Alternative Dispute Resolution: Generating AI/Human Reviewed Ethical Guidelines for ADR Practitioners and the Legal Profession." *Human Reviewed Ethical Guidelines for ADR Practitioners and the Legal Profession (July 30, 2024)* (2024).

[54] Gonzalo Quiroga, Marta. "The Use of Emerging Technologies in Out of Court Dispute Management Procedures: International Legal Approach and Regulatory Challenges." (2024). <https://www.rieel.com/index.php/rieel/article/view/104.> Accessed on 19th January 2025.

[55] Abbott, Ryan, and Brinson S. Elliott. "Putting the Artificial Intelligence in Alternative Dispute Resolution: How AI Rules Will Become ADR Rules." *Amicus Curiae* 4 (2022): 685.

[56] Alhasan, Tariq K. "Integrating AI Into Arbitration: Balancing Efficiency With Fairness and Legal Compliance." *Conflict Resolution Quarterly* (2025). <https://www.researchgate.net/publication/387886502_Integrating_AI_Into_Arbitration_Balancing_Efficiency_With_Fairness_and_Legal_Compliance.> Accessed on 19th January 2025.

[57]Singh, Bhupinder. "Unleashing Alternative Dispute Resolution (ADR) in Resolving Complex Legal-Technical Issues Arising in Cyberspace Lensing E-Commerce and

Moreover, explainability enhancement mechanisms should introduce human-friendly interfaces that makes it easier for its users to understand the reason behind its decision, including the non-technical participants.[58] AI systems can also utilize tools such as Google's What-If Tool by enabling users to see how the algorithmic decisions would vary with different inputs, identify potential biases or inconsistencies and ensure that all parties are treated equitably.[59] Regular audits by independent third parties will also go a long way to validate the ethical alignment of these AI systems and further promote transparency and accountability.[60]

5.2. Putting in Place Robust Accountability Frameworks

Accountability is a very critical aspect in the implementation of AI-driven ADR. Where an AI tool produces an unjust or incorrect result, stakeholders should ensure that they have clear avenues of redress and determination of liability.[61] This calls for a clearly defined framework that indicates responsibilities at each stage in the development and deployment chain of the system.[62] For instance, arbitration agreements may include special clauses that hold developers liable for algorithmic errors or operators liable for mismanagement during the ADR process.[63] These

---

Intellectual Property: Proliferation of E-Commerce Digital Economy." *Revista Brasileira de Alternative Dispute Resolution-Brazilian Journal of Alternative Dispute Resolution-RBADR* 5, no. 10 (2023): 81-105.

[58]Zafar, Ammar. "Balancing the scale: navigating ethical and practical challenges of artificial intelligence (AI) integration in legal practices." *Discover Artificial Intelligence* 4, no. 1 (2024): 27.

[59] *Ibid.*

[60] *Ibid.*

[61] Ribeiro, Marta, Davide Carneiro, and Lurdes Mesquita. "Digital Justice in the EU: Integration of BPMN and AI into ODR Processes." In *EPIA Conference on Artificial Intelligence*, pp. 258-269. Cham: Springer Nature Switzerland, 2024.

[62] Framework, Resolution. "OECD Online Dispute Resolution Framework." (2024).

[63] Zafar, Ammar. "Balancing the scale: navigating ethical and practical challenges of artificial intelligence (AI) integration in legal practices." *Discover Artificial Intelligence* 4, no. 1 (2024): 27.

would provide the contractual basis for accountability, enabling aggrieved parties to question adverse outcomes.[64]

Regulatory models must also play an important role in imposing accountability.[65] Governments and legal institutions might compel ADR platforms to publish essential information about the algorithms they employ, such as known limitations, system biases, and methodologies underlying decisions.[66] Transparency reports should be provided regularly, with stakeholders holding developers and operators accountable where they fail to do so.[67] Precedents, such as that of the *European Court of Human Rights in Big Brother Watch v. United Kingdom 2021*, which emphasis on the need for accountability in technological disputes, can be helpful models for dealing with issues of liability in AI-driven ADR.[68]

5.3. Improved Data Privacy and Security

ADR disputes usually involve sensitive information and any breach of this could lead to a lack of confidence in the process and exposure of parties to potential harm and hence data privacy and security need to be ensured in an AI-driven ADR system.[69] AI-driven systems must, therefore, comply with the most stringent data protection laws, such as the General Data Protection Regulation, mandating that

---

[64] *Ibid.*

[65] Tomilova, Aleksandra. "Design Principles for Algorithmic Accountability: an Elaborated Action Design Research." (2021).

[66] Eviani, Nanda Yuniza, Maskun Maskun, and Ahmad Fachri Faqi. "Legal challenges of AI-induced copyright infringement: evaluating liability and dispute resolution mechanisms in digital era." *Jambura Law Review* 6, no. 2 (2024): 403-428.

[67] *Ibid.*

[68] Valchuk, Nazarii. "Potential and challenges of online dispute resolution for courts." PhD diss., Vilniaus universitetas., 2024. < https://epublications.vu.lt/object/elaba:191367258/index.html.> Accessed on 20th January 2025.

[69] Akintayo, Obafemi D., Chinazo Nneka Ifeanyi, and Okeoma Onunka. "Resolving cybersecurity disputes and protecting digital infrastructure With ADR." <https://www.fepbl.com/index.php/csitrj/article/view/1674.>Accessed on 20th January 2025.

platforms obtain informed consent for data usage, limit the scope of data collection, and anonymize sensitive information.[70]

Security improvements can be realized using some of the emerging technologies, including blockchain.[71] Blockchain technology builds tamper-proof, decentralized records of ADR proceedings that guarantee the secure storage of critical data and its verification.[72] For instance, the records from blockchain would help prevent unauthorized access to sensitive information about arbitration, while offering an absolute record of the decision and handling of evidence.[73] ADR platforms should conduct regular security audits to discover vulnerabilities in their systems.[74] Additionally, training advanced encryption technologies and machine learning models to protect sensitive data further reduce the risks of unauthorized breaches and protect the integrity of the ADR process.[75]

5.4. Fostering Inclusivity and Equity

In this regard, AI-driven ADR systems should be designed to ensure that all parties, irrespective of their socioeconomic or technological background, are given a fair opportunity to participate in the dispute resolution process.[76] In most cases, barriers to access to justice include limited digital literacy or a lack of resources to engage in complex systems.[77] Designing user-friendly interfaces is one way to

---

[70] *Ibid.*

[71]Vy, Ngo Nguyen Thao. "AI Implementation in ODR: A Game-Changer or a Troublemaker of Data Protection." *Vietnamese Journal of Legal Sciences* 8, no. 1 (2023): 1-24.

[72] *Ibid.*

[73] *Ibid.*

[74] Bhushan, Tripti. "The Impact of digital technologies on alternative dispute resolution." *Revista Brasileira de Alternative Dispute Resolution-Brazilian Journal of Alternative Dispute Resolution-RBADR* 5, no. 10 (2023): 329-352.

[75] *Ibid.*

[76] Akintayo, Obafemi D., Chinazo Nneka Ifeanyi, and Okeoma Onunka. "Addressing racial and ethnic tensions in the USA through ADR strategies." *Global Journal of Research in Multidisciplinary Studies* 2, no. 2 (2024): 001-015.

[77] Alhasan, Tariq K. "Integrating AI Into Arbitration: Balancing Efficiency with Fairness and Legal Compliance." *Conflict Resolution Quarterly* (2025).<https://www.researchgate.net/publication/387886502_Integrating_AI

overcome these challenges.[78] The platforms should ensure that their tools are intuitive and accessible, minimizing the learning curve for users who may not be as familiar with technology.[79]

Localization of solutions is also very important in order to make ADR systems equitable.[80] AI tools have to consider the presence of different legal traditions and cultural contexts in cross-border disputes.[81] For example, multilingual support and adaptation of algorithms according to local legislation will help bridge gaps in global and regional practices.[82] Moreover, addressing algorithmic biases is important for inclusivity. Developers should use diverse data during training to avoid the perpetuation of historical inequities.[83] Incorporating fairness metrics and running regular bias-detection tests can also help make sure that any AI-driven ADR systems do not create a disadvantage against any particular socioeconomic, racial, or other group.[84]

5.5. Development of Global Standards and Cooperation

Among the key factors that clearly hinder consistency in ethics along with fairness is a lack of universally accepted standards for artificial intelligence in ADR.[85] The

_Into_Arbitration_Balancing_Efficiency_With_Fairness_and_Legal_Compliance.> Accessed on 19th January 2025.

[78] Sela, Ayelet. "Diversity by design: improving access to justice in online courts with adaptive court interfaces." *The Law & Ethics of Human Rights* 15, no. 1 (2021): 125-152.

[79] Njagi, Muthoni. "Therapeutic Jurisprudence and ADR: Enhancing Legal and Psychological Outcomes in Family Disputes." *Alternative Dispute Resolution*: 268.

[80] Blomgren Amsler, Lisa, Alexander B. Avtgis, and M. Scott Jackman. "Dispute system design and bias in dispute resolution." *SMUL Rev.* 70 (2017): 913.

[81] Zafar, Ammar. "Balancing the scale: navigating ethical and practical challenges of artificial intelligence (AI) integration in legal practices." *Discover Artificial Intelligence* 4, no. 1 (2024): 27.

[82] *Ibid.*

[83] Balan, Anil. "Examining the ethical and sustainability challenges of legal education's AI revolution." *International Journal of the Legal Profession* 31, no. 3 (2024): 323-348.

[84] *Ibid.*

[85] Gonzalo Quiroga, Marta. "The Use of Emerging Technologies in Out of Court Dispute Management Procedures: International Legal Approach and Regulatory Challenges." (2024).

leading role in this regard should be taken by international organizations, such as the ICC and UNCITRAL, in promoting globally applicable principles of fairness, transparency, and accountability.[86] These organizations can bring together representatives from various fields, including legal practitioners, technologists, and policymakers, in order to develop ethical guidelines that are specifically targeted at ADR contexts.[87]Standardized ethical benchmarks could go a long way in ensuring uniformity across jurisdictions and reduce the disparities that will occur when different countries enact variable regulations.[88] For example, an internationally recognized certification system can ensure that AI-driven ADR platforms meet minimum ethical and technical standards before being deployed.[89] Collaboration between governments, industry leaders, and academia may also stimulate research into best practices for integrating AI into ADR. Such cooperation would help in bringing regulations into harmony, innovate, and improve trust in AI-driven ADR systems worldwide.[90]

6.0 Conclusion

AI-driven ADR presents a transformation opportunity to improve efficiency and increase the access rate in dispute resolution processes.[91] Still, every benefit will need to be weighed against massive ethical challenges, which come against

[86] *Ibid.*

[87] Sharma, Priyanka, Mukesh Nandave, and Anoop Kumar. "Reporting of ADRs Across the Globe: India, USA, EU, and Non-EU." In *Pharmacovigilance Essentials: Advances, Challenges and Global Perspectives*, pp. 127-146. Singapore: Springer Nature Singapore, 2024.

[88] *Ibid.*

[89] Singh, Bhupinder. "Unleashing Alternative Dispute Resolution (ADR) in Resolving Complex Legal-Technical Issues Arising in Cyberspace Lensing E-Commerce and Intellectual Property: Proliferation of E-Commerce Digital Economy." *Revista Brasileira de Alternative Dispute Resolution-Brazilian Journal of Alternative Dispute Resolution-RBADR* 5, no. 10 (2023): 81-105.

[90] *Ibid.*

[91] Zafar, Ammar. "Balancing the scale: navigating ethical and practical challenges of artificial intelligence (AI) integration in legal practices." *Discover Artificial Intelligence* 4, no. 1 (2024): 27.

fairness and integrity of the system.[92] Algorithmic bias, a lack of transparency, diffuse accountability, and data privacy risks all present serious risks that could destroy confidence in AI-driven ADR if they were left unregulated.[93]

The integration of AI into ADR is filled with challenges and therefore proactive strategies must be implemented.[94] Explainability through XAI principles, robust accountability mechanisms for addressing issues of liability, and data privacy, using technologies such as blockchain, are some of the imperatives.[95] Additionally, designing user-friendly and culturally adaptable systems will make sure that ADR remains equitable and accessible for all in an inclusive manner.[96] Developing global standards through international collaboration will also create consistent ethical benchmarks, reducing disparities and enhancing trust in AI-driven ADR platforms.[97]

The future of ADR in an AI-driven world relies on the ability to balance innovations with safeguards to protect ethics.[98] By confronting these challenges in a forthright manner, stakeholders will be able to ensure that ADR will always maintain the principles on which it is based those of neutrality, fairness, and justice.[99]

---

[92] Schmitz, Amy J. "Responsible Use of AI in Civil Dispute Resolution." *Responsible Use of AI in Civil Dispute Resolution (July 23, 2024). Ohio State Legal Studies Research Paper* 870 (2024).
[93] *Ibid.*
[94] Nedeva, Stanislava. "Summary of young-OGEMID symposium No. 17:" The role of artificial intelligence in shaping ADR practices"." *TDM-Transnational Dispute Management* (2024).
[95] Alhasan, Tariq K. "Integrating AI Into Arbitration: Balancing Efficiency With Fairness and Legal Compliance." *Conflict Resolution Quarterly* (2025).
[96] Wang, Xukang, and Ying Cheng Wu. "Balancing innovation and Regulation in the age of geneRative artificial intelligence." *Journal of Information Policy* 14 (2024).
[97] *Ibid.*
[98] *Ibid.*
[99] Schmitz, Amy J. "Drive-thru arbitration in the digital age: Empowering consumers through binding ODR." *Baylor L. Rev.* 62 (2010): 178.

List of References

Abbott, Ryan, and Brinson S. Elliott. "Putting the Artificial Intelligence in Alternative Dispute Resolution: How AI Rules Will Become ADR Rules." *Amicus Curiae* 4 (2022): 685.

Akintayo, Obafemi D., Chinazo Nneka Ifeanyi, and Okeoma Onunka. "Addressing racial and ethnic tensions in the USA through ADR strategies." *Global Journal of Research in Multidisciplinary Studies* 2, no. 2 (2024): 001-015.

Akintayo, Obafemi D., Chinazo Nneka Ifeanyi, and Okeoma Onunka. "Resolving cybersecurity disputes and protecting digital infrastructure With ADR." https://www.fepbl.com/index.php/csitrj/article/view/1674 (accessed January 20, 2025).

Alhasan, Tariq K. "Integrating AI Into Arbitration: Balancing Efficiency With Fairness and Legal Compliance." *Conflict Resolution Quarterly* (2025). https://www.researchgate.net/publication/387886502_Integrating_AI_Into_Arbitration_Balancing_Efficiency_With_Fairness_and_Legal_Compliance (accessed January 19, 2025).

Alisha, Mr. SK, and Bellamkonda Roshini Jyothi. "Explainable Artificial Intelligence For Patient Safety: A Review Of Application In Pharmacovigilance." https://ijarst.in/public/uploads/paper/123111716356087.pdf (accessed January 20, 2025).

Barnett, Jeremy, and Philip Treleaven. "Algorithmic dispute resolution—The automation of professional dispute resolution using AI and blockchain technologies." *The Computer Journal* 61, no. 3 (2018): 399-408.

Balan, Anil. "Examining the ethical and sustainability challenges of legal education's AI revolution." *International Journal of the Legal Profession* 31, no. 3 (2024): 323-348.

Bhushan, Tripti. "The Impact of Digital Technologies on Alternative Dispute Resolution." *Revista Brasileira de Alternative Dispute Resolution (RBADR)* 5, no. 10 (2023): 329-352.

Blomgren Amsler, Lisa, Alexander B. Avtgis, and M. Scott Jackman. "Dispute system design and bias in dispute resolution." *SMUL Rev.* 70 (2017): 913.

Brooks, Wensdai. "Artificial Bias: The Ethical Concerns of AI-Driven Dispute Resolution in Family Matters." *Journal of Dispute Resolution* (2022): 117.

Carneiro, Davide, Paulo Novais, Francisco Andrade, John Zeleznikow, and José Neves. "Online Dispute Resolution: An Artificial Intelligence Perspective." *Artificial Intelligence Review* 41 (2014): 211-240.

Choudhary, Ashiv, and Adya Surbhi. "AI Arbitration–Charting the Ethical and Legal Course." In *AIP Conference Proceedings,* vol. 3220, no. 1. AIP Publishing, 2024.
Davies, Ben. "Ethics in Artificial Intelligence and Alternative Dispute Resolution: Generating AI/Human Reviewed Ethical Guidelines for ADR Practitioners and the Legal Profession." *Human Reviewed Ethical Guidelines for ADR Practitioners and the Legal Profession* (July 30, 2024).

Duger, Chloe J. "AI: Increasing Alternatives in Alternative Dispute Resolution." *Resolved: Journal of Alternative Dispute Resolution* 12 (2024): 21.

Ebers, Martin. "Automating Due Process: The Promise and Challenges of AI-Based Techniques in Consumer Online Dispute Resolution." In *Frontiers in Civil Justice,* pp. 142-168. Edward Elgar Publishing, 2022.

Gonzalo Quiroga, Marta. "The Use of Emerging Technologies in Out of Court Dispute Management Procedures: International Legal Approach and Regulatory Challenges." (2024). https://www.rieel.com/index.php/rieel/article/view/104 (accessed January 19, 2025).

Hagemann, Ryan, Jennifer Huddleston Skees, and Adam Thierer. "Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future." *Colorado Technology Law Journal* 17 (2018): 37.

Hamida, Sayda Umma, Mohammad Jabed Morshed Chowdhury, Narayan Ranjan Chakraborty, Kamanashis Biswas, and Shahrab Khan Sami. "Exploring the Landscape of Explainable Artificial Intelligence (XAI): A Systematic Review of Techniques and Applications." *Big Data and Cognitive Computing* 8, no. 11 (2024): 149.

Kahungi, Natasha. "Dawn of Artificial Intelligence in Alternative Dispute Resolution: Expanding Access to Justice Through Technology." *University of Nairobi Law* 2, no. 2 (2023).

Kariuki Muigua and Jeffah Ombati. "Achieving Expeditious Justice: Harnessing Technology for Cost-Effective International Commercial Arbitral Proceedings." *Alternative Dispute Resolution* 7, no. 1 (2018): 11.

Madaio, Michael, Lisa Egede, Hariharan Subramonyam, Jennifer Wortman Vaughan, and Hanna Wallach. "Assessing the fairness of ai systems: Ai practitioners' processes, challenges, and needs for support." *Proceedings of the ACM on Human-Computer Interaction* 6, no. CSCW1 (2022): 1-26.

Paisley, Kathleen, and Edna Sussman. "Artificial Intelligence Challenges and Opportunities for International Arbitration." *New York Dispute Resolution Lawyer* 11, no. 1 (2018): 35-40.

Rajendra, Josephine Bhavani, and Ambikai S. Thuraisingam. "The Deployment of Artificial Intelligence in Alternative Dispute Resolution: The AI Augmented Arbitrator." *Information & Communications Technology Law* 31, no. 2 (2022): 176-193.

Reddy, Jeeri Sanjana, and Vinita Singh. "Soft Law, Hard Justice: Regulating Artificial Intelligence in Arbitration." *Contemporary Asia Arbitration Journal* 17 (2024): 191.

Schmitz, Amy J. "Drive-thru arbitration in the digital age: Empowering consumers through binding ODR." *Baylor L. Rev.* 62 (2010): 178.

Schmitz, Amy J. "Expanding Access to Remedies Through E-Court Initiatives." *Buffalo Law Review* 67 (2019): 89.

Schmitz, Amy J. "Responsible Use of AI in Civil Dispute Resolution." *Responsible Use of AI in Civil Dispute Resolution (July 23, 2024). Ohio State Legal Studies Research Paper* 870 (2024).

Singh, Bhupinder. "Unleashing Alternative Dispute Resolution (ADR) in Resolving Complex Legal-Technical Issues Arising in Cyberspace: Lensing E-

Commerce and Intellectual Property." *Revista Brasileira de Alternative Dispute Resolution (RBADR)* 5, no. 10 (2023): 81-105.

Vy, Ngo Nguyen Thao. "AI Implementation in ODR: A Game-Changer or a Troublemaker of Data Protection." *Vietnamese Journal of Legal Sciences* 8, no. 1 (2023): 1-24.

Zafar, Ammar. "Balancing the Scale: Navigating Ethical and Practical Challenges of Artificial Intelligence (AI) Integration in Legal Practices." *Discover Artificial Intelligence* 4, no. 1 (2024): 27.

Zeleznikow, John. "Using Artificial Intelligence to Provide Intelligent Dispute Resolution Support." *Group Decision and Negotiation* 30, no. 4 (2021): 789-812.

ESG Arbitration: A Noble Cause or The Next Billion-Dollar Sham? - David Onsare

By: ***David Onsare****

Abstract

Environmental, social and governance (ESG) arbitration has become a popular means for parties to resolve disputes about sustainability. Companies promise that they will act ethically. They frame arbitration as a fair method to ensure accountability. Supporters say that ESG arbitration is a credible way to enforce obligations and promote good corporate citizenship. However, critics argue that ESG arbitration often fails to deliver true justice. They see it as a private system that benefits corporations and their legal advisers. Confidentiality rules make it hard to see what is really happening. Affected communities question whether they have any real power in these private tribunals. Some observers believe that ESG arbitration is little more than a lucrative business strategy for large firms. They think it shields companies from scrutiny. Others see a genuine opportunity for reform if arbitrators adopt higher standards and allow more transparency. This paper explores whether ESG arbitration is an authentic force for good or a corporate-driven process. It questions whether arbitration can protect rights and the environment in a meaningful way. It asks if the system is open to public interest considerations or if it prioritises the parties with the deepest pockets. It proposes reforms. It looks to the future and wonders whether ESG arbitration can rise above greenwashing allegations and become a real path to justice.

1. IntroductionESG values matter today.[1] Businesses everywhere talk about sustainability. They promise reduced carbon footprints.[2] They promote fair labour

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

[1] Kariuki Muigua, 'Infusing Environmental, Social, and Governance Tenets into Arbitration and Alternative Dispute Resolution' (2024)

[2] Science Based Targets Initiative, 'Companies Taking Action' (2023) <https://sciencebasedtargets.org/companies-taking-action> accessed 25 January 2025

practices.[3] They claim they will respect human rights.[4] Many governments also push for stronger regulations.[5] This leads to new laws and new standards. Disputes arise when companies fail to meet obligations or when states impose new restrictions. Companies and investors seek stable methods for resolving these disputes.[6] Litigation in national courts may seem slow or uncertain. International arbitration, on the other hand, promises flexibility and expertise.[7]

Yet critics see a gap between promise and practice. They fear that ESG arbitration has become a marketing tool.[8] They question whether it truly holds corporations accountable.[9] Major institutions like the International Chamber of Commerce (ICC), the International Centre for Settlement of Investment Disputes (ICSID) and the London Court of International Arbitration (LCIA) have started to emphasise ESG.[10] They establish panels. They release guidelines. They claim they are prepared to handle the complexities of sustainability disputes. But some people doubt whether arbitration can ever truly serve public interest goals.[11]

---

[3] Christine Parker and John Howe, 'Ruggie's Diplomatic Project and Its Missing Regulatory Infrastructure' in Radu Mares (ed), The UN Guiding Principles on Business and Human Rights (Martinus Nijhoff 2012)

[4] John Gerard Ruggie, Just Business: Multinational Corporations and Human Rights (W.W. Norton 2013)

[5] Stavros Gadinis and Amelia Miazad, 'The Hidden Power of Compliance' (2019) 103 Minnesota Law Review 2135

[6] International Centre for Settlement of Investment Disputes (ICSID), 'The ICSID Caseload -- Statistics' (Issue 2022-2) <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics> accessed 1 February 2025

[7] Julian DM Lew, Loukas A Mistelis and Stefan Kröll, Comparative International Commercial Arbitration (Kluwer Law International 2003) ch 1

[8] Adolf Peter, 'Climate Change and Supply Chain Arbitrations: Impact of EU Law on the BRI and Non-EU Entities' (2023) <https://typeset.io/papers/climate-change-and-supply-chain-arbitrations-impact-of-eu-24zcxheznq> accessed 1 February 2025

[9] William S Laufer, 'Social Accountability and Corporate Greenwashing' (2003) 43 Journal of Business Ethics 253

[10] ICC Commission on Arbitration and ADR, Resolving Climate Change Related Disputes through Arbitration and ADR (ICC Publication 2019); ICSID, 'Draft Working Paper on ESG Considerations in Investor-State Disputes' (2021) <https://icsid.worldbank.org/> accessed 1 February 2025

[11] Gus Van Harten, Investment Treaty Arbitration and Public Law (OUP 2007)

Arbitration remains private.[12] The decisions often stay confidential.[13] These qualities appeal to corporations.[14] They prefer to resolve disputes quietly. They want to limit bad publicity.[15] This means the public does not always see what goes on in ESG-related arbitrations.[16] Communities that are harmed by pollution may not know the details of the settlement.[17] Workers who face discrimination may be told that the matter is confidential.[18] Meanwhile lawyers and law firms earn large fees.[19] They present themselves as ESG experts. They shape policies that favour investors or big business.[20]

This paper examines whether ESG arbitration is as helpful as claimed. It looks at whether arbitration is an industry in itself or a genuine innovation that advances sustainability. It also explores how greenwashing might appear. It asks whether corporations use ESG arbitration to preserve reputations rather than fix real problems. Then it looks at specific examples where companies sued states. These cases raise questions about whether ESG arbitration can protect the environment

---

[12] Gary Born, International Commercial Arbitration (2nd edn, Kluwer Law International 2014)

[13] Joshua Karton, The Culture of International Arbitration and The Evolution of Contract Law (OUP 2013)

[14] Thomas Schultz and Jason Mitchenson, 'Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts' (2016) 12 Journal of Private International Law 344

[15] Sergio Puig, 'No Right without a Remedy: Foundations of Investor-State Arbitration' (2014) 35 University of Pennsylvania Journal of International Law 829

[16] Emilie M Hafner-Burton, Zachary C Steinert-Threlkeld and David G Victor, 'Predictability versus Flexibility: Secrecy in International Investment Arbitration' (2016) 68(3) World Politics 413

[17] Lorenzo Cotula, Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law (Routledge 2012)

[18] Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 Vanderbilt Journal of Transnational Law 775

[19] Pia Eberhardt and Cecilia Olivet, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom' (Corporate Europe Observatory 2012)

[20] David Schneiderman, Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise (Cambridge University Press 2008)

or whether it can undermine new regulations. Finally, the paper considers proposals for reform. It asks whether more transparency or a shift to public tribunals could address these problems.

The central question remains. Does ESG arbitration genuinely help the planet and protect people? Or is it a billion-dollar system that prioritises investor interests and corporate reputation? The paper suggests that the answer may depend on how we reshape arbitration. Without reform, the process may remain an exclusive enterprise that serves private parties more than it serves the public good.

2. The Rise of ESG Arbitration: A New Industry or a Genuine Legal Innovation?

ESG arbitration has grown rapidly. In the past, arbitration mainly dealt with commercial contract disputes and investment disputes between companies and states.[21] It revolved around business obligations, trade agreements and compensation for expropriation.[22] That has changed. Now many contracts include ESG clauses. They talk about respecting human rights. They promise to follow environmental guidelines. They set targets for reducing emissions.[23]

Companies prefer arbitration for these disputes.[24] They like the flexibility.[25] They also appreciate the global reach.[26] Arbitration awards can be enforced in many

---

[21] Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, Comparative International Commercial Arbitration (Kluwer Law International 2003)

[22] Nigel Blackaby and Constantine Partasides, Redfern and Hunter on International Arbitration (6th edn, OUP 2015)

[23] International Finance Corporation, 'Performance Standards on Environmental and Social Sustainability' (IFC 2012) <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards> accessed 1 February 2025

[24] Born (n 13)

[25] Margaret L Moses, The Principles and Practice of International Commercial Arbitration (3rd edn, Cambridge University Press 2017)

[26] Olmos Giupponi and Raul Partido Figueroa, 'Navigating ESG Arbitrability Challenges in Energy and Climate: An In-Depth Analysis and Future Perspectives' (2024)

countries.[27] Courts around the world tend to recognise and enforce arbitration decisions.[28] This predictability is appealing to investors.[29] They know that if a dispute arises about ESG obligations, they can rely on this mechanism.[30] They do not have to rely on local courts that may be unpredictable or under-resourced.[31]

Many institutions have adapted to this trend. The ICC, for example, has released guidance on how to handle disputes with strong environmental or social dimensions.[32] ICSID, which traditionally deals with investor-state disputes, also acknowledges the rise of ESG clauses.[33] The LCIA and the Singapore International Arbitration Centre (SIAC) have similar approaches.[34] They encourage parties to include clear ESG obligations in their contracts.[35] They promote special panels of arbitrators who claim expertise in sustainability.[36]

<https://typeset.io/papers/navigating-esg-arbitrability-challenges-in-energy-and-5fr41vq6zb> accessed 17 February 2025

[27] Emmanuel Gaillard and John Savage, Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International 1999)

[28] Albert Jan van den Berg, The New York Arbitration Convention of 1958 (Kluwer Law International 1981)

[29] Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521

[30] Thomas Schultz and Federico Ortino, The Oxford Handbook of International Arbitration (OUP 2020)

[31] Jan Paulsson, Denial of Justice in International Law (Cambridge University Press 2005)

[32] Gauthier Vannieuwenhuyse, 'Exploring the Suitability of Arbitration for Settling ESG and Human Rights Disputes' (2023) Journal of International Arbitration <https://typeset.io/papers/exploring-the-suitability-of-arbitration-for-settling-esg-3gv3jtx3> accessed 17 February 2025

[33] Christoph H Schreuer, The ICSID Convention: A Commentary (2nd edn, Cambridge University Press 2009)

[34] Simon Greenberg, Christopher Kee and J Romesh Weeramantry, International Commercial Arbitration: An Asia-Pacific Perspective (Cambridge University Press 2011)

[35] Stephan Schill, The Multilateralization of International Investment Law (Cambridge University Press 2009)

[36] Catherine A Rogers, Ethics in International Arbitration (OUP 2014)

This has created a new industry.[37] Law firms have developed ESG practice groups. They market themselves as authorities on climate change litigation and social responsibility disputes.[38] Arbitration experts say they can guide companies through the complexities of carbon offsets or supply chain labour standards.[39] They promise efficient resolution.[40] They highlight the confidentiality of the process. For corporations, this is a desirable combination: demonstrate ESG commitment while avoiding the messy spotlight of public litigation.

However, some argue that this new industry is not necessarily a sign of genuine innovation.[41] They see it as a repackaging of the same arbitration model, with "ESG" simply added as a label.[42] Critics say that the fundamental power dynamics of arbitration remain unchanged.[43] Arbitrators are usually selected from a small circle of corporate lawyers.[44] Claimants tend to be investors or multinational companies with deep pockets.[45] Respondents may be states or smaller entities.[46]

---

[37] Yves Dezalay and Bryant G Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (University of Chicago Press 1996)

[38] Nelson Cher Weng Goh, 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' (2022) The Journal of World Energy Law & Business <https://typeset.io/papers/esg-and-investment-arbitration-a-future-with-cleaner-foreign-5fk5y6dx> accessed 17 February 2025

[39] Jason Fry, 'International Arbitration and the Environment' in Stavros Brekoulakis and others (eds), The Evolution and Future of International Arbitration (Kluwer Law International 2016)

[40] Gabrielle Kaufmann-Kohler and Antonio Rigozzi, International Arbitration: Law and Practice in Switzerland (OUP 2015)

[41] Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital (Cambridge University Press 2013)

[42] Choudhury (n 19)

[43] Van Harten (n 12)

[44] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) European Journal of International Law 387

[45] Susan D Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 North Carolina Law Review 1

[46] Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harvard International Law Journal 435

Communities directly harmed by corporate actions are rarely parties to the arbitration.[47] They may not have the funds or legal knowledge to participate.[48]

Fees in ESG arbitration can also be high.[49] Complex disputes require multiple expert witnesses, long hearings and extensive legal analysis.[50] Arbitrators charge significant daily rates.[51] Law firms charge hourly fees that can be out of reach for many organisations.[52] The entire process can generate large revenues for the arbitral industry.[53] For some observers, this raises the suspicion that ESG arbitration is more about profit than purpose.[54] They doubt whether it can truly address global challenges like climate change or labour abuse.[55]

Nevertheless, there are those who see potential in ESG arbitration. They believe it is a necessary tool in a world where global supply chains cross many jurisdictions.[56] National courts may lack the ability to handle cross-border cases efficiently.[57] Arbitration can gather experts from all over the world.[58] It can produce enforceable awards.[59] This can encourage businesses to follow through

---

[47] Nicolás M Perrone, 'The International Investment Regime After the Global Crisis of Neoliberalism: Rupture or Continuity?' (2016) 23 Indiana Journal of Global Legal Studies 603

[48] Catherine A Rogers, 'The Arrival of the "Have-Nots" in International Arbitration' (2007) 8 Nevada Law Journal 341

[49] Susan D Franck, 'Rationalizing Costs in Investment Treaty Arbitration' (2011) 88 Washington University Law Review 769

[50] Blackaby and Partasides (n 23)

[51] Eberhardt and Olivet (n 20)

[52] Maya Steinitz, 'The Case for an International Court of Civil Justice' (2019) 67 Stanford Law Review 75

[53] Dezalay and Garth (n 38)

[54] Laufer (n 10)

[55] Barnali Choudhury, 'Balancing Soft and Hard Law for Business and Human Rights' (2018) 67 International & Comparative Law Quarterly 961

[56] Born (n 13)

[57] Paulsson (n 32)

[58] Schultz and Ortino (n 31)

[59] van den Berg (n 29)

on their obligations.[60] If they fail, they know they will face a swift arbitration claim.[61] That could help maintain higher standards.[62]

Yet, even supporters of ESG arbitration accept that reforms are needed. Transparency is one key concern. Critics say that when important matters of public concern are decided behind closed doors, it undermines trust.[63] Some commentators call for mandatory publication of key parts of the arbitration process.[64] They argue that the public has a right to know whether a company is in breach of its ESG promises. Others suggest creating a roster of arbitrators with expertise in human rights and environmental science.[65] This could ensure that panels have the right qualifications and are not limited to commercial lawyers alone.

The rise of ESG arbitration raises a tough question. Is it truly a new form of dispute resolution that integrates corporate responsibility? Or is it a carefully designed industry that feeds on ESG buzz? The paper explores this tension further in subsequent sections. The next section looks at how greenwashing might occur and how arbitration can mask or reveal corporate misconduct.

---

[60] Franck (n 30)

[61] Kaufmann-Kohler and Rigozzi (n 41)

[62] Anne van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Stephan Schill (ed), International Investment Law and Comparative Public Law (OUP 2010)

[63] Catherine A Rogers, 'Transparency in International Commercial Arbitration' (2006) Kansas Law Review, Bocconi Legal Studies Research Paper No 06-10

[64] James D Fry and Odysseas G Repousis, 'Towards a New World for Investor-State Arbitration Through Transparency' (2016) 48 NYU Journal of International Law and Politics 795

[65] Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 361

3. ESG Arbitration and Greenwashing: A Convenient Cover for Corporate Misconduct?

Greenwashing involves presenting an environmentally responsible image while ignoring underlying harms.[66] It also applies to social issues.[67] A corporation may publish glossy reports that celebrate diversity, while actual labour conditions remain poor.[68] ESG arbitration can play a role in this process.[69] When a dispute emerges, companies can use arbitration to manage it privately.[70] They can avoid open court proceedings that might reveal uncomfortable details.[71] They can settle quietly.[72] This allows them to continue public relations campaigns that emphasise their claimed commitments to sustainability.[73]

At first glance, one might think that arbitration would only provide genuine accountability. After all, the parties have to present evidence and arguments to independent arbitrators.[74] If a company is at fault, the award might require payment of compensation or other remedial steps. However, the confidentiality inherent in arbitration can be a shield. Companies can insist on gag orders. They can structure settlements so that the public does not learn the facts.[75] In certain cases, even the existence of the arbitration might remain confidential.[76]

---

[66] Olesya F Zasemkova, 'International Arbitration: Towards Sustainable Development and Environmental Protection' (2023) <https://typeset.io/papers/international-arbitration-towards-sustainable-development-24v73rght1> accessed 17 February 2025

[67] CS De Silva Lokuwaduge and Keshara de Silva, 'ESG Risk Disclosure and the Risk of Green Washing' (2022) Australasian Business, Accounting and Finance Journal

[68] Peng Hu and others, 'Peeking into Corporate Greenwashing through the Readability of ESG Disclosures' (2024) Sustainability

[69] Fry (n 40)

[70] Born (n 13)

[71] Hafner-Burton, Steinert-Threlkeld and Victor (n 17)

[72] Karton (n 14)

[73] Gerasimos G Rompotis, 'Do ESG ETFs "Greenwash"? Evidence from the US Market' (2023) Journal of Environmental, Social, and Governance

[74] Xin Gao, 'The Interaction Between Greenwashing and Chinese ESG Investors: Analyzing from the Perspectives of Credibility and Investment Decision-making' (2024) Advances in Economics, Management and Political Sciences

[75] Rogers (n 64)

[76] Ileana M Smeureanu, Confidentiality in International Commercial Arbitration (Kluwer Law International 2011)

This secrecy often benefits the party with the most to hide.[77] For example, if there has been a serious pollution event or a large-scale labour rights violation, a company may worry about reputational harm.[78] Instead of letting the issue escalate to a public trial, it seeks an arbitral forum.[79] There it can negotiate a settlement.[80] It can incorporate a strict confidentiality clause.[81] Meanwhile, it can continue to publish ESG reports that emphasise minor improvements. Outsiders might never know the severity of the harm or the steps (if any) taken to address it.[82]

Power imbalances in ESG arbitration are also a concern.[83] Affected communities may not have resources.[84] They might not afford legal representation.[85] They might not have access to experts who can prove wrongdoing.[86] Even if they get pro bono help, arbitration costs can be high.[87] They may have to travel for hearings or pay for expert reports.[88] Meanwhile the corporation can hire top legal and scientific

[77] Choudhury (n 19)
[78] Judith Kimmerling, 'Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco' (2006) 38 New York University Journal of International Law and Politics 413
[79] Van Harten (n 12)
[80] Michael McIlwrath and John Savage, International Arbitration and Mediation: A Practical Guide (Kluwer Law International 2010)
[81] Alexis C Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 16 American University International Law Review 969
[82] Pan Deng, Yuqi Zhang, and Qi Yu, 'Exploring Investment Optimization and "Greenwashing" from ESG Disclosure: A Dual Examination of Investor Perception' (2024) Journal of Economics, Finance and Accounting Studies
[83] Rogers (n 49)
[84] Cotula (n 18)
[85] Franck (n 50)
[86] Cotula (n 18)
[87] Rogers (n 49)
[88] Steinitz (n 53)

experts.[89] That imbalance shapes how negotiations unfold.[90] It can lead to settlements that favour the corporation's image rather than a fair outcome.[91]

One real-world example involves the disputes between Shell and communities in the Niger Delta.[92] Over the years, there have been allegations of pollution and human rights abuses. Some disputes were settled through arbitration or confidential mediation.[93] Critics argue that the lack of public disclosure made it hard for communities to see if justice was done.[94] They also say that repeated issues suggest that the underlying problems were not fully resolved.[95] Instead, the process might have allowed Shell to manage risk privately without real accountability.[96]

Critics point to how greenwashing can become more sophisticated when arbitration is involved.[97] The process allows a company to say it respects the law.[98] It states that it chooses an international tribunal to verify compliance.[99] Yet the company controls much of the narrative.[100] The public does not have an

---

[89] Eberhardt and Olivet (n 20)
[90] Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95
[91] Kevin E Davis and Helen Hershkoff, 'Contracting for Procedure' (2011) 53 William & Mary Law Review 507
[92] John Vidal, 'Shell Announces £55m Payout for Nigeria Oil Spills' (The Guardian, 7 January 2015) <https://www.business-humanrights.org/en/latest-news/shell-announces-55m-payout-for-nigeria-oil-spills/> accessed 17 February 2025
[93] Amnesty International, 'The True "Tragedy": Delays and Failures in Tackling Oil Spills in the Niger Delta' (Amnesty International Publications 2011) <https://www.amnesty.org/en/documents/afr44/018/2011/en/> accessed 1 February 2025
[94] V Agafonov, 'ESG Principles and Greenwashing: Legal Issues of Differentiation' (2024) Actual Problems of Russian Law
[95] Kimmerling (n 79)
[96] Penelope Simons and Audrey Macklin, The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage (Routledge 2014)
[97] Laufer (n 10)
[98] Schultz and Mitchenson (n 15)
[99] Puig (n 16)
[100] Hafner-Burton, Steinert-Threlkeld and Victor (n 17)

opportunity to examine the evidence.[101] Activists cannot see how the settlement terms were reached. In addition, arbitration decisions are not always published.[102] That means future claimants cannot rely on precedent.

Proponents of ESG arbitration respond that greenwashing is not the fault of arbitration itself.[103] They claim that if parties agree, they can make proceedings more transparent.[104] They can appoint arbitrators with expertise in sustainability.[105] They can involve stakeholders such as community representatives.[106] They can release redacted versions of awards for public viewing.[107] In theory, all this is possible. But in practice, companies and investors often resist public disclosure.[108] They argue that confidentiality is essential to protect trade secrets or to safeguard sensitive financial data.

This tension between confidentiality and public accountability is a key issue.[109] It leads to calls for new rules. Some propose that any arbitration concerning ESG

---

[101] Fry and Repousis (n 65)
[102] Dina Lucia Todaro and Riccardo Torelli, 'From Greenwashing to ESG-Washing: A Focus on the Circular Economy Field' (2024) Corporate Social Responsibility and Environmental Management
[103] Fry (n 40)
[104] Julie A Lee, 'UNCITRAL's Unclear Transparency Instrument: Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations' (2013) 33 Northwestern Journal of International Law & Business 439
[105] Markus W Gehring and Marie-Claire Cordonier Segger (eds), Sustainable Development in World Investment Law (Kluwer Law International 2011)
[106] Michael Wheeler, Environmental Dispute Resolution (Environmental Law Institute 1995)
[107] Raghvendra Pratap Singh and Srishti Kumar, 'Transparency and Confidentiality in International Commercial Arbitration' (2020) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management
[108] A Saravanan and S Subramanian, 'Transparency and Confidentiality Requirements in Investment Treaty Arbitration' (2018) BRICS Law Journal
[109] Sirimon Treepongkaruna and others, 'Greenwashing, Carbon Emission, and ESG' (2024) Business Strategy and the Environment

issues must follow a presumption of transparency.[110] Others want arbitrators to have the power to require disclosure if the matter involves public interest. But these changes have yet to gain universal acceptance. As a result, for many disputes, confidentiality remains the default. This fosters an environment where critics can suspect that arbitration is a cover. They worry that it helps corporations maintain a facade rather than face scrutiny.[111]

Thus, ESG arbitration can enable greenwashing when used to avoid public oversight.[112] It may let corporate actors keep harmful practices out of the spotlight. This occurs at the same time as they publish sustainability claims. To address this, reforms must address confidentiality and power imbalances. The next section looks at a related paradox. Companies sometimes use arbitration to challenge states that enact strong ESG policies. This raises further questions about whether ESG arbitration truly serves the public good.[113]

4. The ESG Arbitration Paradox: When Investors Sue States for Enforcing ESG Policies

One might assume that ESG arbitration would be used by citizens or NGOs to hold corporations accountable.[114] That is sometimes true. However, there is also a paradox.[115] Investors can sue states if they feel that ESG regulations harm their

[110] Sherlin Tung and Brian Lin, 'More Transparency in International Commercial Arbitration: To Have or Not to Have?' (2018) Law & Society: International & Comparative Law eJournal

[111] CG Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) Social Science Research Network

[112] Nan Wu, 'Transparency and Data Protection: Conflicts and Resolutions in International Commercial Arbitration' (2024) Journal of Education, Humanities and Social Sciences

[113] Alessandra Asteriti and C Tams, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration' (2010)

[114] Judith Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 Yale Law Journal 2804

[115] Jorge E Viñuales, Foreign Investment and the Environment in International Law (Cambridge University Press 2012)

investments.[116] This occurs in investor-state dispute settlement (ISDS) when a state enacts new environmental protections or labour laws.[117] Investors may claim that these measures violate their rights under bilateral investment treaties (BITs) or multilateral agreements.[118] These treaties often include arbitration clauses. The result is that states defending new ESG policies can be forced into arbitration.[119]

A well-known example is the dispute Rockhopper v Italy. Italy placed a ban on oil and gas exploration in certain coastal areas. Rockhopper, an oil company, filed an arbitration claim under the Energy Charter Treaty.[120] The company argued that Italy's ban contravened its investment rights. Critics said this suit punishes a state for taking steps to protect the environment. They also argued that it exposes a contradiction. How can the investor claim to support ESG while challenging legitimate climate policies?

Another example is Vattenfall v Germany. Germany decided to phase out nuclear power and reduce coal power.[121] Vattenfall took the country to arbitration.[122] It claimed that Germany's policies negatively impacted its investments in power plants. Observers noted the irony.[123] On one hand, corporations praise

---

[116] Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), Evolution in Investment Treaty Law and Arbitration (Cambridge University Press 2011)

[117] M Sornarajah, The International Law on Foreign Investment (3rd edn, Cambridge University Press 2010)

[118] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd edn, OUP 2012)

[119] Van Harten (n 12)

[120] Rockhopper Exploration Plc v Italian Republic ICSID Case No ARB/17/14 (registered 2017). For an overview, see ICSID, 'Case Details: ARB/17/14' <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/17/14> accessed 1 February 2025

[121] Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'The State of Play in Vattenfall v. Germany II: Leaving the German Public in the Dark' (IISD 2014)

[122] Vattenfall AB and Others v Federal Republic of Germany ICSID Case No ARB/12/12 (registered 2012). See ICSID, 'Case Details: ARB/12/12' <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/12> accessed 1 February 2025

[123] Miles (n 42)

sustainability in annual reports.[124] On the other hand, they use arbitration to seek compensation when a state tries to enact stricter environmental controls.[125]

These cases highlight that ESG arbitration is not always about holding corporations to account.[126] Sometimes it is the state that faces legal action for imposing ESG requirements.[127] Critics say that this reveals a fundamental flaw in the system.[128] It allows companies to have it both ways. They can market themselves as sustainability champions.[129] Yet they will sue governments if regulations threaten profits. That can undermine public trust in the idea that ESG arbitration promotes sustainable development.[130]

Defenders of the system say that states agree to these treaties.[131] They allow arbitration because they want to attract foreign investment. They also argue that not all ESG measures are well-designed.[132] Sometimes states impose sweeping rules without proper transition periods.[133] Or they fail to compensate investors for sudden changes in policy.[134] From this perspective, arbitration ensures that states

---

[124] Megan Bowman, 'Banking on Climate Change: How Finance Actors and Transnational Regulatory Regimes are Responding' (2015) 45 Environmental Law 591

[125] Julia Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?' (2013) 3(1) Western Journal of Legal Studies 1

[126] Perrone (n 48)

[127] Todd Allee and Clint Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 65 International Organization 401

[128] Schneiderman (n 21)

[129] Simon Baughen, 'Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven' (2006) 18 Journal of Environmental Law 207

[130] Valentina Vadi, 'Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?' (2015) 48 Vanderbilt Journal of Transnational Law 1285

[131] Charles N Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chicago Journal of International Law 471

[132] Gehring and Cordonier Segger (n 106)

[133] Thomas W Wälde and Abba Kolo, 'Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law' (2001) 50 International and Comparative Law Quarterly 811

[134] Rudolf Dolzer, 'Fair and Equitable Treatment: Today's Contours' (2014) 12 Santa Clara Journal of International Law 7

do not act arbitrarily. Yet that does not fully address the policy question.[135] If the world needs urgent climate action, should companies be able to demand huge payouts for lost profits?

The paradox grows when one realises that ESG language is often woven into investment treaties.[136] States and international organisations now include references to sustainability.[137] They proclaim that the treaty will promote responsible investment and green growth. Yet they also keep the arbitration clauses that allow companies to sue.[138] This tension confuses observers. The treaty includes words about the environment.[139] It also includes strong investor protection. Which has priority?

These paradoxical claims can create chilling effects.[140] A government might hesitate to pass stricter pollution laws if it fears a costly arbitration claim.[141] The threat of an award for damages can discourage bold ESG action.[142] Some states, especially those with smaller budgets, worry about multi-million or even billion-dollar awards. This risk can hamper global efforts to address the climate crisis.[143] It can also harm labour rights reforms. For instance, if a country raises its

---

[135] Barnali Choudhury, 'International Investment Law and Non-Economic Issues' (2020) 53 Vanderbilt Journal of Transnational Law 1

[136] Kathryn Gordon, Joachim Pohl and Marie Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' (OECD Working Papers on International Investment 2014/01, OECD Publishing 2014)

[137] Wolfgang Alschner and Elisabeth Tuerk, 'The Role of International Investment Agreements in Fostering Sustainable Development' in Freya Baetens (ed), Investment Law within International Law: Integrationist Perspectives (Cambridge University Press 2013)

[138] M Sornarajah, Resistance and Change in the International Law on Foreign Investment (Cambridge University Press 2015)

[139] Lorenzo Cotula, 'Raising the Bar on Responsible Investment: What Role for Investment Treaties?' (IIED 2018)

[140]Tienhaara (n 117)

[141] Gus Van Harten and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (2016) 7 Journal of International Dispute Settlement 92

[142] Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 Transnational Environmental Law 229

[143] Vadi (n 131)

minimum wage or imposes stricter labour standards, an investor might argue that its expected profits are reduced.[144]

Some scholars argue that this aspect of arbitration undermines the legitimacy of ESG as a concept.[145] How can a legal framework be labelled "ESG-friendly" if it penalises states for protecting the environment or workers? Others note that arbitration can still be used in a balanced way.[146] Tribunals can interpret treaties in light of sustainability goals.[147] They can give states a margin of appreciation to protect public interests. In practice, though, many arbitrators come from commercial law backgrounds.[148] They tend to focus on investor protection. They may give less weight to policy measures that lack immediate economic justification.[149]

The paradox remains a central part of any discussion about ESG arbitration.[150] It shows that the system can be hijacked to pursue compensation for private entities.[151] Meanwhile states face the cost of defending these claims.[152] Even if the state ultimately wins, litigation expenses are high.[153] That money might have been used for environmental programs or social initiatives.

---

[144] Schneiderman (n 21)
[145] Miles (n 42)
[146] Stephan W Schill, 'Reforming Investor--State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20 Journal of International Economic Law 649
[147] Diane A Desierto, 'Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making' (2012) 26 Florida Journal of International Law 51
[148] Susan D Franck and others, 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' (2015) 53 Columbia Journal of Transnational Law 429
[149] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall Law Journal 211
[150] Viñuales (n 116)
[151] Sornarajah (n 139)
[152] Franck (n 50)
[153] Lise Johnson and Lisa Sachs, 'The Outsized Costs of Investor-State Dispute Settlement' (2016) 16 AIB Insights 10

Therefore, ESG arbitration may not always be the champion for sustainable goals. It can serve as a powerful tool for investors who wish to challenge regulations.[154] This contradicts the image of ESG arbitration as a friend of the environment and social justice.[155] The next section considers arbitrators themselves and whether they are truly neutral or if they lean toward corporate interests.

5. Are ESG Arbitrators Independent or Just Corporate-Friendly Gatekeepers?

Arbitration depends on arbitrators to make decisions.[156] They review the evidence.[157] They interpret contracts and treaties.[158] They issue binding awards.[159] The whole system rests on the assumption that arbitrators are neutral.[160] But are they? The reality is that the arbitration community is small.[161] Many arbitrators are partners in global law firms or have strong connections with business elites.[162] This may raise doubts about their independence.[163]

Repeat appointments are a common issue. If certain arbitrators develop a reputation for being company-friendly, corporations may select them more often.[164] That can create a financial incentive.[165] Some arbitrators might be wary of ruling against large corporate clients who might later choose them again.[166] These unspoken pressures can shape how arbitrators approach ESG disputes.[167] They

---

[154] Tienhaara (n 143)
[155] Choudhury (n 136)
[156] Blackaby and Partasides (n 23)
[157] Born (n 13)
[158] Schreuer (n 34)
[159] Born (n 13)
[160] Rogers (n 37)
[161] Dezalay and Garth (n 38)
[162] Puig (n 45)
[163] Van Harten (n 150)
[164] R Doak Bishop and Silvia M Marchili, Annulment under the ICSID Convention (OUP 2012)
[165] Eberhardt and Olivet (n 20)
[166] Eberhardt and Olivet (n 20)
[167] Franck (n 47)

might give greater weight to investor claims.[168] They might interpret ESG commitments narrowly.[169]

The "club" problem also arises. Arbitrators and lawyers often meet at conferences. They attend networking events. They may serve together on the boards of various institutions.[170] This can create close relationships.[171] The community is tight-knit. Outsiders might feel that their interests are not represented.[172] Affected communities or workers might not see people like themselves on arbitral panels.[173] The typical profile is that of an experienced commercial lawyer, often with a background in investment arbitration.[174]

When it comes to ESG disputes, critics argue that panels often lack the right expertise.[175] They note that environmental science, human rights law and climate policy are specialised fields.[176] Yet these complex topics are sometimes judged by arbitrators who do not have that background.[177] Arbitrators may rely on expert witnesses.[178] They can also consult external resources.[179] But they remain generalists in many cases.[180] Without deeper knowledge, they might adopt a conservative approach that favours existing commercial norms.[181]

---

[168] Miles (n 42)
[169] Miles (n 42)
[170] Van Harten (n 12)
[171] Dezalay and Garth (n 38)
[172] Choudhury (n 19)
[173] Perrone (n 48)
[174] Franck and others (n 149)
[175] Schill (n 147)
[176] Philippe Sands, Principles of International Environmental Law (3rd edn, Cambridge University Press 2012)
[177] Edith Brown Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 Georgetown Law Journal 675
[178] Born (n 13)
[179] Blackaby and Partasides (n 23)
[180] Catherine A Rogers, 'The Vocation of the International Arbitrator' (2005) 20 American University International Law Review 957
[181] Van Harten (n 150)

Another concern is funding.[182] Arbitration can be financed by third-party funders.[183] These entities invest in claims in exchange for a share of any award.[184] This can push arbitrators to think in terms of monetary compensation.[185] Social or environmental justice might not be their priority.[186] Some question whether this approach can ever reflect the wider public interest that ESG issues often involve.[187]

One proposed reform is to require arbitrators to disclose all potential conflicts of interest.[188] That includes financial ties, prior appointments and relationships with parties or counsel.[189] Some institutions already mandate such disclosures, but the scope can be narrow.[190] Another idea is to create specialised rosters for ESG disputes.[191] Panels could include not just commercial lawyers, but also experts in ecology or human rights.[192] That might ensure decisions are informed by a broader perspective. However, implementing such changes requires buy-in from institutions and states.[193]

---

[182] Maya Steinitz, 'Whose Claim Is This Anyway? Third-Party Litigation Funding' (2011) 95 Minnesota Law Review 1268

[183] Victoria Shannon Sahani, 'Judging Third-Party Funding' (2016) 63 UCLA Law Review 388

[184] Jonas von Goeler, Third-Party Funding in International Arbitration and Its Impact on Procedure (Kluwer Law International 2016)

[185] Jean E Kalicki, 'Security for Costs in International Arbitration' (2006) 3 Transnational Dispute Management 5

[186] Miles (n 42)

[187] Rogers (n 37)

[188] Ibid

[189] Chiara Giorgetti, 'Who Decides Who Decides in International Investment Arbitration?' (2013) 35 University of Pennsylvania Journal of International Law 431

[190] Nathalie Bernasconi-Osterwalder, Lise Johnson and Fiona Marshall, 'Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel' (IISD 2011)

[191] Gehring and Cordonier Segger (n 106)

[192] Ibid

[193] Franck (n 30)

Defenders of the current system say that it works well enough.[194] They argue that arbitrators, as professionals, can learn new areas.[195] They can adapt to ESG topics.[196] They also say that competition among arbitrators promotes fairness. If an arbitrator is seen as too partial, they risk losing future appointments. They note that the biggest arbitration institutions have ethical codes requiring impartiality.[197]

Skeptics remain unconvinced.[198] They observe that high-stakes arbitration often goes to a handful of well-known arbitrators.[199] This concentration of power can lead to groupthink.[200] Arbitrators share similar backgrounds in commercial law.[201] They are used to the same arguments about investor protection.[202] They might see ESG obligations as secondary.[203] They might interpret them narrowly, focusing on the letter of the contract rather than the spirit.

In ESG disputes, the outcome can affect entire communities and ecosystems.[204] That is different from a typical commercial claim over a failed merger or an unpaid invoice.[205] The stakes go beyond money.[206] Yet the system was designed for

---

[194] Jan Paulsson, The Idea of Arbitration (OUP 2013))
[195] Thomas W Wälde, 'Procedural Challenges in Investment Arbitration Under the Shadow of the Dual Role of the State' (2010) 26 Arbitration International 3
[196] Charles N Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chicago Journal of International Law 471
[197] Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush Arsanjani and others (eds), Looking to the Future: Essays on International Law in Honor of W. Michael Reisman (Martinus Nijhoff 2010)
[198] Sornarajah (n 139)
[199] Puig (n 45)
[200] Susan D Franck and others, 'Inside the Arbitrator's Mind' (2017) 66 Emory Law Journal 1115
[201] Franck and others (n 149)
[202] Sornarajah (n 118)
[203] Miles (n 42)
[204] Cotula (n 18)
[205] Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International 2009)
[206] Viñuales (n 116)

commercial disputes.[207] It was not built to address broad social issues.[208] This discrepancy can make some outcomes seem unfair.[209] Even if a panel tries to be balanced, the framework itself may tilt in favour of economic interests.

Thus, arbitrators occupy a unique position.[210] They stand at the intersection of commercial practice and emerging ESG norms.[211] Their role shapes whether ESG arbitration can be fair and forward-looking.[212] If the same corporate-friendly arbitrators dominate, the system might remain tilted.[213] That can undermine trust in the idea that ESG arbitration promotes sustainability.[214] Reformers say we need a new generation of arbitrators.[215] We need professionals who appreciate the complexities of environmental and social impacts.[216] The next section examines potential reforms and new models that might address these and other concerns.

6. The Future of ESG Arbitration: Reform or Reinvention?

Calls for reform are getting louder. Observers note that if ESG arbitration is to be taken seriously, it must address its flaws.[217] One priority is transparency.[218] Critics say that disputes about major pollution events or labour violations should not remain hidden.[219] They suggest that awards and key documents be published, with confidential information redacted if needed.[220] This would allow the public

[207] Lew, Mistelis and Kröll (n 22)
[208] Choudhury (n 136)
[209] Schneiderman (n 21)
[210] Rogers (n 181)
[211] Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law (Cambridge University Press 2003)
[212] Franck (n 30)
[213] Eberhardt and Olivet (n 20)
[214] Franck (n 30)
[215] Franck and others (n 149)
[216] Viñuales (n 116)
[217] Howard Mann, 'ISDS: Who Wins More, Investors or States?' (International Institute for Sustainable Development 2018)
[218] Fry and Repousis (n 65)
[219] Nigel Blackaby and Caroline Richard, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?' in Michael Waibel and others (eds), The Backlash Against Investment Arbitration (Kluwer Law International 2010)
[220] Lee (n 105)

and the media to evaluate the fairness of decisions. It would also deter frivolous claims and encourage consistent rulings.[221] Opponents respond that confidentiality is a core feature of arbitration.[222] They say it encourages candid settlements.[223] Yet that approach might conflict with the public importance of ESG issues.[224]

Another proposal is to shift certain ESG disputes from private arbitration to public tribunals.[225] Advocates of this change argue that the environment and human rights have broad social significance.[226] They say that only the courts or specialised global bodies can truly ensure justice.[227] They point to examples like the International Criminal Court or the proposed World Environment Court. While these institutions do not currently handle commercial disputes, the idea is that a new or adapted body could be created. That tribunal would have judges or arbitrators with expertise in sustainability. It would prioritise public interest. Critics counter that states might be reluctant to cede sovereignty to a new global court. Businesses might refuse to sign contracts that remove their option to arbitrate in private.

---

[221] Hafner-Burton, Steinert-Threlkeld and Victor (n 17)

[222] Christopher Kee, 'The Evolution of the International Commercial Arbitration System' in Loukas Mistelis (ed), Concise International Arbitration (2nd edn, Kluwer Law International 2015)

[223] Born (n 13)

[224] Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 Stanford Journal of International Law 103

[225] Jayems Dhingra, 'Can Justice Be Served Without Transparency in International Commercial Arbitration?' in Muruga Perumal Ramaswamy and João Ribeiro (eds), Harmonising Trade Law to Enable Private Sector Regional Development, CLJP Hors Serie Volume XX (2016)

[226] Ellen Hey, 'The MDGs, Access to Justice, and the International Courts' in Malcolm Langford, Andy Sumner and Alicia Ely Yamin (eds), The Millennium Development Goals and Human Rights (Cambridge University Press 2013)

[227] Sands (n 177)

A third path involves a hybrid approach. Some arbitration centres have started pilot programmes that incorporate mediation and community participation.[228] In these pilots, all stakeholders, including representatives of local communities, can present their concerns.[229] The process includes experts in human rights and environmental science.[230] The aim is to find a solution that addresses the harm, not just the legal liability. This approach might produce more equitable settlements.[231] It could also force companies to engage directly with those they have affected. However, it is still experimental. Critics worry that it remains optional. Companies can reject it and stick to traditional arbitration.[232]

Community representation is another key topic.[233] Typical commercial arbitration involves sophisticated parties who choose arbitrators, schedule hearings and present their arguments.[234] But if an ESG dispute arises from, say, a factory that has polluted a local river, community members might not have the resources to participate effectively.[235] Some reformers propose mandatory legal aid funds.[236] Others suggest that arbitration panels should include an advocate for the public interest.[237] That person or organisation could challenge evidence and represent affected parties.[238] Yet these proposals raise questions. Who would pay for the public interest advocate? How would the advocate be selected?

---

[228] Lawrence Susskind and Jeffrey Cruikshank, Breaking the Impasse: Consensual Approaches to Resolving Public Disputes (Basic Books 1987)
[229] Wheeler (n 107)
[230] Lisa Blomgren Bingham, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict' (2008) 24 Ohio State Journal on Dispute Resolution 1
[231] Rogers (n 49)
[232] John Braithwaite, Restorative Justice and Responsive Regulation (OUP 2002)
[233] Cecilia Olivet and Pia Eberhardt, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom' (Transnational Institute 2012)
[234] Born (n 13)
[235] 1 Rogers (n 49)
[236] Franck (n 30)
[237] Choudhury (n 19)
[238] Blackaby and Richard (n 220)

Furthermore, the structure of arbitration might need an overhaul if it is to address ESG disputes effectively.[239] Traditional arbitration was designed for private contracts.[240] It was never meant to handle questions like intergenerational equity or large-scale ecological damage.[241] Some experts believe we need a different kind of process, one that looks beyond compensation to ask how we can restore habitats or reform corporate practices. That might require remedies that go beyond monetary awards.[242] It might involve ongoing monitoring or public reporting.[243] It might require structural changes in a company's operations.[244]

On the other hand, supporters of the status quo say that incremental changes are enough.[245] They point to the fact that many institutions now offer rules that encourage sustainability considerations.[246] For instance, some sets of rules mention environmental impact assessments or call for faster procedures in climate-related cases.[247] They say these modifications show that arbitration can adapt without losing its core strengths: flexibility, speed and enforceability.[248]

The future of ESG arbitration could go in several directions. It could remain a niche practice, dominated by corporate-friendly lawyers who rebrand themselves as ESG experts.[249] It could evolve into a more open system, with greater transparency

---

[239] Schill (n 147)
[240] Lew, Mistelis and Kröll (n 22)
[241] Sands (n 177)
[242] Marie-Claire Cordonier Segger and Markus W Gehring, Sustainable Development in World Trade Law (Kluwer Law International 2005)
[243] Laurence Boisson de Chazournes, 'Technical and Financial Assistance and Compliance: The Interplay' in Ulrich Beyerlin and others (eds), Ensuring Compliance with Multilateral Environmental Agreements (Martinus Nijhoff 2006)
[244] Benjamin J Richardson, Socially Responsible Investment Law: Regulating the Unseen Polluters (OUP 2008)
[245] Paulsson (n 195)
[246] Fry (n 40)
[247] Lucy Greenwood, 'The Canary Is Dead: Arbitration and Climate Change' (2019) 36 Journal of International Arbitration 3
[248] Klaus Peter Berger, 'The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective' (1989) 12 Fordham International Law Journal 605
[249]) Eberhardt and Olivet (n 20)

and broader participation.[250] Or it could be replaced by entirely new forms of dispute resolution that focus on the collective interest in the environment and social justice.[251]

Whichever path prevails, it is clear that ESG arbitration stands at a crossroads.[252] There is real potential to create a dispute resolution system that balances commercial interests with public needs.[253] However, without significant reforms, the suspicion of greenwashing will persist.[254] The public will continue to see private arbitration as an insider's game.[255] It will seem more like a way to handle risk for large companies than a vehicle for meaningful accountability.[256]

7. Conclusion: Noble Cause or Corporate Sham?

ESG arbitration carries the promise of progress.[257] The idea behind it is noble.[258] Companies should respect the environment, treat workers fairly and uphold good governance.[259] Arbitration could provide a swift method to enforce these promises.[260] It could encourage companies to fulfill obligations or pay when they fail.[261] Yet in practice, it often falls short.[262] Confidentiality favours big corporations. Power imbalances put affected communities at a disadvantage.

---

[250] Fry and Repousis (n 65)
[251] Resnik (n 115)
[252] Emmanuel Gaillard, The Emerging System of International Arbitration (Brill Nijhoff 2012)
[253] Diane A Desierto, 'Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making' (2012) 26 Florida Journal of International Law 51
[254] Laufer (n 10)
[255] Rogers (n 181)
[256] Sornarajah (n 139)
[257] International Bar Association, 'Report on Use of ESG Contractual Obligations and Related Disputes' (2023) <https://www.ibanet.org/document?id=report-on-use-of-ESG-contractual-obligations> accessed 24 February 2025
[258] Ibid
[259] Ibid
[260] Ibid
[261] Ibid
[262] Ibid

Arbitrators come from an elite circle that sometimes views ESG as a marketing trend rather than a genuine principle.[263]

High-profile cases show that investors use arbitration to challenge states' environmental policies.[264] This undercuts the notion that ESG arbitration is always about moral responsibility. When states face large compensation claims for imposing climate regulations, one wonders whose interests the system serves.[265] Meanwhile, the potential for greenwashing remains significant.[266] Firms settle disputes secretly and continue touting their ESG credentials in public.[267]

This does not mean that ESG arbitration cannot be redeemed.[268] Reforms can help.[269] Greater transparency would allow public scrutiny.[270] Specialised rosters of arbitrators with expertise in sustainability could offer balanced judgments.[271] Mandatory disclosure of rulings could deter frivolous claims and build consistent jurisprudence. New models of dispute resolution might bring communities into the process more directly.[272]

Yet the effort required is substantial. The arbitration industry makes huge profits as it stands. Many law firms and institutions have a stake in maintaining the status quo.[273] They fear that too much transparency might reduce the appeal of arbitration.[274] Corporations may prefer to keep potential liabilities out of public

---

[263] Ibid
[264] Center for International Environmental Law, 'Overcoming International Investment Agreements as a Barrier to Climate Action' (2024) <https://www.ciel.org/wp-content/uploads/2024/01/Overcoming-International-Investment-Agreements-as-a-Barrier-to-Climate-Action.pdf> accessed 24 February 2025
[265] Ibid
[266] Ibid
[267] Ibid
[268] International Bar Association (n 258)
[269] Ibid
[270] Ibid
[271] Ibid
[272] Ibid
[273] Rogers (n 37)
[274] Dezalay and Garth (n 38)

view.[275] They also worry that involving community representatives could slow proceedings or force them to address uncomfortable facts.[276] Reform would require a shift in values, not just in procedure.[277]

Ultimately, whether ESG arbitration is a noble cause or a billion-dollar sham may depend on what we do next. If the system remains the same, it risks becoming an elaborate form of greenwashing.[278] It will shield corporate interests more than it protects the environment or human rights.[279] However, if activists, legal professionals and policymakers push for significant reforms, there is still hope.[280] A reimagined ESG arbitration system could align with public interest.[281] It could provide clarity.[282] It could ensure compensation for harm.[283] It could become a credible mechanism for accountability rather than a tool for risk management.[284]

In a world facing climate change, social upheaval and governance challenges, the stakes are high.[285] ESG arbitration can be part of the solution only if it undergoes serious transformation.[286] If it refuses to change, it will remain suspect.[287] Observers will continue to question its legitimacy.[288] They will point to the secrecy,

---

[275] Ibid
[276] Ibid
[277] Ibid
[278] Pia Eberhardt and Cecilia Olivet, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom' (Transnational Institute, November 2012) <https://www.tni.org/files/download/profitingfrominjustice.pdf> accessed 24 February 2025
[279] Ibid
[280] Malcolm Langford, Daniel Behn and Runar Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) J Int Economic Law 301
[281] Beate Sjåfjell, 'Beyond Climate Risk: Integrating Sustainability into the Duties of the Corporate Board'
[282] Ibid
[283] Ibid
[284] Ibid
[285] Sornarajah (n 139)
[286] Ibid
[287] Ibid
[288] Ibid

the power imbalances and the paradox of investor-state claims.[289] The choice lies with the arbitration community, states, investors and civil society.[290] They can reshape the process or they can carry on with business as usual. One path leads to a more equitable framework. The other keeps ESG arbitration as an often hollow promise that mostly benefits those already in power.[291]

[289] Ibid
[290] Ibid
[291] Ibid

Bibliography

Agafonov V, 'ESG Principles and Greenwashing: Legal Issues of Differentiation' (2024) Actual Problems of Russian Law

Allee T and Peinhardt C, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 65 International Organization 401

Alschner W and Tuerk E, 'The Role of International Investment Agreements in Fostering Sustainable Development' in Freya Baetens (ed), Investment Law within International Law: Integrationist Perspectives (Cambridge University Press 2013)

Amnesty International, 'The True "Tragedy": Delays and Failures in Tackling Oil Spills in the Niger Delta' (Amnesty International Publications 2011) <https://www.amnesty.org/en/documents/afr44/018/2011/en/>

Asteriti A and Tams C, 'Transparency and Representation of the Public Interest in Investment Treaty Arbitration' (2010)

Baughen S, 'Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven' (2006) 18 Journal of Environmental Law 207

Bernasconi-Osterwalder N and Brauch MD, 'The State of Play in Vattenfall v. Germany II: Leaving the German Public in the Dark' (IISD 2014)

Bernasconi-Osterwalder N, Johnson L and Marshall F, 'Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel' (IISD 2011)

Berger KP, 'The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective' (1989) 12 Fordham International Law Journal 605

Bingham LB, 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict' (2008) 24 Ohio State Journal on Dispute Resolution 1

Bishop RD and Marchili SM, Annulment under the ICSID Convention (OUP 2012) Blackaby N and Partasides C, Redfern and Hunter on International Arbitration (6th edn, OUP 2015)

Blackaby N and Richard C, 'Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?' in Michael Waibel and others (eds), The Backlash Against Investment Arbitration (Kluwer Law International 2010)

Boisson de Chazournes L, 'Technical and Financial Assistance and Compliance: The Interplay' in Ulrich Beyerlin and others (eds), Ensuring Compliance with Multilateral Environmental Agreements (Martinus Nijhoff 2006)

Born G, International Commercial Arbitration (2nd edn, Kluwer Law International 2014)

Bowman M, 'Banking on Climate Change: How Finance Actors and Transnational Regulatory Regimes are Responding' (2015) 45 Environmental Law 591

Braithwaite J, Restorative Justice and Responsive Regulation (OUP 2002)

Brown AC, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' (2001) 16 American University International Law Review 969

Brown J, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?' (2013) 3(1) Western Journal of Legal Studies 1

Brower CN and Schill SW, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chicago Journal of International Law 471

Buys CG, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) Social Science Research Network

Center for International Environmental Law, 'Overcoming International Investment Agreements as a Barrier to Climate Action' (2024) <https://www.ciel.org/wp-content/uploads/2024/01/Overcoming-International-Investment-Agreements-as-a-Barrier-to-Climate-Action.pdf>

Choudhury B, 'Balancing Soft and Hard Law for Business and Human Rights' (2018) 67 International & Comparative Law Quarterly 961

—— 'International Investment Law and Non-Economic Issues' (2020) 53 Vanderbilt Journal of Transnational Law 1

—— 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 Vanderbilt Journal of Transnational Law 775

Cordonier Segger MC and Gehring MW, Sustainable Development in World Trade Law (Kluwer Law International 2005)

Cotula L, Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law (Routledge 2012)

—— 'Raising the Bar on Responsible Investment: What Role for Investment Treaties?' (IIED 2018)

Davis KE and Hershkoff H, 'Contracting for Procedure' (2011) 53 William & Mary Law Review 507

De Silva Lokuwaduge CS and de Silva K, 'ESG Risk Disclosure and the Risk of Green Washing' (2022) Australasian Business, Accounting and Finance Journal

Deng P, Zhang Y and Yu Q, 'Exploring Investment Optimization and "Greenwashing" from ESG Disclosure: A Dual Examination of Investor Perception' (2024) Journal of Economics, Finance and Accounting Studies

Desierto DA, 'Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making' (2012) 26 Florida Journal of International Law 51

Dezalay Y and Garth BG, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (University of Chicago Press 1996)

Dhingra J, 'Can Justice Be Served Without Transparency in International Commercial Arbitration?' in Muruga Perumal Ramaswamy and João Ribeiro (eds), Harmonising Trade Law to Enable Private Sector Regional Development, CLJP Hors Serie Volume XX (2016)

Dolzer R, 'Fair and Equitable Treatment: Today's Contours' (2014) 12 Santa Clara Journal of International Law 7

Dolzer R and Schreuer C, Principles of International Investment Law (2nd edn, OUP 2012)

Eberhardt P and Olivet C, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom' (Corporate Europe Observatory 2012)

—— 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom' (Transnational Institute, November 2012) <https://www.tni.org/files/download/profitingfrominjustice.pdf>

Eccles RG and Klimenko S, 'The Investor Revolution' (2019) 97(3) Harvard Business Review 106

Franck SD, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harvard International Law Journal 435

—— 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 North Carolina Law Review 1

—— 'Rationalizing Costs in Investment Treaty Arbitration' (2011) 88 Washington University Law Review 769

—— 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521

Franck SD and others, 'Inside the Arbitrator's Mind' (2017) 66 Emory Law Journal 1115

—— 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' (2015) 53 Columbia Journal of Transnational Law 429

Fry JD and Repousis OG, 'Towards a New World for Investor-State Arbitration Through Transparency' (2016) 48 NYU Journal of International Law and Politics 795

Fry J, 'International Arbitration and the Environment' in Stavros Brekoulakis and others (eds), The Evolution and Future of International Arbitration (Kluwer Law International 2016)

Gadinis S and Miazad A, 'The Hidden Power of Compliance' (2019) 103 Minnesota Law Review 2135

Gaillard E, The Emerging System of International Arbitration (Brill Nijhoff 2012)

Gaillard E and Savage J, Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer Law International 1999)

Galanter M, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95

Gao X, 'The Interaction Between Greenwashing and Chinese ESG Investors: Analyzing from the Perspectives of Credibility and Investment Decision-making' (2024) Advances in Economics, Management and Political Sciences

Gehring MW and Cordonier Segger MC (eds), Sustainable Development in World Investment Law (Kluwer Law International 2011)

Giorgetti C, 'Who Decides Who Decides in International Investment Arbitration?' (2013) 35 University of Pennsylvania Journal of International Law 431

Giupponi O and Figueroa RP, 'Navigating ESG Arbitrability Challenges in Energy and Climate: An In-Depth Analysis and Future Perspectives' (2024) <https://typeset.io/papers/navigating-esg-arbitrability-challenges-in-energy-and-5fr41vq6zb>

Goh NCW, 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' (2022) The Journal of World Energy Law & Business <https://typeset.io/papers/esg-and-investment-arbitration-a-future-with-cleaner-foreign-5fk5y6dx>

Gordon K, Pohl J and Bouchard M, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' (OECD Working Papers on International Investment 2014/01, OECD Publishing 2014)

Greenberg S, Kee C and Weeramantry JR, International Commercial Arbitration: An Asia-Pacific Perspective (Cambridge University Press 2011)

Greenwood L, 'The Canary Is Dead: Arbitration and Climate Change' (2019) 36 Journal of International Arbitration 3

Hafner-Burton EM, Steinert-Threlkeld ZC and Victor DG, 'Predictability versus Flexibility: Secrecy in International Investment Arbitration' (2016) 68(3) World Politics 413

Hey E, 'The MDGs, Access to Justice, and the International Courts' in Malcolm Langford, Andy Sumner and Alicia Ely Yamin (eds), The Millennium Development Goals and Human Rights (Cambridge University Press 2013)

Hu P and others, 'Peeking into Corporate Greenwashing through the Readability of ESG Disclosures' (2024) Sustainability

ICC Commission on Arbitration and ADR, Resolving Climate Change Related Disputes through Arbitration and ADR (ICC Publication 2019)

ICSID, 'Draft Working Paper on ESG Considerations in Investor-State Disputes' (2021) <https://icsid.worldbank.org/>

—— 'The ICSID Caseload -- Statistics' (Issue 2022-2) <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics>

International Bar Association, 'Report on Use of ESG Contractual Obligations and Related Disputes' (2023) <*https://www.ibanet.org/document?id=report-on-use-of-ESG-contractual-obligations*>

International Finance Corporation, 'Performance Standards on Environmental and Social Sustainability' (IFC 2012) <*https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards*>

Johnson L and Sachs L, 'The Outsized Costs of Investor-State Dispute Settlement' (2016) 16 AIB Insights 10

Kalicki JE, 'Security for Costs in International Arbitration' (2006) 3 Transnational Dispute Management 5

Karton J, The Culture of International Arbitration and The Evolution of Contract Law (OUP 2013)

Kaufmann-Kohler G and Rigozzi A, International Arbitration: Law and Practice in Switzerland (OUP 2015)

Kee C, 'The Evolution of the International Commercial Arbitration System' in Loukas Mistelis (ed), Concise International Arbitration (2nd edn, Kluwer Law International 2015)

Kimmerling J, 'Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco, and Aguinda v. Texaco' (2006) 38 New York University Journal of International Law and Politics 413

Langford M, Behn D and Lie R, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) J Int Economic Law 301

Laufer WS, 'Social Accountability and Corporate Greenwashing' (2003) 43 Journal of Business Ethics 253

Lee JA, 'UNCITRAL's Unclear Transparency Instrument: Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations' (2013) 33 Northwestern Journal of International Law & Business 439

Lew JDM, Mistelis LA and Kröll S, Comparative International Commercial Arbitration (Kluwer Law International 2003)

Mann H, 'ISDS: Who Wins More, Investors or States?' (International Institute for Sustainable Development 2018)

McIlwrath M and Savage J, International Arbitration and Mediation: A Practical Guide (Kluwer Law International 2010)

Miles K, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital (Cambridge University Press 2013)

Moses ML, The Principles and Practice of International Commercial Arbitration (3rd edn, Cambridge University Press 2017)

Muigua K, 'Infusing Environmental, Social, and Governance Tenets into Arbitration and Alternative Dispute Resolution' (2024)

Newcombe A and Paradell L, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International 2009)

Olivet C and Eberhardt P, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom' (Transnational Institute 2012)

Parker C and Howe J, 'Ruggie's Diplomatic Project and Its Missing Regulatory Infrastructure' in Radu Mares (ed), The UN Guiding Principles on Business and Human Rights (Martinus Nijhoff 2012)

Paulsson J, Denial of Justice in International Law (Cambridge University Press 2005)

—— The Idea of Arbitration (OUP 2013)

Pauwelyn J, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law (Cambridge University Press 2003)

Perrone NM, 'The International Investment Regime After the Global Crisis of Neoliberalism: Rupture or Continuity?' (2016) 23 Indiana Journal of Global Legal Studies 603

Peter A, 'Climate Change and Supply Chain Arbitrations: Impact of EU Law on the BRI and Non-EU Entities' (2023) <https://typeset.io/papers/climate-change-and-supply-chain-arbitrations-impact-of-eu-24zcxheznq>

Puig S, 'No Right without a Remedy: Foundations of Investor-State Arbitration' (2014) 35 University of Pennsylvania Journal of International Law 829

—— 'Social Capital in the Arbitration Market' (2014) 25(2) European Journal of International Law 387

Puig S and Shaffer G, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 361

Resnik J, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 Yale Law Journal 2804

Richardson BJ, Socially Responsible Investment Law: Regulating the Unseen Polluters (OUP 2008)

Rogers CA, 'The Arrival of the "Have-Nots" in International Arbitration' (2007) 8 Nevada Law Journal 341

—— Ethics in International Arbitration (OUP 2014)

—— 'The Vocation of the International Arbitrator' (2005) 20 American University International Law Review 957

—— 'Transparency in International Commercial Arbitration' (2006) Kansas Law Review, Bocconi Legal Studies Research Paper No 06-10

Rompotis GG, 'Do ESG ETFs "Greenwash"? Evidence from the US Market' (2023) Journal of Environmental, Social, and Governance

Ruggie JG, Just Business: Multinational Corporations and Human Rights (W.W. Norton 2013)

Sahani VS, 'Judging Third-Party Funding' (2016) 63 UCLA Law Review 388

Sands P, Principles of International Environmental Law (3rd edn, Cambridge University Press 2012)

Saravanan A and Subramanian S, 'Transparency and Confidentiality Requirements in Investment Treaty Arbitration' (2018) BRICS Law Journal

Schill S, The Multilateralization of International Investment Law (Cambridge University Press 2009)

Schill SW, 'Reforming Investor--State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20 Journal of International Economic Law 649

Schneiderman D, Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise (Cambridge University Press 2008)

Schreuer CH, The ICSID Convention: A Commentary (2nd edn, Cambridge University Press 2009)

Schultz T and Mitchenson J, 'Navigating Sovereignty and Transnational Commercial Law: The Use of Comity by Australian Courts' (2016) 12 Journal of Private International Law 344

Schultz T and Ortino F, The Oxford Handbook of International Arbitration (OUP 2020)

Science Based Targets Initiative, 'Companies Taking Action' (2023) <https://sciencebasedtargets.org/companies-taking-action>

Shelton D, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 Stanford Journal of International Law 103

Simons P and Macklin A, The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage (Routledge 2014)

Singh RP and Kumar S, 'Transparency and Confidentiality in International Commercial Arbitration' (2020) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management

Sjåfjell B, 'Beyond Climate Risk: Integrating Sustainability into the Duties of the Corporate Board'

Smeureanu IM, Confidentiality in International Commercial Arbitration (Kluwer Law International 2011)

Sornarajah M, Resistance and Change in the International Law on Foreign Investment (Cambridge University Press 2015)

—— The International Law on Foreign Investment (3rd edn, Cambridge University Press 2010)

Steinitz M, 'The Case for an International Court of Civil Justice' (2019) 67 Stanford Law Review 75

—— 'Whose Claim Is This Anyway? Third-Party Litigation Funding' (2011) 95 Minnesota Law Review 1268

Susskind L and Cruikshank J, Breaking the Impasse: Consensual Approaches to Resolving Public Disputes (Basic Books 1987)

Tienhaara K, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), Evolution in Investment Treaty Law and Arbitration (Cambridge University Press 2011)

—— 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 Transnational Environmental Law 229

Todaro DL and Torelli R, 'From Greenwashing to ESG-Washing: A Focus on the Circular Economy Field' (2024) Corporate Social Responsibility and Environmental Management

Treepongkaruna S and others, 'Greenwashing, Carbon Emission, and ESG' (2024) Business Strategy and the Environment

Tung S and Lin B, 'More Transparency in International Commercial Arbitration: To Have or Not to Have?' (2018) Law & Society: International & Comparative Law eJournal

Vadi V, 'Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?' (2015) 48 Vanderbilt Journal of Transnational Law 1285

Van Aaken A, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Stephan Schill (ed), International Investment Law and Comparative Public Law (OUP 2010)

Van den Berg AJ, The New York Arbitration Convention of 1958 (Kluwer Law International 1981)

—— 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush Arsanjani and others (eds), Looking to the Future: Essays on International Law in Honor of W. Michael Reisman (Martinus Nijhoff 2010)

Van Harten G, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall Law Journal 211

—— Investment Treaty Arbitration and Public Law (OUP 2007)

Van Harten G and Scott DN, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (2016) 7 Journal of International Dispute Settlement 92

Vannieuwenhuyse G, 'Exploring the Suitability of Arbitration for Settling ESG and Human Rights Disputes' (2023) Journal of International Arbitration <https://typeset.io/papers/exploring-the-suitability-of-arbitration-for-settling-esg-3gv3jtx3>

Vidal J, 'Shell Announces £55m Payout for Nigeria Oil Spills' (The Guardian, 7 January 2015) <https://www.business-humanrights.org/en/latest-news/shell-announces-55m-payout-for-nigeria-oil-spills/>

Viñuales JE, Foreign Investment and the Environment in International Law (Cambridge University Press 2012)

von Goeler J, Third-Party Funding in International Arbitration and Its Impact on Procedure (Kluwer Law International 2016)

Wälde TW, 'Procedural Challenges in Investment Arbitration Under the Shadow of the Dual Role of the State' (2010) 26 Arbitration International 3

Wälde TW and Kolo A, 'Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law' (2001) 50 International and Comparative Law Quarterly 811

Weiss EB, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order' (1993) 81 Georgetown Law Journal 675

Wheeler M, Environmental Dispute Resolution (Environmental Law Institute 1995)

Wu N, 'Transparency and Data Protection: Conflicts and Resolutions in International Commercial Arbitration' (2024) Journal of Education, Humanities and Social Sciences

Zasemkova OF, 'International Arbitration: Towards Sustainable Development and Environmental Protection' (2023) <https://typeset.io/papers/international-arbitration-towards-sustainable-development-24v73rght1>

Rockhopper Exploration Plc v Italian Republic ICSID Case No ARB/17/14

Vattenfall AB and Others v Federal Republic of Germany ICSID Case No ARB/12/12

Who Holds Arbitrators Accountable? Examining the Limits of Self-Regulation in Arbitration

By: **James Njuguna* & Murithi Antony****

Abstract

Arbitration has long been heralded as a quick, efficient, and effective alternative to litigation, affording parties autonomy over their dispute resolution process. However, its self-regulatory regime raises fundamental questions about arbitrator accountability. Unlike judges, arbitrators are not subject to hierarchical supervision, and the mechanisms for addressing arbitrator misconduct, incompetence, or bias remain fragmented and incoherent among jurisdictions. This paper critically examines the challenges posed by arbitration's self-regulatory model, with special focus on problems of transparency, conflict of interest, and judicial intervention. Drawing on Commonwealth case law, it assesses the effectiveness of current mechanisms designed to ensure arbitrator integrity and procedural fairness. The article contends that though self-regulation enhances the efficiency of arbitration, it also generates accountability gaps that erode trust in the process. It concludes with recommendations intended to enhance the accountability of arbitrators without compromising the fundamental autonomy and efficiency upon which arbitration is founded.

1. Introduction

Arbitration is a pillar of modern dispute resolution, particularly in commercial and international contexts.[1] Its great appeal lies in the ability to offer a confidential and flexible procedure, one that skillfully avoids the delays and costs often

** MCIArb; LLM (UoN) LL.B (MKU) PG Dip in Law (KSL); Law Lecturer – University of Embu; Senior Advocate – Kariuki Muigua & Co. Advocates; Email: njuguna@kmco.co.ke*

*** LL.B (Hons), University of Embu; PG Dip in Law (Cnd), KSL; Research Assistant, Centre for Climate Change Adaptation and Mitigation (CCCAM) – University of Embu; Email: amurithi326@gmail.com*

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

associated with conventional court litigation.[2] However, this same autonomy raises a fundamental concern in respect of upholding arbitrators' fairness, competence, and impartiality?[3]

Unlike judicial systems, where appellate mechanisms provide structured oversight, arbitration lacks a centralized accountability framework.[4] Arbitrators are typically appointed by the disputing parties or selected by arbitral institutions, and their awards are usually final and not subject to appeal, unless in exceptional circumstances provided under the law.[5] Without external scrutiny, arbitrator integrity becomes a concern, particularly regarding conflicts of interest, repeat appointments, and procedural improprieties.[6]

Most legal frameworks, including the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, allow awards to be set aside only on limited grounds such as fraud, procedural irregularities, or violations of public policy.[7] Generally, courts are hesitant to intervene in arbitration, stressing its finality and efficiency.[8] This deference to arbitration, however, often denies parties sufficient remedy where arbitrators fall short of basic standards of impartiality and diligence.[9]

---

[2] Alashqar, Yaser. "The Comparative View: Mediation, Negotiation and Arbitration." In *Reconciliation, Conflict Transformation, and Peace Studies*, pp. 131-144. Cham: Springer Nature Switzerland, 2024.

[3] Spain, Anna. "Integration Matters: Rethinking the Architecture of International Dispute Resolution." *U. Pa. J. Int'l L.* 32 (2010): 1.

[4] 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.

[5] Sweet, Alec Stone, and Florian Grisel. "The evolution of international arbitration: delegation, judicialization, governance." *International Arbitration and Global Governance: Contending Theories and Evidence* (2014): 22-46.

[6] *Ibid.*

[7] UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) art 34.

[8] Steele, Brette L. "Enforcing international commercial mediation agreements as arbitral awards under the New York convention." *UCLA L. Rev.* 54 (2006): 1385.

[9] *Ibid.*

Upon this contextual background, this paper examines arbitration's mechanisms of accountability. It examines the challenges of arbitration's self-regulation, including insufficient transparency, ethical enforcement, and power imbalances. Finally, it proposes pragmatic reforms to strengthen arbitrator accountability without undermining arbitration's core advantages.

2. Arbitrator Integrity and the Mechanisms for Accountability

2.1. The Importance of Arbitrator Integrity in Dispute Resolution

Integrity of arbitrators is the cornerstone on which arbitration can establish legitimacy as a method of dispute resolution.[10] Integrity in arbitration involves key components such as impartiality, competence, and procedural fairness.[11] If an arbitrator's integrity is compromised through bias, incompetence, or conflict of interest, the integrity of the arbitral process is undermined.[12]

Arbitrator integrity is particularly crucial because arbitration awards have binding legal consequences, often with limited grounds for appeal.[13] In high-stake commercial and investment cases, the arbitrators exercise immense power, and their ethical requirements are even more important.[14] If arbitrators do not practice fairness and impartiality, the parties involved will begin to lose faith in the arbitration process, and this will cause a move towards litigation or other forms of dispute resolution.[15]

---

[10] Park, William W. "Arbitrator integrity: the transient and the permanent." *San Diego L. Rev.* 46 (2009): 629.

[11] Menkel-Meadow, Carrie. "Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not." *U. Miami L. Rev.* 56 (2001): 949.

[12] Tarawneh, Mosleh A., and Tariq K. Alhasan. "Justice in the balance: The crucial role of disclosure in ensuring justice in Jordanian arbitration." *Conflict Resolution Quarterly* 42, no. 1 (2024): 5-14.

[13] McIlwrath, Michael, and John Savage. "International arbitration and mediation: a practical guide." (2009): 1-530.

[14] *Ibid.*

[15] Park, William W. "Arbitrator integrity and investor-state disputes." In *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2009)*, pp. 100-129. Brill Nijhoff, 2010.

Studies have shown the significance of arbitrator integrity to the arbitration outcomes.[16] Research by Queen Mary University of London established that corporate counsel overwhelmingly regards arbitrator impartiality as the most significant factor in arbitral proceedings.[17] Similarly, a 2020 Commonwealth Secretariat study, which addressed investment arbitration, underscored concerns that arbitrators who adjudicate investor-state disputes repeatedly exhibit discernible patterns in their decisions, and this raises suspicions of systemic bias.[18]

2.2. The Self-Regulatory Framework of Arbitral Institutions

Arbitral institutions play a central role in ensuring arbitrator integrity.[19] They establish procedural rules, maintain lists of qualified arbitrators, and enforce ethical codes.[20] Some of the key arbitral institutions include the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC), and Nairobi Centre for International Arbitration (NCIA).[21]

---

[16] *Ibid.*

[17] Queen Mary University of London, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* (2021) https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf . *See also*, Yiannibas, Katerina. "The adaptability of international arbitration: Reforming the arbitration mechanism to provide effective remedy for business-related human rights abuses." *Netherlands Quarterly of Human Rights* 36, no. 3 (2018): 214-231.

[18] Commonwealth Secretariat, *A Study of International Commercial Arbitration in the Commonwealth* (Commonwealth Secretariat 2020) https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/key_reform_pdfs/A%2BStudy%2Bof%2BInternational%2BCommercial%2BArbitration_PDF_-compressed.pdf.

[19] Honcharenko, Olena M., Olga O. Bakalinska, Olena A. Belianevych, Svitlana I. Bevz, and Olena A. Chernenko. "International commercial arbitration as a modern self-regulation tool in hybrid war." *AUC IURIDICA* 68, no. 3 (2022): 123-138.

[20] Bukhman, Emil. "Time Limits on Arbitrability of Securities Industry Disputes Under the Arbitration Rules of Self-Regulatory Organizations." *Brook. L. Rev.* 61 (1995): 143.

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

All these institutions have their own regulations regarding the conduct of arbitrators.[22] The ICC Rules of Arbitration mandate that arbitrators be impartial and disclose any information that could potentially impact on their independence.[23] Similarly, the LCIA Rules compel arbitrators to provide written declarations concerning potential conflicts of interest.[24] Despite the evident ethical guidelines established by these institutions, the enforcement is very disparate.[25]

Many arbitral institutions hesitate to take disciplinary action against arbitrators who fail to disclose conflicts of interest or exhibit partiality.[26] This reluctance often stems from concerns over possible reputational damage or the economic interests of the arbitration business.[27] Unlike in judicial forums, where judges can be openly reprimanded or removed from office, arbitrators rarely face public sanctions for ethical missteps.[28]

A good illustration of self-regulation deficiencies can be evidenced in the case of *Halliburton Company v. Chubb Bermuda Insurance Ltd (2020) UKSC 48*, a seminal judgment of the United Kingdom (UK) Supreme Court. Central to this judgment was an arbitrator who did not disclose many concurrent appointments on disputes which had some relationship with one of the parties.[29] The court recognized that such appointments had to be disclosed to guarantee impartiality; nonetheless, the

---

[22] Rogers, Catherine A. "Regulating international arbitrators: A functional approach to developing standards of conduct." *Stan. J. Int'l L.* 41 (2005): 53.
[23] International Chamber of Commerce (ICC), *ICC Rules of Arbitration* (2021) art 11.
[24] London Court of International Arbitration (LCIA), *LCIA Arbitration Rules* (2020) arts 5.4–5.5 available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.
[25] Rogers, Catherine A. "The vocation of the international arbitrator." *Am. U. Int'l L. Rev.* 20 (2004): 957.
[26] *Ibid.*
[27] Jordan, Cally, and Pamela Hughes. "Which way for market institutions: The fundamental question of self-regulation." *Berkeley Bus. LJ* 4 (2007): 205.
[28] *Ibid.*
[29] D'Silva, Magdalene. "Dealing in power: gatekeepers in arbitrator appointment in international commercial arbitration." *Journal of International Dispute Settlement* 5, no. 3 (2014): 605-634.

arbitrator remained in the proceedings.[30] The case highlighted the challenge of holding arbitrators to account where control remains with arbitral institutions alone.[31] In Kenya, the same issues have been raised in instances where arbitrators have not acted independently, with courts setting aside arbitral awards on grounds that the arbitrator had not disclosed a conflict of interest.[32] This has always been informed by the fact that such failure compromises impartiality, illustrating the tension between finality and accountability in arbitration.[33] While judicial intervention offers a potential solution, it remains reactive rather than preventive. This gap underscores the need for institutional reforms.[34]

2.3. The Problem of Repeat Appointments and Arbitrator Bias

One of the most pressing concerns regarding arbitrators' integrity is repeat appointments, where the same arbitrators are frequently selected by the same parties or law firms.[35] In commercial arbitration, companies tend to appoint arbitrators based on their previous decisions and perceived biases.[36] Excessive repeat appointments can lead to systemic bias, where arbitrators feel pressure to rule in favor of parties who are likely to appoint them in the future.[37]

Studies have shown that over 60% of investment arbitration cases involved arbitrators who had been appointed multiple times by the same parties or firms.[38] Critics argue that this fosters bias, while others contend that experienced

---

[30] *Ibid.*
[31] *Ibid.*
[32] *See*, *Mumias Sugar Company Limited v Mumias Outgrowers Co. (1998) Limited [2012] eKLR.*
[33] Murithi Antony, *"Bolstering the Credibility of Arbitration: Addressing Conflict of Interest and Ensuring Impartiality."* ((2024)13(1) Journal of Alternative Dispute Resolution)) Page 97-115. Available at https://ciarbkenya.org/journals/
[34] *Ibid.*
[35] Kuo, Houchih. "The Issue of Repeat Arbitrators: Is It a Problem and How Should the Arbitration Institutions Respond." *Contemp. Asia Arb. J.* 4 (2011): 247.
[36] *Ibid.*
[37] Koh, Will Sheng Wilson. "Think Quality Not Quantity: Repeat Appointments and Arbitrator Challenges." *Journal of International Arbitration* 34, no. 4 (2017).
[38] Farsi, Maryam, and Hamidreza Oloumiyazdi. "Repeated Appointments in Institutional Arbitration: Challenges and Solutions." *Private Law Research* 12, no. 46 (2024): 37-64.

arbitrators are naturally in higher demand.[39] In Kenya, experiential evidence by practitioners supports the presence of such a trend, most prominently in commercial and construction cases.[40]

A lack of transparency in the appointment of arbitrators makes this problem even more acute.[41] In contrast to judges, whose appointments and decisions are open to public scrutiny, arbitrators do their work in a closed system where their previous decisions and affiliations are not necessarily made public.[42] Although some arbitral institutions have tried introducing measures of transparency such as, the ICC's practice of issuing lists of arbitrators involved in cases many institutions are opposed to full disclosure.[43]

2.4. The Limited Scope of Judicial Intervention in Ensuring Accountability

Although arbitration is designed to function independent of court institutions, national courts continue to have a significant role to play in holding arbitrators responsible.[44] National courts are, however, hesitant to intervene in awards resulting from arbitral proceedings in their adherence to the principle of finality of arbitration.[45] Such feature is embedded in several international arbitration frameworks, as seen in Article 5 of the UNCITRAL Model Law on International Commercial Arbitration which limits court intervention unless where so provided

[39] Slaoui, Fatima-Zahra. "The rising issue of 'repeat arbitrators': a call for clarification." *Arbitration international* 25, no. 1 (2009): 103-120.
[40] *Ibid.*
[41] Biswas, Apoorba, and Rishabh Mishra. "A Take on the Growing Challenge of Repeat Appointments of Arbitrators." *Ind. Arb. L. Rev.* 2 (2020): 229.
[42] Sobota, Luke A. "10 Repeat Arbitrator Appointments in International Investment Disputes." In *Challenges and recusals of judges and arbitrators in international courts and tribunals*, pp. 293-319. Brill Nijhoff, 2015.
[43] *Ibid.*
[44] Benson, Bruce L. "To arbitrate or to litigate: that is the question." *European Journal of Law and Economics* 8 (1999): 91-151.
[45] *Ibid.*

by law, and which serves as the foundation in several Commonwealth jurisdictions like Kenya, Canada, Australia, and the UK.[46]

Under most arbitration laws, judicial intervention is allowed only in narrow circumstances, for instance, where the impartiality of an arbitrator is questioned, where there are serious procedural irregularities, where an arbitrator acts outside his or her jurisdiction, or where an award violates basic principles of law.[47]

Despite this legal foundation, courts are reluctant to intervene in arbitration.[48] In *Lesotho Highlands Development Authority v. Impregilo SpA* (2005) UKHL 43, the UK House of Lords reaffirmed that errors of law or fact do not warrant setting aside an arbitral award.[49] This precedent illustrates the courts' readiness to safeguard arbitration's autonomy, even where judicial intervention is warranted.[50]

While many courts take a restrictive approach to judicial intervention, Kenyan courts have adopted a more flexible stance.[51] In *Nyutu Agrovet Ltd v. Airtel Networks Kenya Ltd (2019) eKLR*, the Supreme Court of Kenya affirmed that courts retain residual jurisdiction to review arbitral awards outside the narrow confines of the Arbitration Act.[52] This decision demonstrated a readiness to permit judicial review where arbitration would lead to blatant injustice.[53]

---

[46] UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) art 5.
[47] Kanowitz, Leo. "Alternative Dispute Resolution and the Public Interest: The Arbitration Experience." *Hastings LJ* 38 (1986): 239.
[48] Cohen, Julius Henry. *Commercial Arbitration and the Law*. D. Appleton, 1918.
[49] Davis, Kenneth R. "When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards." *Buff. L. Rev.* 45 (1997): 49.
[50] *Ibid.*
[51]Murithi Antony and James Njuguna, *"Limiting the Jurisdiction of the Arbitral Tribunal: A Necessity or an Issue Taken Too Far?"* ((2024)13(1) Journal of Alternative Dispute Resolution)) Page 97-115. Available at https://ciarbkenya.org/journals/.
[52] Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Petition 12 of 2016) [2019] KESC 11 (KLR)
[53] *Ibid.*

Similarly, in *Kenya Shell Limited v. Kobil Petroleum Limited (2006) eKLR*, the Court held that while arbitration, as a private method of dispute resolution, must be given respect, courts are not debarred from intervening in cases of gross procedural unfairness.[54] These decisions indicate how the Kenyan courts are beginning to get more active in keeping arbitrators in check while nevertheless remaining sensitive to the autonomy of arbitration.[55]

The balancing act between finality of arbitration and judicial review is probably the most intricate topic in the field of dispute resolution.[56] On the one hand, excessive intervention from the courts disenfranchises the effectiveness of arbitration to a point where it is indistinguishable from litigation.[57] Conversely, insufficient intervention lets arbitrators work with near-complete immunity, effectively making awards which could be perceived as unfair.[58]

Finding the right balance calls for judicious intervention by courts, safeguarding arbitration autonomy but intervening when constitutional legal principles are involved.[59] To this effect, some scholars of law have suggested the establishment of special arbitration review panels within national court structures, which would oversee arbitrator misconduct without compromising the efficiency of arbitration.[60]

---

[54] Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR

[55] *Ibid.*

[56] Reuben, Richard C. "Democracy and dispute resolution: the problem of arbitration." *Law and contemporary problems* 67, no. 1/2 (2004): 279-320.

[57] Gurian, Nico. "Rethinking judicial review of arbitration." *Colum. JL & Soc. Probs.* 50 (2016): 507.

[58] Kaden, Lewis B. "Judges and Arbitrators: Observations on the Scope of Judicial Review." *Colum. L. Rev.* 80 (1980): 267.

[59] Gurian, Nico. "Rethinking judicial review of arbitration." *Colum. JL & Soc. Probs.* 50 (2016): 507.

[60] Abedian, Hossein. "Judicial Review of Arbitral Awards in International Arbitration–A Case for an Efficient System of Judicial Review." *Journal of International Arbitration* 28, no. 6 (2011).

Finally, while the courts have a role to play in ensuring the accountability of arbitrators, their intervention needs to be crafted carefully to safeguard the integrity and independence of arbitration.[61]

3. Recommendations towards Enhancing Arbitrator Accountability

3.1. Enhancing Institutional Oversight and Ethical Enforcement

Strengthening the arbitral institutions' oversight mechanisms is among the most effective means of enhancing arbitrators' accountability.[62] Arbitral institutions are primarily responsible for establishing ethical standards, selecting arbitrators, and dealing with complaints.[63] Their self-regulatory regime, though, is too often non-transparent and enforcement is irregular.[64] To hold themselves accountable, arbitral institutions must have stricter policies regarding arbitrator disclosure, appointment, and complaint handling.[65]

One hallmark reform would be the required disclosure of arbitrators' appointment records.[66] Currently, parties to the process of choosing arbitrators are left with little information regarding an arbitrator's past cases, past decisions, and possible conflicts of interest.[67] Having a mechanism by which arbitrators are obligated to disclose their appointment history including repeat appointments by the same parties or law firms would enable parties to make better-informed decisions and

---

[61] *Ibid.*

[62] Schacherer, Stefanie. "Independence and impartiality of arbitrators: a rule of law analysis." (2018): 1.

[63] Carrasco, Enrique R., and Alison K. Guernsey. "World Bank's Inspection Panel: Promoting True Accountability through Arbitration." *Cornell Int'l LJ* 41 (2008): 577.

[64] Kodjovi, Daniel. "Evaluating The Impact of Third-Party Funding on Expanding Access to Arbitration in Nigeria: Opportunities, Challenges, And Strategic Recommendations." *Challenges, And Strategic Recommendations (October 15, 2024)* (2024).

[65] *Ibid.*

[66] *Ibid.*

[67] Strong, S. I. "Mandatory Arbitration of Internal Trust Disputes–Improving Arbitrability and Enforceability through Proper Procedural Choices." *Arbitration International* 28, no. 4 (2012): 591-652.

avoid systemic bias.[68] A few institutions, like the ICC, have initiated measures to enhance transparency by making some appointment information accessible; however, a more complete disclosure is necessary for all institutions.[69]

Another critical reform is the implementation of independent ethics committees within arbitral institutions.[70] These committees would be responsible for reviewing complaints against arbitrators and, where required, imposing sanctions.[71] Today, most complaints against arbitrators are handled internally by the same institutions that administer cases, which presents a possible conflict of interest.[72] Should institutions establish independent ethics bodies, review of arbitrator misconduct can occur more objectively, and the integrity of the complaint procedure would be enhanced.[73]

In addition, arbitral institutions ought to introduce public reporting of disciplinary action against arbitrators.[74] In contrast to judges, who can be publicly censured or removed for misconduct, arbitrators are almost never publicly penalized beyond private warnings.[75] Institutions should investigate the publication of anonymized reports regarding the disciplinary action they take against arbitrators, which would enhance transparency and ensure that those who are guilty of misconduct suffer reputational sanctions.[76]

---

[68] *Ibid.*

[69] Rogers, Catherine A. "Regulating international arbitrators: A functional approach to developing standards of conduct." *Stan. J. Int'l L.* 41 (2005): 53.

[70] *Ibid.*

[71] Gruner, Dora Marta. "Accounting for the public interest in international arbitration: the need for procedural and structural reform." *Colum. J. Transnat'l L.* 41 (2002): 923.

[72] *Ibid.*

[73] Rogers, Catherine A. "Transparency in international commercial arbitration." *U. KaN. l. rev.* 54 (2005): 1301.

[74] *Ibid.*

[75] *Ibid.*

[76] Reuben, Richard C. "Democracy and dispute resolution: the problem of arbitration." *Law and contemporary problems* 67, no. 1/2 (2004): 279-320.

3.2. Expansion of Judicial Review While Preserving Finality

Judicial oversight is an essential safeguard against any misconduct by arbitrators.[77] However, courts must take caution not to interfere excessively in arbitration proceedings.[78] The appropriate equilibrium between finality and oversight demands a reform of the judicial review process to provide room for intervention in the event of evident ethical violations while maintaining the efficiency that arbitration guarantees.[79]

One method for striking this balance is to enable parties to object to arbitrators before the end of proceedings.[80] Most of the court intervention now takes place only following an award being given and so restricts the effectiveness of oversight.[81] If courts would allow limited intervention at an earlier stage like where an arbitrator declines to reveal a material conflict of interest most challenges to the integrity of arbitrators may be addressed proactively, rather than through post-award litigation.[82]

Furthermore, the courts need to be afforded more leeway to vacate awards in instances of arbitrator bias or ethical violations that are apparent.[83] The present judicial review standard is too frequently, excessively narrow, obliging parties to demonstrate extreme wrongdoing for an award to be vacated.[84] It would be prudent for courts to employ a more adaptable standard that considers whether an arbitrator's conduct, even if not explicitly dishonest, has compromised the

---

[77] Gelander, Jessica L. "Judicial review of international arbitral awards: Preserving independence in international commercial arbitrations." *Marq. L. Rev.* 80 (1996): 625.
[78] Abedian, Hossein. "Judicial Review of Arbitral Awards in International Arbitration–A Case for an Efficient System of Judicial Review." *Journal of International Arbitration* 28, no. 6 (2011).
[79] *Ibid.*
[80] *Ibid*
[81] *Ibid*
[82] Curtin, Kenneth M. "An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards." *Ohio St. J. on Disp. Resol.* 15 (1999): 337.
[83] *Ibid.*
[84] *Ibid.*

integrity of the process.[85] This would help to ensure that arbitration is always a fair and impartial process.[86]

One solution to having more effective court intervention without imposing too heavy a burden on the judiciary is to create specialized review panels for arbitration in national courts.[87] Comprising judges who are specialists in arbitration law, these panels would rule on matters of arbitrator misconduct or process abuse.[88] Centralizing decision-making on matters of arbitration within such specialized judicial panels, the courts can render a more consistent and informed review with respect to preserving the autonomy of arbitration.[89]

3.3. Improving Transparency in Arbitration Proceedings

Confidentiality is a feature of arbitration, yet excessive secrecy also comes in the way of meaningful accountability.[90] To make arbitration a fair and credible process, greater transparency in the appointment of arbitrators, case management, and publication of awards is essential.[91]

A key reform would be the publication of anonymized arbitral awards.[92] Unlike judicial rulings, which are publicly available and set legal precedents, most arbitral

---

[85] *Ibid.*

[86] Curtin, Kenneth M. "An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards." *Ohio St. J. on Disp. Resol.* 15 (1999): 337.

[87] Ninković, Sanela. "Judicial Review of Arbitral Awards and Parties' Right to Expand It." *ZEuS Zeitschrift für Europarechtliche Studien* 17, no. 4 (2014): 485-528.

[88] Kaden, Lewis B. "Judges and Arbitrators: Observations on the Scope of Judicial Review." *Colum. L. Rev.* 80 (1980): 267.

[89] Murphy, Stephen Wills. "Judicial review of arbitration awards under state law." *Virginia Law Review* (2010): 887-937.

[90] Murithi Antony, *"Bolstering the Credibility of Arbitration: Addressing Conflict of Interest and Ensuring Impartiality."* ((2024)13(1) Journal of Alternative Dispute Resolution)) Page 97-115. Available at https://ciarbkenya.org/journals/

[91] Rogers, Catherine A. "Transparency in international commercial arbitration." *U. KaN. l. rev.* 54 (2005): 1301.

[92] Riepin, Pavlo. "Principle of transparency in arbitration." PhD diss., Vilniaus universitetas., 2020.

awards remain confidential.[93] This secrecy makes it impossible for parties to judge arbitrators based on their prior reasoning and decisions.[94] Mandatory anonymized publication of awards especially in investment and public interest cases would generate a body of case law that parties could consult when choosing arbitrators and designing their arbitration agreements.[95]

In the same vein, a public database of arbitrators' case records would assist parties in making informed arbitral appointments.[96] Such a database may contain anonymized case summaries of arbitrators' previous cases, their prior decisions, and any complaints filed against them that are on record.[97] Such disclosure, though it must take into account privacy considerations, would constitute an essential check against repeatedly errant arbitrators.[98]

Another step towards increased transparency would be to make arbitrators give fully reasoned awards.[99] There are still some arbitration proceedings that permit short-form awards, giving little explanation for the tribunal's decision.[100] The absence of reasoning makes it harder to determine if an arbitrator has arrived at an informed and unbiased decision.[101] By insisting on thoroughly reasoned

---

[93] Arb, Janet Walker C., and Doug Jones AO. "Transparency and Efficiency in International Commercial Arbitration."< https://dougjones.info/content/uploads/2022/11/657-Transparency-and-Efficiency-in-International-Commercial-Arbtiration.pdf.> Accessed on 11th February 2025.

[94] *Ibid.*

[95] Valeev, Damir. "Transparency Challenges in Sports Arbitration: Analysis and Solutions." *Uzbek Journal of Law and Digital Policy* 1, no. 2 (2023).

[96] *Ibid.*

[97] *Ibid.*

[98] Deli, Maria Beatrice. "Transparency in the Arbitral Procedure." In *General Principles of Law and International Investment Arbitration*, pp. 45-57. Brill Nijhoff, 2018.

[99] Susan, Binsy, and Amogh Srivastava. "Publication of Arbitral Awards: Balancing Confidentiality and Transparency in Arbitration." *Ind. Arb. L. Rev.* 4 (2022): 13.

[100] Argen, Robert D. "Ending blind spot justice: broadening the transparency trend in international arbitration." *Brook. J. Int'l L.* 40 (2014): 207.

[101] *Ibid.*

awards, institutions can make the arbitrators more accountable to a better standard.[102]

3.4. Overcoming Power Disparities in Arbitrator Appointments

Power disparities in the selection of arbitrators typically favor strong parties, like large corporations, to the detriment of weaker ones, including consumers, employees, and small companies.[103] In many cases, dominant corporate entities draft arbitration clauses that favor specific arbitral institutions and, at times, even preselect arbitrators.[104] Such actions result in perceived bias by the arbitrators against non-recurring corporate clients, defeating the principle of fairness in arbitration.[105]

To redress this imbalance, arbitration laws need to impose stricter requirements of neutrality in the appointment of arbitrators, particularly in contracts with an extreme imbalance in bargaining power.[106] For example, consumer arbitration clauses could be subjected to more intense scrutiny to ensure that arbitrators are chosen from an independent and balanced panel.[107] Some jurisdictions have already legislated regulating arbitrator appointments in employment and consumer arbitration, setting a precedent for broader reforms.[108]

Furthermore, arbitral institutions ought to implement randomized appointment procedures for arbitrators where impartiality concerns are most severe.[109] By

---

[102] *Ibid.*

[103] Kronstein, Heinrich. "Arbitration is power." *NYUL Rev.* 38 (1963): 661.

[104] Brekoulakis, Stavros. "Systemic bias and the institution of international arbitration: a new approach to arbitral decision-making." *Journal of international dispute settlement* 4, no. 3 (2013): 553-585.

[105] Elm, Jan-Philip. "Behavioral Insights into International Arbitration: An Analysis of How to De-Bias Arbitrators." *The American Review of International Arbitration* 27, no. 1 (2016): 2017-01.

[106] *Ibid.*

[107] Schneiderman, David. "Judicial politics and international investment arbitration: seeking an explanation for conflicting outcomes." *Nw. J. Int'l L. & Bus.* 30 (2010): 383.

[108] Antich, Federico. "Are Arbitrators from Mars and Mediators from Venus?" *YB on Int'l Arb. & ADR* 8 (2024): 23.

[109] *Ibid.*

having arbitrators allocated via a random procedure, rather than being appointed by one party, there would be fewer opportunities for biased appointments, and therefore an increased perception of fairness in dispute resolution.[110]

4. Conclusion

The legitimacy of arbitration as a tool for conflict resolution is based on a delicate range between effectiveness and accountability.[111] While the autonomy of arbitration is one of its greatest strengths, this self-governance is also fraught with dangers, including unchecked abuse by arbitrators, potential conflicts of interest, and procedural unfairness.[112] Without regulation, arbitration has the potential to become a regime in which arbitrators enjoy de facto absolute immunity, thereby undermining confidence in its capacity to provide fair results.[113]

Institutional arbitral institutions must actively enhance their oversight functions by demanding more transparency in arbitrator appointment, applying more rigorous ethical requirements, and publishing anonymized disciplinary findings.[114] Courts, while preserving arbitration's finality, also need to be empowered to intervene where there is an egregious ethical failure without unnecessarily prolonging resolution of a dispute.[115]

By embracing a combination of institutional reforms, judicial checks, and transparency mechanisms, arbitration can remain effective while making sure that arbitrators are still accountable to the parties they serve.[116] A properly regulated

---

[110] *Ibid.*

[111] Rabinovich-Einy, Orna. "The legitimacy crisis and the future of courts." *Cardozo J. Conflict Resol.* 17 (2015): 23.

[112] Shany, Yuval. "Assessing the effectiveness of international courts: a goal-based approach." *American Journal of International Law* 106, no. 2 (2012): 225-270.

[113] Mayer, Bernard S. *Beyond neutrality: Confronting the crisis in conflict resolution*. John Wiley & Sons, 2004.

[114] Bingham, Lisa Blomgren. "Designing justice: Legal institutions and other systems for managing conflict." *Ohio St. J. on Disp. Resol.* 24 (2008): 1.

[115] *Ibid.*

[116] Stipanowich, Thomas J., and Véronique Fraser. "The international task force on mixed mode dispute resolution: exploring the interplay between mediation, evaluation and arbitration in commercial cases." *Fordham Int'l LJ* 40 (2016): 839.

system of arbitration that provides for fairness, neutrality, and integrity will not only serve the parties well but also enhance arbitration's reputation as a vital cornerstone of contemporary dispute resolution.[117]

[117] *Ibid.*

List of References

Abedian, Hossein. "Judicial Review of Arbitral Awards in International Arbitration–A Case for an Efficient System of Judicial Review." *Journal of International Arbitration* 28, no. 6 (2011).

Alashqar, Yaser. "The Comparative View: Mediation, Negotiation and Arbitration." In *Reconciliation, Conflict Transformation, and Peace Studies*, pp. 131-144. Cham: Springer Nature Switzerland, 2024.

Antich, Federico. "Are Arbitrators from Mars and Mediators from Venus?" *YB on Int'l Arb. & ADR* 8 (2024): 23.

Arb, Janet Walker C., and Doug Jones AO. "Transparency and Efficiency in International Commercial Arbitration." https://dougjones.info/content/uploads/2022/11/657-Transparency-and-Efficiency-in-International-Commercial-Arbtiration.pdf. Accessed on 11th February 2025.

Argen, Robert D. "Ending blind spot justice: broadening the transparency trend in international arbitration." *Brook. J. Int'l L.* 40 (2014): 207.

Benson, Bruce L. "To arbitrate or to litigate: that is the question." *European Journal of Law and Economics* 8 (1999): 91-151.

Bernstein, Lisa. "Understanding the limits of court-connected ADR: a critique of federal court-annexed arbitration programs." *U. Pa. L. Rev.* 141 (1992): 2169.

Bingham, Lisa B. "Control over dispute-system design and mandatory commercial arbitration." *Law & Contemp. Probs.* 67 (2004): 221.

Bingham, Lisa Blomgren. "Designing justice: Legal institutions and other systems for managing conflict." *Ohio St. J. on Disp. Resol.* 24 (2008): 1.

Biswas, Apoorba, and Rishabh Mishra. "A Take on the Growing Challenge of Repeat Appointments of Arbitrators." *Ind. Arb. L. Rev.* 2 (2020): 229.

Brekoulakis, Stavros. "Systemic bias and the institution of international arbitration: a new approach to arbitral decision-making." *Journal of International Dispute Settlement* 4, no. 3 (2013): 553-585.

Bukhman, Emil. "Time Limits on Arbitrability of Securities Industry Disputes Under the Arbitration Rules of Self-Regulatory Organizations." *Brook. L. Rev.* 61 (1995): 143.

Carrasco, Enrique R., and Alison K. Guernsey. "World Bank's Inspection Panel: Promoting True Accountability through Arbitration." *Cornell Int'l LJ* 41 (2008): 577.

Cohen, Julius Henry. *Commercial Arbitration and the Law.* D. Appleton, 1918.

Curtin, Kenneth M. "An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards." *Ohio St. J. on Disp. Resol.* 15 (1999): 337.

Davis, Kenneth R. "When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards." *Buff. L. Rev.* 45 (1997): 49.

Deli, Maria Beatrice. "Transparency in the Arbitral Procedure." In *General Principles of Law and International Investment Arbitration*, pp. 45-57. Brill Nijhoff, 2018.

D'Silva, Magdalene. "Dealing in power: gatekeepers in arbitrator appointment in international commercial arbitration." *Journal of International Dispute Settlement* 5, no. 3 (2014): 605-634.

Elm, Jan-Philip. "Behavioral Insights into International Arbitration: An Analysis of How to De-Bias Arbitrators." *The American Review of International Arbitration* 27, no. 1 (2016).

Farsi, Maryam, and Hamidreza Oloumiyazdi. "Repeated Appointments in Institutional Arbitration: Challenges and Solutions." *Private Law Research* 12, no. 46 (2024): 37-64.

Gelander, Jessica L. "Judicial review of international arbitral awards: Preserving independence in international commercial arbitrations." *Marq. L. Rev.* 80 (1996): 625.

Giorgetti, Chiara, and Mohammed Abdel Wahab. "A code of conduct for arbitrators and judges." In *Academic Forum on ISDS Concept Paper*, vol. 4. 2019.
Gruner, Dora Marta. "Accounting for the public interest in international arbitration: the need for procedural and structural reform." *Colum. J. Transnat'l L.* 41 (2002): 923.

Honcharenko, Olena M., et al. "International commercial arbitration as a modern self-regulation tool in hybrid war." *AUC IURIDICA* 68, no. 3 (2022): 123-138.

Jordan, Cally, and Pamela Hughes. "Which way for market institutions: The fundamental question of self-regulation." *Berkeley Bus. LJ* 4 (2007): 205.

Kanowitz, Leo. "Alternative Dispute Resolution and the Public Interest: The Arbitration Experience." *Hastings LJ* 38 (1986): 239.

Kuo, Houchih. "The issue of repeat arbitrators, is it a problem and how should the arbitration institutions respond." *Contemp. Asia Arb. J.* 4 (2011): 247.

Mayer, Bernard S. *Beyond neutrality: Confronting the crisis in conflict resolution.* John Wiley & Sons, 2004.

McIlwrath, Michael, and John Savage. *International arbitration and mediation: a practical guide.* (2009): 1-530.

Menkel-Meadow, Carrie. "Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not." *U. Miami L. Rev.* 56 (2001): 949.

Meshel, Tamar. "International Arbitration: The New Frontier of Business and Human Rights Dispute Resolution." *Dalhousie LJ* 44 (2021): 101.

Muigua. K., *'Settling Disputes Through Arbitration in Kenya'* Greenwood Publishers Limited, 4th Edition, 2022.

Murithi Antony, *"Bolstering the Credibility of Arbitration: Addressing Conflict of Interest and Ensuring Impartiality."* ((2024)13(1) Journal of Alternative Dispute Resolution)) Page 97-115. Available at https://ciarbkenya.org/journals/

Murithi Antony and James Njuguna, *"Limiting the Jurisdiction of the Arbitral Tribunal: A Necessity or an Issue Taken Too Far?"* ((2024)13(1) Journal of Alternative Dispute Resolution)) Page 97-115. Available at https://ciarbkenya.org/journals/

Murphy, Stephen Wills. "Judicial review of arbitration awards under state law." *Virginia Law Review* (2010): 887-937.

Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Petition 12 of 2016) [2019] KESC 11 (KLR).

Park, William W. "Arbitrator integrity: the transient and the permanent." *San Diego L. Rev.* 46 (2009): 629.

Queen Mary University of London, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World' https://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/

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.

Rogers, Catherine A. "Regulating international arbitrators: A functional approach to developing standards of conduct." *Stan. J. Int'l L.* 41 (2005): 53.

Spain, Anna. "Integration Matters: Rethinking the Architecture of International Dispute Resolution." *U. Pa. J. Int'l L.* 32 (2010): 1.

Sweet, Alec Stone, and Florian Grisel. "The evolution of international arbitration: delegation, judicialization, governance." In *International Arbitration and Global Governance: Contending Theories and Evidence* (2014): 22-46.

Tarawneh, Mosleh A., and Tariq K. Alhasan. "Justice in the balance: The crucial role of disclosure in ensuring justice in Jordanian arbitration." *Conflict Resolution Quarterly* 42, no. 1 (2024): 5-1

Whisper of Bias on Impartiality of Arbitrators: How Tanzanian Courts Handle Bias Through the Prism of IBA Guidelines

By: ***Mark Malekela****

Abstract

In a world where arbitrators come from diverse backgrounds and may unknowingly bring preconceptions into their decision-making, there is a growing need for more refined mechanisms to address biases. This article examines the Tanzanian Arbitration Act, 2020, which addresses the removal of arbitrators due to bias or lack of impartiality, alongside the 2024 IBA Guidelines on Conflict of Interest in International Arbitration. The article finds that, the Act lacks detailed guidelines, such as those found in the IBA Guidelines. Through analysis of recent Tanzanian case law to assess how courts determine bias in arbitrators, the article highlights the tests applied by courts to determine bias and the judiciary's discretion in interpreting potential conflicts. The article notes that the courts in Tanzania have grappled with balancing parties' rights to a fair tribunal against frivolous challenges, particularly in the context of undisclosed arbitrator relationships. Ultimately, by a comparative critical analysis considering the approach to arbitrator impartiality in other common law jurisdictions, such as India, and the United Kingdom, this article argues for adopting more detailed standards in Tanzania's Arbitration Act, akin to the IBA Guidelines in determining bias and lack of impartiality as a valid ground for removal of an arbitrator.

Keywords: Arbitrators, Impartiality, International Arbitration, IBA Guidelines, Conflict of Interest.

*Mark Malekela, LL. M (Stockholm University). Lawyer, Dar es Salaam, Tanzania. Email: malekelamark@gmail.com. ORCiD ID: https://orcid.org/0000-0003-0342-8929

1. Introduction

To ensure and protect the integrity of the international arbitral process, the notions of "impartiality" and "independence" of international arbitrators are crucial.[1] This is particularly crucial in a time when challenges to the validity of international arbitration are growing.[2] It is widely acknowledged that an arbitrator's lack of impartiality and independence can be used as a basis for annulling the award and prohibiting its enforcement because the tribunal's makeup violated the arbitration law in effect at the seat of arbitration.[3] In this critical aspect of arbitral procedure, the parties' autonomy to customise the proceedings, including the selection of their preferred arbitrators, even if biassed, is curtailed to maintain the integrity of the process.[4]

The Tanzanian Arbitration Act, 2020 addresses the impartiality and independence of arbitrators, particularly in Sections 27 and 28.[5] Section 27 establishes that parties may agree to the grounds or circumstances for revoking an arbitrator's appointment. The provision further bestows power to the court to revoke an appointment of an arbitrator or remove an arbitrator based on the grounds specified in the proceeding provision – that is, section 28 of the Act, allowing parties to object if there are justifiable doubts as to the arbitrator's impartiality or independence.

Section 28 elaborates on the challenge procedure, setting a clear framework for how parties may bring forward concerns related to a lack of impartiality. This section essentially mirrors global arbitration standards by underscoring that the

---

[1] Catherine Rogers, 'Arbitrator impartiality: the devil is in the details', in William W. Park (ed), Arbitration International, (© The Author(s); Oxford University Press 2023, Volume 39, Issue 2), pp. 310 – 313

[2] Redfern and Hunter, *Law and Practice*, Nos 4-52; Gary Born, *International Commercial Arbitration*, 1760 et seq.

[3] See Mayer, Sheppard, Nassar, in ILA (ed.), Report of the Sixty-Ninth Conference, 340, 365 et seq.

[4] Gary Born, *International Commercial Arbitration,* 1762.

[5] The Arbitration Act, CAP 15, R. E. 2020

appearance of bias or actual bias through "justifiable doubts as to an arbitrator's impartiality" can be a valid ground for removal of an arbitrator.[6] This provision emphasizes that arbitrators have a duty to remain impartial throughout the proceedings, and any conflicts of interest must be disclosed. However, it is prudent to note that the Arbitration Act does not provide a detailed "test" or "grounds" for impartiality, as stipulated in the IBA Guidelines on Conflict of Interest in International Arbitration (the "**IBA Guidelines**"), where disclosure obligations and the duty to maintain impartiality are critical.[7]

The impartiality of arbitrators lies at the heart of international arbitration's legitimacy and effectiveness. Parties choose arbitration precisely because it promises a fair, neutral, and independent tribunal—a forum where their disputes can be resolved free from any undue influence.[8] The Arbitration (Rules of Procedure)[9] further reinforce the need for arbitrators to disclose any circumstances that may give rise to doubts about their impartiality or independence. Rule 23 (2) mandates that arbitrators must promptly disclose any such circumstances, including any past or present relationships with any party involved in the dispute. This provision closely aligns with the IBA Guidelines' emphasis on full disclosure

---

[6] Section 28 (1) (a) of the Arbitration Act, CAP 15, R.E. 2020 provides that, "a party to arbitral proceedings may, upon notice to the other party, to the arbitrator concerned and to any other arbitrator, apply to the Centre to remove an arbitrator on any of the following grounds: (a) that there are circumstances which give rise to justifiable doubts as to his impartiality…" However, under the same provision – that is, Section 28 (3), the proceedings before the High Court for the removal of an arbitrator during ongoing proceedings does not bar the arbitral tribunal from continuing with the arbitral proceedings and making an arbitral award.

[7] The IBA Guidelines on Conflicts of Interest in International Arbitration, 2024. The IBA Guidelines have become a go-to-guide for arbitrators, counsel, and arbitral institutions in identifying conflicts of interest and assessing the need for disclosure under General Standard 7.

[8] Lew, Mistelis, Kröll, *Comparative International Commercial Arbitration*, No. 11-7; Lörcher, Lörcher, Lörcher, Das Schiedsverfahren, No. 108.

[9] The Arbitration (Rules of Procedure) GN. No. 146 (2021). See Rule 23 (2) and 24 (6) of the Arbitration (Rules of Procedure), GN No. 146 (2021).

to prevent any appearance of bias or conflict of interest. However, unlike the IBA Guidelines, the Tanzanian Arbitration Act and its accompanying rules do not explicitly categorize potential conflicts of interest into graded lists. Instead, the Arbitration Act only broadly provides that a party to arbitral proceedings may apply for removal of an arbitrator if there are circumstances which give rise to justifiable doubts as to an arbitrator's impartiality, leaving the courts to interpret the seriousness of potential conflicts on a case-by-case basis.[10]

As recent cases have shown, impartiality is often contested, challenged, and difficult to assess in practice. The High Court of Tanzania, through cases such as *The Arab Contractors (Osman Ahmed Osman & Co., and Elsewedy Electric Company v. Bharya Engineering and Constructing Company Limited (BECCO) and Larissa Leach,* Misc. Commercial Case No. 28 of 2022 ("**The Arab Contractors Case**") and *Ramani Consultants Limited v. Swissport Tanzania PLC,* Misc. Commercial Cause No. 66 of 2023/7309 of 2024 ("**Ramani Consultants**"), have been exemplary case laws of these debates, grappling with the fine line between ensuring impartial tribunals and protecting against frivolous challenges.

Recently, the Tanzanian courts again confronted these issues in *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited* ("**Oryx Oil Case**").[11] In this case, the petitioner raised concerns over the arbitrator's failure to disclose certain connections with the respondent, which could potentially affect his impartiality. The petitioner relied on the English case of *Halliburton Company v. Chubb Bermuda Insurance Ltd*[12] to argue that arbitrators must be mindful of both apparent bias and unconscious bias. In its ruling, the High Court of Tanzania found that these

[10] See, Section 28 (1) (a) of the Arbitration Act, 2020, read together with Rule 24 (1) of the Arbitration (Rules of Procedure), GN No. 146 of 2021.
[11] *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited*, Miscellaneous Civil Cause No. 138 of 2022
[12] *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48

concerns warranted serious consideration, though the case also highlighted the difficulties courts face in striking the balance between real and perceived bias.[13] The petitioner later appealed the decision, resulting in *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited*.[14] The Court of Appeal of Tanzania held that the High Court's decision did not prevent the appellant from participating in the arbitral proceedings or contesting a subsequent award. Since the decision to remove the arbitrator due to bias was ruled by the Court of Appeal as interlocutory, the appeal was subsequently rendered barred by Section 5(2) of the Appellate Jurisdiction Act of Tanzania.

These cases raise critical questions regarding the standards used to determine bias and impartiality, the timing of such challenges, and the threshold of proof required to establish a breach of impartiality. The critical questions include: What constitutes a breach of impartiality? and, how do or should courts weigh the rights of parties to a fair tribunal against the risk of frivolous challenges? In addressing these concerns, it is essential to examine the Tanzanian Arbitration Act, 2020, alongside the IBA Guidelines. The IBA Guidelines provide a structured and internationally recognized framework for determining whether conflicts of interest exist. They categorize potential conflicts into the Green, Orange, and Red Lists, which distinguish between situations where no disclosure is needed, where disclosure is recommended but not disqualifying, and where disqualification is mandatory. In contrast, the Tanzanian Arbitration Act, while emphasizing the essence of independence and impartiality of an arbitrator, it does not adopt these graded standards. This leaves room for judicial discretion in determining the subject of bias, whether conscious, or unconscious and the seriousness of potential conflicts of interest.

---

[13] *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited*, Miscellaneous Civil Cause No. 138 of 2022
[14] *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited*, Civil Appeal No. 47 of 2024

To deepen this discussion, it is essential to consider how these rulings align—or conflict—with the IBA Guidelines, a pivotal instrument in international arbitration practice. This article also argues that, adopting more detailed standards, akin to the IBA Guidelines' categorization of conflicts, could further strengthen Tanzania's Arbitration Act and its procedural Regulations. This would provide clearer guidelines for arbitrators and parties alike, reducing uncertainty and enhancing the legitimacy of arbitration in the country. Furthermore, a brief comparative analysis with case law from other major jurisdictions—South Africa, India, and the United Kingdom, just to mention a few – is done to help frame Tanzania's approach within the broader international arbitration landscape.

2. The Arab Contractors Case: Apprehension of bias test

In *The Arab Contractors* case, the petitioners filed the case to challenge the impartiality of the appointed arbitrator, Larissa Leach due to her act of dismissing the petitioners' objection on the basis of the statements submitted by the first respondent without conferring the petitioners the right to be heard and, further, her subsequent refusal to recuse herself from the conduct of the matter, which created doubts regarding her impartiality. Although no concrete evidence of actual bias was presented, the challenge was rooted in the perception that her connections might create an appearance of partiality.[15]

2.1 Parties Arguments

In arguing the case, the petitioners were of the view that, during the arbitration proceedings steered by the second respondent, a notice of objection regarding the jurisdiction was issued. The objection alleged that the mandatory mediation procedure by the Management Committee was skipped, and the second respondent dismissed the petitioners' objection without giving them a chance to be heard. The petitioners prayed for the arbitrator's removal from the matter due to her alleged doubts about her impartiality and failure to conduct the

[15] *The Arab Contractors (Osman Ahmed Osman & Co., and Elsewedy Electric Company v. Bharya Engineering and Constructing Company Limited (BECCO) and Larissa Leach,* Misc. Commercial Case No. 28 of 2022, [5-9]

proceedings, which violated section 37(1) (a) of the Arbitration Act, Cap.20 R.E 2020.[16] The petitioners further cited the case of *Halliburton Company v. Chubb Bermuda Insurance Ltd*[17] to buttress their prayer on the removal of the arbitrator based on their allegation that the arbitrator has shown a biased posture against the petitioners by merely overruling their objection in a hurried manner as she did without affording the parties their rightful audience.[18]

In response to the petitioners' submissions before the High Court, the respondents also made their arguments, for the first respondent, and the second respondent – the arbitrator being challenged in the arbitration proceedings. Counsel appearing for the respondents argued that the second respondent did not force the addition of witnesses and heard the petitioners' objections multiple times. He denied summary rejection of the objection and maintained that the objection was based on a document accepted by the petitioners. He argued that the first respondent's affidavit served as a witness statement for cross-examination, and the parties had agreed to an oral hearing.[19]

Counsel for the respondents further argued that the petitioners sabotaged the proceedings by raising their complaint about infringement of their right to be heard. The second respondent provided a draft schedule of events for an oral hearing, but the petitioners raised their complaint about infringement of their right to be heard. He argued that the parties had agreed to the applicable institutional rules and that the failure to file a witness statement breached the agreed procedure and that the second respondent made a right decision to proceed as scheduled, but

---

[16] Ibid, [8-9]
[17] *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48
[18] See, *The Arab Contractors (Osman Ahmed Osman & Co., and Elsewedy Electric Company v. Bharya Engineering and Constructing Company Limited (BECCO) and Larissa Leach,* Misc. Commercial Case No. 28 of 2022, [10] which provides for the submissions made by the petitioners' counsel in favor of the petition in the High Court.
[19] *The Arab Contractors (Osman Ahmed Osman & Co., and Elsewedy Electric Company v. Bharya Engineering and Constructing Company Limited (BECCO) and Larissa Leach,* Misc. Commercial Case No. 28 of 2022, [5-9]

the petitioners persisted in insisting on a witness statement and demanding the recusal of the second respondent. He also argued that the terms of the contract were not redefined by the second respondent and that the rights and obligations of the arbitrator and the parties were as set out in the Tanzania Institute of Arbitrators (TIArb) Rules 2018.[20]

In countering the petitioners' arguments, counsel for respondents relied on the doctrine of *Kompetenz-Kompetenz* in arguing that the second respondent had jurisdiction to determine all issues regarding her jurisdiction and urged the High Court to decline to the prayers to have the sole arbitrator removed due to no apparent bias on her part.[21] As for the second respondent, when afforded the opportunity to be heard before the High Court,[22] she argued that the petitioners' submissions did not prove her to be biased or improperly conducted. She argued that the parties had submitted to TIArb, and the applicable Rules were the TIArb Rules 2018, in which the petitioners' allegations were misconceived and that her proposal to add witnesses to prove the petitioners' case was not outside the powers of the arbitrator. She also argued that the parties were granted a hearing, and that the decision was based on the parties' pleadings and the need to uphold the spirit of just, expeditious, economical, and final determination. She denounced the submission that she re-defined or re-wrote the contract for the parties, even though Rule 9.2 of the TIArb Rules 2018 gives an arbitrator wide power to act over a matter. She argued that there must be a real likelihood of bias if a judge is to

[20] Ibid, [13-14]
[21] Ibid, [15-16]. The principle of competence-competence is recognised under the Arbitration Act, which empowers the tribunal to rule on the question of whether it has jurisdiction.
[22] *The Arab Contractors (Osman Ahmed Osman & Co., and Elsewedy Electric Company v. Bharya Engineering and Constructing Company Limited (BECCO) and Larissa Leach,* Misc. Commercial Case No. 28 of 2022, [15-16]. By virtue of Section 28 (5) of the Arbitration Act, the arbitrator against whom the application for removal is brought is entitled to be heard by the Centre or Court (emphasis added) before it makes any order under this section.

recuse themselves from the conduct of a matter and that, the petitioners' grounds of bias were imaginary and unreasonable apprehension of fears, hence, not real.[23]

2.2 Decision of the Court

Ultimately, the High Court removed the arbitrator, emphasizing the importance of safeguarding the perception of fairness in arbitration proceedings in adherence to the principles of natural justice. The High Court noted that the second respondent proposed adding more witnesses to the petitioners' case, claiming it was a way to salvage the first respondent's case and thus displaying justifiable doubts about her impartiality in the eyes of the petitioners.[24] However, the High Court disagreed with such actions by the sole arbitrator, stating that the case belongs to the parties and should not be the concern of a court or arbitrator. The High Court therefore found that the suggestion given by the sole arbitrator was not meant to favour the first respondent, as it was made during deliberation of possible ways forward for both parties. The High Court further disagreed with the counsel for respondents' submission, as it did not show a reasonable apprehension of bias and rather emphasised that the case belongs to the parties and should not be seen as siding with only one party.[25]

---

[23] See, *The Arab Contractors (Osman Ahmed Osman & Co., and Elsewedy Electric Company v. Bharya Engineering and Constructing Company Limited (BECCO) and Larissa Leach,* Misc. Commercial Case No. 28 of 2022, [17] where the High Court noted that as regards the issue of disqualification or recusal, the second respondent placed reliance on the case of I*ssack Mwamasika and 2 Others vs. CRDB Bank Ltd,* Civil Appeal No.6 of 2016 and the case of *Dhirajlal Walji Ladwa and 2Others vs. Jistesh Jayantilal Ladwa and Another,* Commercial Cause No.2 of 2020, (unreported) as well as the case of Laurean G. Rugaumukamu vs. IGP & Another, Civil Appeal No.13 of 1999.

[24] See, *The Arab Contractors (Osman Ahmed Osman & Co., and Elsewedy Electric Company v. Bharya Engineering and Constructing Company Limited (BECCO) and Larissa Leach,* Misc. Commercial Case No. 28 of 2022, [28].

[25] See, *The Arab Contractors (Osman Ahmed Osman & Co., and Elsewedy Electric Company v. Bharya Engineering and Constructing Company Limited (BECCO) and Larissa Leach,* Misc. Commercial Case No. 28 of 2022, [29]. The learned judge noted as follows: "However, as I look at the submissions and the materials laid before me, I do not find that the suggestion given by the Sole Arbitrator was meant to favour the 1st Respondent since it was made in the course of deliberating the possible way forward for both parties. For such reasons, I

2.3 Analysis: Apprehension of bias test or Proof of actual bias?

Here, the High Court's decision reflects a growing sensitivity to the "apprehension of bias," rather than focusing strictly on evidence of actual bias. This approach mirrors the IBA Guidelines, which emphasise that arbitrators must not only be impartial in fact but must also be seen to be impartial by a reasonable third party.[26] The *Green List*, *Orange List*, and *Red List* in the IBA Guidelines are structured precisely to address these various levels of perceived or actual conflicts of interest by arbitrators and the relevant parties to arbitration proceedings.[27]

In *The Arab Contractors* case, if any actual professional relationship between the arbitrator and one of the parties existed, it could potentially fall under the *Orange List* category—situations that may give rise to a justifiable concern but do not automatically disqualify an arbitrator. Since the High Court did not find any such relationship to give rise to a justifiable apprehension of bias on the arbitrator, the High Court did not remove the arbitrator on the ground of bias. Under the IBA Guidelines, arbitrators have a duty to disclose any such relationships, and parties are afforded the opportunity to assess whether they find the circumstances problematic.[28] General Standard 3 (a) of the IBA Guidelines requires that in determining whether facts or circumstances should be disclosed, an arbitrator should take into account all facts and circumstances known to the arbitrator, including those communicated to the arbitrator by the parties and resulting from

---

am not in agreement with what Mr. Kifunda submitted since that alone did not exhibit a reasonable apprehension that there was real likelihood of bias."

[26] See, Cleary Gottlieb Alert Memorandum, '*International Bar Association Publishes Revisions to Guidelines on Conflicts of Interest in International Arbitration.*' (8 Mar. 2024), https://www.clearygottlieb.com/-/media/files/alert-memos-2024/international-bar-association-publishes-revisions-to-guidelines-on-conflicts-of-interest-in-international-arbitration.pdf

[27] IBA Guidelines on Conflicts of Interest in International Arbitration, 2024

[28] See, the IBA Guidelines on Conflicts of Interest in International Arbitration, 2024 which under Part II, General Standard 3 provides that in determining whether facts or circumstances should be disclosed, is subject to the arbitrator's duty to investigate under General Standard 7 (d), and that the arbitrator should consider all facts and circumstances known to the arbitrator.

the arbitrator's own reasonable enquiries. Consequently, the IBA Guidelines were amended to elaborate that an arbitrator's determination of whether certain facts or circumstances should be disclosed are "subject to the arbitrator's duty to investigate under General standard 7 (d)," and that, "the arbitrator should take into account all facts and circumstances known to the arbitrator."[29]

Similarly, the Tanzanian Arbitration (Rules of Procedure) requires an appointed arbitrator to disclose any circumstances that are likely to give rise to justifiable doubts as to his impartiality or independence.[30] However, the Act and its rules do not detailly provide what facts and circumstances should an arbitrator take into account, or whether the parties have to bring to light to the arbitrator, any facts or circumstances that would connote to conflicts of interest as in the IBA Guidelines. The High Court of Tanzania's decision to remove the arbitrator based on violation of the principles of natural justice particularly the right to a fair hearing,[31] grounding the absence of impartiality on the arbitrator reflects an ultra-cautious approach, leaning heavily towards protecting the perception of impartiality. However, by strictly emphasising 'perception,' the court risks encouraging parties to raise superficial or speculative challenges, potentially stalling proceedings and adding to arbitration's already growing procedural burdens.

Under Tanzanian Arbitration Act, a party wishing to challenge the appointment of an arbitrator must formalize their objection by presenting it directly to the

---

[29] See, General Standard 3 (a) of The IBA Guidelines on Conflicts of Interest in International Arbitration, 2024. See also, Cleary Gottlieb Alert Memorandum, *'International Bar Association Publishes Revisions to Guidelines on Conflicts of Interest in International Arbitration.'* (Mar. 8, 2024), (https://www.clearygottlieb.com/-/media/files/alert-memos-2024/international-bar-association-publishes-revisions-to-guidelines-on-conflicts-of-interest-in-international-arbitration.pdf)

[30] Rule 23 (2) of the Arbitration (Rules of Procedure) GN. No. 146 (2021)

[31] Emma Lindsay, Camilla Gambarini, '*The proposed reform of the English Arbitration Act on arbitrators' independence and impartiality and the duty of disclosure from a comparative perspective,*' Arbitration International, Volume 40, Issue 1, March 2024, pp. 37–66, https://doi.org/10.1093/arbint/aiae007

chairperson of the arbitral tribunal or to the Tanzanian Arbitration Centre – or as is presently the case, the High Court. This objection should include the reasons for the challenge and any relevant evidence. The arbitrator facing the challenge may without delay, furnish explanations to the arbitral tribunal or the Chairman.[32] If the challenge is accepted, the arbitrator, whether due to suspected partiality or legal incapacity, will be replaced as stipulated in Section 27 (4) and 28 of the Arbitration Act, and Regulation 25 of the Arbitration (Rules of Procedure). It is important to note that the law allows an arbitrator to acknowledge their own inability to act impartially, enabling them to voluntarily withdraw from the case through resignation without facing any negative consequences for this decision.[33]

Critically, the High Court's ruling in *The Arab Contractors* appears more rigid on proof of an apprehension of bias than evidence of actual bias. In the High Court's view, the only question was whether the circumstances give rise to the challenging of the arbitrator exhibited a reasonable apprehension that there was real likelihood of bias. As a result, the High Court's bias test was to determine whether a 'reasonable person with knowledge of the material facts' might have fairly concluded that the arbitrator was biased.[34] This approach seemingly raised the

[32] Section 28 (5) of the Arbitration Act, CAP 15 R.E. 2020 provides that the arbitrator whom the challenge is brought is entitled to be heard by the Centre or Court (emphasis added, as presently, the Centre is not fully operational).

[33] Rule 25 (3) and (4) of the Arbitration (Rules of Procedure) GN. No. 146 (2021) provides that, an arbitrator may resign by submitting his resignation to the other members of the arbitral tribunal and the Secretary-General. If the arbitrator was appointed by one of the parties, the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto, and the arbitral tribunal shall promptly notify the Secretary-General of its decision. See also, Alberto Jonathas Maia, '*Impartiality of Arbitrators in Brazilian Law: An Intersectional Approach Between Arbitration, Economics, and Psychology,*' in Maxi Scherer (ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2024, Volume 41, Issue 4), pp. 487 – 520.

[34] In *The Arab Contractors (Osman Ahmed Osman & Co., and Elsewedy Electric Company v. Bharya Engineering and Constructing Company Limited (BECCO) and Larissa Leach,* Misc. Commercial Case No. 28 of 2022, [29] the Hight Court held that, "Since I have established that there was a breach of natural justice, it follows that, where there has been a violation

bar for arbitrators trying to avoid bias while lowering the bar for parties trying to prove bias. For judicial bias, most common law nations use this test.[35] This shows that it is a commonly recognized bias test, even with the high standards set for arbitrators and judges.[36]

The High Court of Tanzania's emphasis on being governed by a subjective test aligns with global arbitration standards and does not completely diverge from the more pragmatic approach taken by courts in other jurisdictions. For example, in South Africa,[37] the case of *Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another*[38] provides a contrasting viewpoint. In this case, the parties agreed that the dispute would be resolved by an arbitrator, namely Mr Nigel Andrews (the first respondent). After remeasuring the work done, the arbitrator found Mphaphuli to be liable to Bopanang for a certain amount. Bopanang then applied to the High Court in Pretoria for the arbitration award to be made an order of court. That application was opposed by Mphaphuli, who also filed a counterapplication to have the award set aside. Mphaphuli argued that he was not given a fair hearing by the arbitrator, as he claimed secret meetings and correspondence were conducted without Mphaphuli's knowledge. He also claimed the arbitrator exceeded his mandate in terms of the arbitration agreement. The High Court ruled in favour of Bopanang, which was later upheld by the Supreme Court of Appeal.[39]

---

of natural justice the right course is to order a hearing de novo before a different arbitrator, just as it was prayed by the Petitioners."

[35] Emma Garett, *Independence, and impartiality: Australia's arbitrator bias test*. Arbitration International, 2024, 40, 135–155 https://doi.org/10.1093/arbint/aiae004 ;See also, *Issack Mwamasika & 2 Others v. CRDB Bank Limited,* Court of Appeal of Tanzania, Civil Revision No. 6 of 2016.

[36] Ben Rayment, 'Bias After Dallaglio' (1996) 1(2) Judicial Rev 102.

[37] Reference to the South African case has also been made in this article because, in South Africa's legal system, where common law and judicial precedents are part of the sources that make up South African law as in Tanzania.

[38] *Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another* (CCT 97/07) [2009] ZACC 6

[39] *Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another* (CCT 97/07) [2009], ZACC 6 [5 – 10]

Mphaphuli yet dissatisfied with the Supreme Court of Appeal decision, appealed to the South African Constitutional Court which recognized that while an arbitrator must be impartial, and that, what is fair in each arbitration will be dependent on the context. The mere existence of communications between the arbitrator and one of the parties could not automatically disqualify an arbitrator unless it can be shown that such a relationship compromises their ability to decide fairly. O'Regan J held that the arbitration had been conducted fairly since the intention of the parties was that the arbitrator would conduct the arbitration in an informal, investigative manner, rather than in the formal, adversarial manner consistent with a trial in a court of law – which did not give rise to a gross irregularity which would warrant the arbitration award being set aside.[40]

By emphasising that an arbitrator's impartiality must be assessed within the context of the specific arbitration agreement and the expectations of the parties involved, the South African Constitutional Court navigates the tension between formal legal standards and the practical realities of arbitration. This approach not only validates the procedural flexibility inherent in arbitration but also highlights the need for contextual understanding when evaluating claims of bias or impropriety. For instance, the IBA Guidelines seek to filter out unnecessary disqualifications by grading conflicts of interest according to their seriousness. IBA Guidelines essentially strike a balance between ensuring fairness and preventing undue challenges.[41] Yet, while the High Court of Tanzania, in the *Arab Contractors* case, relied on the subjective test to consider whether in the 'eyes of the parties,' the facts or circumstances "exhibit a reasonable apprehension that there was real likelihood of bias," it did not provide a detailed analysis of the extent of the standards and proof required for bias on conflict of interest or whether it truly threatened the fairness of the arbitration—a gap that opens the door for more

[40] Ibid
[41] See, IBA Arbitration Committee Subcommittee on Rules & Guidelines, '*Commentary on the revised text of the 2024 Guidelines on Conflicts of Interest in International Arbitration.*' September 2024.

judicial discretion in decisions on impartiality of arbitrators.[42] The *Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another*[43] judgment thus stresses that a more nuanced approach should be taken when assessing the impartiality of arbitrators—an approach that the High Court of Tanzania might consider or keep on applying in future cases.

In the UK, a common law jurisdiction like Tanzania, the House of Lords in *Porter v. Magill* established a test for apparent bias, known as the "fair-minded observer or reasonable apprehension of bias test."[44] In this case, it was alleged that the auditor (Mr Magill) displayed apparent bias and therefore ought to be removed.[45] In order to maintain his independence and impartiality when assessing if local counsellors had broken any laws, the auditor had to remain impartial. The auditor's public declaration of his preliminary findings on a matter before any formal hearing raised concerns about his impartiality.[46] However, the auditor denied bias having applied the test for apparent bias to himself and refused to resign.[47] The apparent test determines whether a hypothetical, informed observer would conclude that there was a real possibility, or a real danger of bias.[48] Considering this, the High Court of Tanzania's reliance on the mere perception of bias in *The Arab Contractors* case seems aligned to the test for apparent bias, as the

---

[42] Unlike how some other jurisdictions would consider the IBA Guidelines in their decisions on cases involving the impartiality of arbitrators, the High Court of Tanzania has frequently mainly relied on precedents from case law on the tests of bias and the provisions of the Arbitration Act, 2020. See, *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited*, Miscellaneous Civil Cause No. 138 of 2022, TZHC - Commercial Division, [12, 13-17]

[43] *Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another* (CCT 97/07) [2009] ZACC 6

[44] *Porter v Magill*, [2001] UKHL 67

[45] *Porter v Magill*, [2001] UKHL 67, [491]

[46] Ibid [485, 491]

[47] *Porter v Magill*, [492]

[48] Aceris Law LLC, The Impartiality Test: How Unbiased Can an Arbitrator Truly Be? *International Arbitration Attorney,* (28th Sept 2024).

judge explored whether a reasonable observer would indeed conclude that the arbitrator's relationship would affect her impartiality.

3. The Oryx Oil Case: A Closer Look at Arbitrator Disclosure Obligations

A similar issue arose in the more recent case of *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited*,[49] where the petitioner raised concerns about the arbitrator's failure to disclose the fact that the arbitrator previously worked for the respondent, an act which is related to his impartiality and connections with one of the parties. The embattled arbitrator found nothing that would be said to constitute a justifiable reason to call for his recusal, stating that; "I have therefore failed to find any realistic reasons of fear of bias upon which a seriously minded person would point a finger at. I am aware that as an arbitrator, I should not recuse myself in conduct of any proceedings for flimsy reasons."[50] However, it should be well noted that, the petitioners alleged that the information they were not informed about had a connection to the pending arbitration proceedings, and their concerns about the arbitrator's impartiality were based on his past dealings with the respondent as a consultant who prepared what came to be known as the Kawawa Road Fuel Filling Business Plan.[51] The petitioner further relied on the English case of *Halliburton Company v. Chubb Bermuda Insurance Ltd*, arguing that an arbitrator must independently make disclosure of matters that would or might create justifiable doubts.[52] In *Halliburton Company v. Chubb Bermuda Insurance Ltd,*

---

[49] *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited*, Miscellaneous Civil Cause No. 138 of 2022 [TZHC - Commercial Division]

[50] See, *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited*, [1-3]

[51] Ibid, [3]

[52] *Halliburton Company v. Chubb Bermuda Insurance Ltd*, [2020] UKSC 48. The Supreme Court affirmed that the Arbitration Act 1996 sets high standards of impartiality and disclosure for arbitrators, and that these standards represent an important part of what parties expect from a London-seated international arbitration. While the Supreme Court ultimately dismissed Halliburton's challenge to the arbitrator in question, Mr Kenneth Rokison QC (holding that there was no appearance of bias, at least by the time of the challenge hearing), it affirmed that by accepting appointments in multiple international arbitrations with overlapping subject-matter, an arbitrator may create "*justifiable doubts*" about his or her impartiality. The decision also clearly established for the first time an independent

the United Kingdom Supreme Court had to decide whether and to what extent English law imposed an obligation of disclosure, which the Court of Appeal had determined to be the case. The Supreme Court's judgement recognized the duty of disclosure as part of English law.[53]

In the *Oryx Oil* case, the High Court of Tanzania did not remove the arbitrator based on the undisclosed connections with the other party, but rather held that the applicant's allegation of the existence of bias or lack of impartiality on the arbitrator was more of a perception than a reality despite the existence of proof.[54] Through the said ruling, this case aligned with the principle from *The Arab Contractors* case reflecting an ultra-cautious approach by Tanzanian courts in addressing the potential perception of bias. The question that comes to mind is: Was not the consulting relationship as on the arbitrator's CV required to be disclosed by the arbitrator and cleared out with the parties in the first place? The respondents contended that "the arbitrator was not under any obligation to disclose any information on his association with the respondent." The High Court also did not directly provide analysis and responses to these questions but rather mentioned that "while the act of inflating the arbitrator's credentials is in bad taste and borders on misrepresentation, the effects arising out of this inaccuracy cannot be said to bring about any sense of feeling that the arbitrator may be biased in his operation."[55]

However, as reasoned by the United Kingdom's Supreme Court of Appeal in *Halliburton Company v. Chubb Bermuda Insurance Ltd,* unless there is disclosure, the parties may often be unaware of matters which could give rise to justifiable doubts

---

duty on arbitrators under English law to make disclosure of matters that "*would or might*" create such justifiable doubts. The Supreme Court recognised, however, that the assessment of both the impartiality and disclosure standards must reflect the context, custom and practice in particular subject-matter fields of arbitration.

[53] *Halliburton Company v. Chubb Bermuda Insurance Ltd*, [2020] UKSC 48

[54] *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited*, [17]

[55] See, *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited*, [14-15]

about an arbitrator's impartiality and entitle them to a remedy from the court.[56] The Supreme Court of Appeal opined that, "an arbitrator who knowingly fails to act in a way which fairness requires to the potential detriment of a party is guilty of partiality. Unless the parties have expressly or implicitly waived their right to disclosure, such disclosure is not just a question of best practice but is a matter of legal obligation."[57] It further held that, "the failure to disclose may demonstrate a lack of regard to the interests of the noncommon party and may in certain circumstances amount to apparent bias."[58]

Arguably, the *Oryx Oil* decision relied on the grounds stated in the Court of Appeal of Tanzania's reasoning in the case of *Issack Mwamasika & 2 Others v. CRDB Bank Limited* as an 'iconic decision' in which grounds for recusal of a judicial officer were exemplified, but not entirely line with the IBA Guidelines, which requires arbitrators to disclose any circumstances that could give rise to doubts regarding their impartiality or independence.[59] As aforementioned, the IBA Guidelines categorize potential conflicts of interest into three lists: the Green List – where no disclosure is required, the Orange List – where disclosure is recommended but does not automatically disqualify the arbitrator, and the Red List – where the

---

[56] *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [para 75]. At para 76 of the case, the UKSC agreed with the position of the Court of Appeal noting that the statutory duties of the arbitrator 'give rise to an implied term in the contract between the arbitrator and the parties that the arbitrator will so act. The arbitrator would not comply with that term if the arbitrator at and from the date of his or her appointment had such knowledge of undisclosed circumstances as would, unless the parties waived the obligation, render him or her liable to be removed.'

[57] *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48

[58] *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [para 118]. See also, Emma Lindsay, Camilla Gambarini, *'The proposed reform of the English Arbitration Act on arbitrators' independence and impartiality and the duty of disclosure from a comparative perspective,'* Arbitration International, Volume 40, Issue 1, March 2024, p. 41, https://doi.org/10.1093/arbint/aiae007

[59] See, *Issack Mwamasika & 2 Others v. CRDB Bank Limited,* Court of Appeal of Tanzania, Civil Revision No. 6 of 2016. In this case, the Court of Appeal exercised its revisional powers to explore guidance on the correct legal procedure for a court to take when a judge disqualifies himself at the time of composing a judgment.

conflict is severe enough to mandate disqualification or disclosure depending on the subcategory.[60] The arbitrator's failure to disclose relevant information in the *Oryx Oil* case likely fell within the Orange or Red List categories, where such omissions can significantly affect the tribunal's perception of impartiality and fairness.[61] Notably, in evaluating the obligation to disclose, the IBA Guidelines' standards suggest adopting a subjective test, '*in the eyes of the parties*' test, as opposed to an objective, '*reasonable third person test*' that applies in evaluating the existence of conflicts of interest.[62] Should the High Court of Tanzania in the *Oryx Oil* case have considered or applied the IBA Guidelines in its analysis and reasoning, the circumstance in the case could arguably fall within the Orange List—which covers circumstances where potential conflicts may exist but are not severe enough to mandate automatic disqualification. The IBA Guidelines emphasise the need for transparency and disclosure in such instances, encouraging parties to make informed decisions on whether to accept the arbitrator. The guidelines clearly portray through its grounds that while actual

[60] See, Part II: Practical Application of the General Standards, in the IBA Guidelines on Conflicts of Interest in International Arbitration, 2024. The Guidelines address scenarios that are likely to arise in modern arbitration practice in the Application Lists to have a significant practical impact.

[61] The IBA Guidelines on the Conflicts of Interest in International Arbitration, 2024, para 4. The IBA Guidelines set out different situations that fall within three lists. The Red Lists are non-exhaustive and detail-specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence. It consists of two parts: 'a Non-Waivable Red List' and 'Waivable Red List.' The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality and independence. The Green List provides situations that need not be disclosed. See also, Catherine Rogers, '*Arbitrator Impartiality: The Devil is in the Details*' Arbitration International 312 (2023); Catherine Rogers, '*Arbitrator Challenges: Too Many or Not Enough*', Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2014).

[62] See, The IBA Guidelines on the Conflicts of Interest in International Arbitration, 2024, para 2, [4].

bias is a serious issue, even the perception of bias can erode the legitimacy of arbitration.[63]

The intriguing question as posed by arbitration practitioners in Tanzania was whether the Court of Appeal would determine that the High Court reached a correct outcome by regarding a persuasive decision in *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48 interpreting section 28 (1) of the Arbitration Act, 2020.[64] However, in the subsequent appeal *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited*,[65] the Court of Appeal upheld the decision of the High Court but clarified that the High Court's ruling did not close the doors for the appellant to participate in the arbitral proceedings. The Court of Appeal emphasised that the ruling on the arbitrator's removal was interlocutory, and the appellant could challenge the final arbitral award under section 5(2) of the Appellate Jurisdiction Act of Tanzania. This procedural nuance underscores the importance of disclosure while maintaining the principle that parties should not be deprived of their right to arbitrate, pending a final determination of any bias-related claims.

In the upshot, the *Oryx Oil* case also highlights the Tanzanian courts' emphasis on disclosure yet leaves room for parties to contest final awards. The tricky part of contesting a final award on a ground of bias or lack of impartiality of an arbitrator is that it can only apply in exceptional circumstances, as held by the Supreme Court of India in *Avitel Post Stuidoz Limited & Ors. V. HSBC Pl Holdings (Mauritius)*

---

[63] In April 2023, the IBA formed a new task force, termed as the 'IBA Arbitration Committee Subcommittee on Rules & Guidelines' to review the guidelines on conflicts of interest in international arbitration. See Susannah Moody, '*IBA Task Force to Review Conflict Guidelines*', 11 April 2023 available at https://globalarbitrationreview.com/article/iba-task-force-review-conflict-guidelines

[64] Madeline Kimei, 'Tanzania' in Abayomi Okubote (ed), *Arbitration Compass* (Africa Arbitration Academy 2024), at para 22, p. 82. Available at: https://africaarbitrationacademy.org/arbitration-compass/

[65] *Oryx Oil Company Limited & Another v. Oilcom Tanzania Limited*, Civil Appeal No. 47 of 2024 [CAT at Dar es Salaam].

Limited.[66] This was also mirrored in our jurisdiction in the case of *Bharya Engineering and Conracting Company Ltd (BECCO) v. The Arab Contractors Limited* & *Elsewedy Electric Company,* where in setting aside the additional award, the High Court found that, save for the allegation of bias, the petition was meritorious as the application for additional award was time barred.[67] On the allegation of arbitrator's bias, the High Court observed that the fact that the arbitrator copied the words, phrases or sentences found in the respondents' submission is insufficient to establish bias.[68] In essence, the *Oryx Oil* case reflects the growing need for arbitrators to be diligent in their disclosures, reaffirming the standards set by both Tanzanian courts and international guidelines, such as the IBA Guidelines. According to the IBA Guidelines, arbitrators must err on the side of transparency, ensuring that parties are fully informed of any facts or circumstances that might give rise to justifiable doubts about their impartiality or independence.[69] The failure to do so, as in the *Oryx Oil* case, can lead to an arbitrator's removal, thus preserving the legitimacy of the arbitral process.

4. Ramani Consultants v. Swissport: Tactical Challenges

In *Ramani Consultants v. Swissport Tanzania*, the impartiality challenge arose after a statement on the way the claimant's claim had been stated was made by the arbitrator and that, in effect, the arbitrator predetermined the dispute before hearing the parties, contrary to the principles of natural justice.[70] This is a classic scenario where parties, dissatisfied with the direction of the case, seek to disqualify

---

[66] *Avitel Post Stuidoz Limited & Ors. V. HSBC Pl Holdings (Mauritius) Limited,* 2024 SCC Online SC 345. See also, Ekta Tyagi, Anjali Shah (DSK Legal), *Arbitrator's Bias as a Ground for Challenging a Foreign Award: The Indian Perspective* (Kluwer Arbitration Blog September 17th 2024) https://arbitrationblog.kluwerarbitration.com/2024/09/17/arbitrators-bias-as-a-ground-for-challenging-a-foreign-award-the-indian-perspective/

[67] *Bharya Engineering and Conracting Company Ltd (BECCO) v. The Arab Contractors Limited* & *Elsewedy Electric Company,* Misc. Commercial Cause No. 3 of 2023 (TZHC, Comm. Div.), [14-15].

[68] Ibid, [15].

[69] The IBA Guidelines on the Conflicts of Interest in International Arbitration, 2024.

[70] *Ramani Consultants v. Swissport Tanzania PLC*, (Misc. Commercial Cause No. 66 of 2023/7309 of 2024).

arbitrators in the hope of reversing unfavourable outcomes. The High Court's decision to reject the challenge rested on two key points: the lack of evidence of actual bias and the absence of any allegation that the arbitrator was in any way dishonest or interested in the subject matter before him.[71] This approach represents a more pragmatic stance, echoing international best practices and aligning more closely with the IBA Guidelines. This is because the ruling mirrors the global trend of discouraging tactical challenges designed to derail arbitration after a party receives an unfavourable direction or outcome of the case.

However, while the High Court in this instance rejected the challenge, it left open a larger question: What constitutes sufficient evidence of bias? The High Court of Tanzania in *Ramani Consultants v. Swissport Tanzania PLC* held that not every suspicion felt by a party must lead to the conclusion that the arbitrator is biased. The High Court noted that there must be reasonable apprehension about the arbitrator's bias for an arbitrator to be removed by the court under section 17 (4) (b) of the Arbitration Act. [72] The IBA Guidelines rather articulate that mere suspicion or dissatisfaction with an arbitrator's rulings is insufficient to justify a challenge. Rather, there must be an objective basis for the belief that bias exists. In this case, it appears that the court required more concrete proof than the IBA standards might suggest, setting a high bar for claimants to demonstrate bias.[73] This could be problematic in cases where bias is more subtle, manifesting through unconscious tendencies rather than overt actions.

---

[71] *Ramani Consultants v. Swissport Tanzania PLC*, (Misc. Commercial Cause No. 66 of 2023/7309 of 2024, [5].
[72] *Ramani Consultants v. Swissport Tanzania PLC*, (Misc. Commercial Cause No. 66 of 2023/7309 of 2024).
[73] Cleary Gottlieb Alert Memorandum, *'International Bar Association Publishes Revisions to Guidelines on Conflicts of Interest in International Arbitration.'* (Mar. 8, 2024), https://www.clearygottlieb.com/-/media/files/alert-memos-2024/international-bar-association-publishes-revisions-to-guidelines-on-conflicts-of-interest-in-international-arbitration.pdf

The IBA Guidelines also place a strong emphasis on the timing of conflict-of-interest objections, recognizing that late-stage challenges can be misused as tactical manoeuvrers rather than genuine concerns about impartiality.[74] The *Orange List* guidelines suggest that if a party is aware of a potential conflict but fails to raise it promptly, it waives its right to challenge the arbitrator on those grounds later in the proceedings.[75] By emphasising the importance of grounded challenges, the court in *Ramani Consultants* reinforced this critical principle, protecting the integrity of the arbitral process from abuse.

5.I BA Guidelines on Conflict of Interest in International Arbitration: A Critical Benchmark?

The IBA Guidelines are increasingly seen as the international standard for managing issues of arbitrator impartiality and independence.[76] They provide clear rules for disclosure, categorization of conflicts, and the procedures for raising challenges.[77] As such, they serve as a critical reference point when assessing

---

[74] See, IBA Arbitration Committee Subcommittee on Rules & Guidelines, '*Commentary on the revised text of the 2024 Guidelines on Conflicts of Interest in International Arbitration.*' September 2024, [1, 2]; Khalil Mechantaf, An Arbitrator's Reasonable Apprehension of Bias: Business Relationships Do Not 'Always' Create One According to Ontario's SCJ. (Kluwer Arbitration Blog – 3rd September 2024); Alberto Jonathas Maia, 'Impartiality of Arbitrators in Brazilian Law: An Intersectional Approach Between Arbitration, Economics, and Psychology', in Maxi Scherer (ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2024, Volume 41, Issue 4), pp. 487 - 520

[75] See, General Standard 4 of the IBA Guidelines on Conflicts of Interest in International Arbitration, 2024. See also, Rule 24 (1) (2) of the Arbitration (Rules of Procedure), GN. No. 146 (2021) which mirrors the timely requirement of the IBA Guidelines in challenging an arbitrator on the grounds of bias or lack of impartiality.

[76] See, IBA Arbitration Committee Subcommittee on Rules & Guidelines, '*Commentary on the revised text of the 2024 Guidelines on Conflicts of Interest in International Arbitration.*' September 2024, [1, 2];

[77] Sophie Bayrou, Conflicts of Interest in International Arbitration: new IBA Guidelines. Clyde & Co. – UK & Europe. (17th July 2024). Available at: https://www.clydeco.com/en/insights/2024/07/conflicts-of-interest-in-international-arbitration ; Chiara Capalti &. Giorgia Bizzarri, The Revised IBA Guidelines on Conflicts of Interest: A Call to Action for Parties and. Counsel? (Kluwer. Arbitration Blog. 7th May

whether a court or arbitral tribunal's handling of impartiality is consistent with global best practices.[78]

In the Tanzanian cases, the courts' responses highlight the tension between two key principles outlined in the IBA Guidelines: the need to protect the integrity, impartiality and independence of arbitrators, and the need to avoid excessive, disruptive challenges that undermine the efficiency of arbitration. The *Arab Contractors* case arguably tilted too far toward the former, focusing on the mere appearance of bias, while *Ramani Consultants* reasserted the latter, prioritizing procedural efficiency by rejecting unfounded challenges. While the IBA Guidelines do not have binding legal force, they are widely respected and referenced in both institutional arbitration and judicial contexts, the Tanzanian courts would benefit from more robust engagement with these guidelines to ensure their decisions strike the right balance between fairness and efficiency in dealing with questions of impartiality and independence of arbitrators.[79] Specifically, the courts should develop clearer reasoning when it comes to deciding whether a conflict-of-interest warrants disqualification, incorporating the IBA Guidelines' graded approach to conflicts. This would not only provide greater consistency in rulings but would also bring Tanzanian arbitration law more in line with international norms.[80]

2024). Available at: https://arbitrationblog.kluwerarbitration.com/2024/05/07/the-revised-iba-guidelines-on-conflicts-of-interest-a-call-to-action-for-parties-and-counsel/

[78] IBA Arbitration Committee Subcommittee on Rules & Guidelines, '*Commentary on the revised text of the 2024 Guidelines on Conflicts of Interest in International Arbitration.*' September 2024. The Guidelines are made under the premise of having a set of common test practices regarding disclosure of conflicts of interest promotes the efficiency, the effectiveness, and the legitimacy of international arbitration as a system to resolve disputes.

[79] See, *Introduction,* The IBA Guidelines on Conflicts of Interest in International Arbitration, 2024, para 6, [p. 5].

[80] As noted in the IBA Arbitration Committee Subcommittee on Rules & Guidelines' *Commentary on the revised text of the 2024 IBA Guidelines on Conflicts of Interest in International Arbitration*, the IBA Guidelines have gained wide acceptance within the international arbitration community and are commonly referred to by arbitral institutions and national

Both *The Arab Contractors* and *Ramani Consultants* cases also touch on a broader issue not explicitly addressed in the judgments: the role of unconscious or implicit bias in arbitration. Modern understandings of bias recognize that even without a direct conflict of interest, arbitrators may be influenced by subtle cognitive biases shaped by their background, culture, or prior relationships. Unconscious or implicit bias applies to where the arbitrator may have underlying attitudes and stereotypes that affect how they understand and interact with the parties, impacting their appearance of impartiality.[81] The IBA Guidelines acknowledge that arbitrators must remain vigilant about potential unconscious biases and encourage disclosure whenever in doubt.

Yet, this raises a fundamental question: How do courts and arbitration institutions effectively address implicit bias when it is, by definition, difficult to detect and prove? Current legal frameworks, including the IBA Guidelines, primarily focus on objective factors—prior relationships, financial interests, and other tangible connections.[82] However, in a world of increasingly global arbitration, where arbitrators come from diverse backgrounds and may unknowingly bring preconceptions into their decision-making, there is a growing need for more refined tools to address implicit biases.[83] This article suggests that, one of the tools to address implicit biases should be inclusion of the grounds for establishing bias as provided for in the IBA Guidelines within the Tanzanian Arbitration Act. Is

courts dealing with issues of independence and impartiality or disclosures of potential conflicts of interest.

[81] Alberto Jonathas Maia, '*Impartiality of Arbitrators in Brazilian Law: An Intersectional Approach Between Arbitration, Economics, and Psychology,*' in Maxi Scherer (ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2024, Volume 41, Issue 4), pp. [488].

[82] Karel Daele, '*Challenge and Disqualification on the Ground of Impartiality Issues,*' in Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration, International Arbitration Law Library, Volume 24 (© Kluwer Law International; Kluwer Law International 2012), pp. 365 – 453.

[83] See, IBA Arbitration Committee Subcommittee on Rules & Guidelines, '*Commentary on the revised text of the 2024 Guidelines on Conflicts of Interest in International Arbitration.*' September 2024, [1, 2].

such a new suggestion? Certainly not. The same has been done with, for instance, the Indian Arbitration Act – a common law jurisdiction like ours, which incorporated the grounds for justifiable bias as to the impartiality or independence of arbitrators (as provided for in the IBA Guidelines) in Schedules V and VII of the Arbitration and Conciliation Act, 1996 of India.[84] This came about after the Law Commission of India's 2014 report had proposed requiring specific disclosures from arbitrators about any relationships or interests that may raise justifiable doubts during their appointment.[85] The Law Commission suggested that the Schedules, drawn from the Red and Orange lists of the IBA Guidelines to be used as a guide to determine if such doubts exist. This meant that, disclosure is required for a broader list of categories, as incorporated in the Arbitration and Conciliation Act, 1996 of India.[86]

---

[84] The inclusion of the specific disclosures by the arbitrator in the Arbitration Act of India followed proposals made by the Law Commission of India's Report No. 246 of 2014 on the Amendment of the Arbitration and Conciliation Act, 1996. On 31st December 2015, the Arbitration and Conciliation (Amendment) Act No. 3 of 2016 amended the Act to include Schedules V and VII into the Act. See, The Arbitration and Reconciliation Act, 1996. See also, Ekta Tyagi, Anjali Shah (DSK Legal), *Arbitrator's Bias as a Ground for Challenging a Foreign Award: The Indian Perspective* (Kluwer Arbitration Blog September 17th 2024) https://arbitrationblog.kluwerarbitration.com/2024/09/17/arbitrators-bias-as-a-ground-for-challenging-a-foreign-award-the-indian-perspective/

[85] See, Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Comm No. 246, 2014) paras 59-60.

[86] See, Amendment of Section 12 in: Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Comm No. 246, 2014) paras 8 (iii)(vi). The Law Commission of India noted that, "this amendment is intended to further goals of independence and impartiality in arbitrations, and only gives legislative colour to the phrase "independence or impartiality" as it is used in the Act. The contents of the Fourth Schedule incorporate the Red and Orange lists of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration." See also, Ashtusho Ray, *Law Commission's report to Revamp the Indian Arbitration Experience.* Kluwer Arbitration Blog (23rd August 2014). https://arbitrationblog.kluwerarbitration.com/2014/08/23/law-commissions-report-to-revamp-the-indian-arbitration-experience/

Subsequently, the High Courts in India, for instance, the Bombay High Court in *Avitel Post Stuidoz Limited & Ors. V. HSBC Pl Holdings (Mauritius) Limited*[87]applied the reasonable apprehension test – as mentioned above and as contained in general Standard 2(b) of the IBA Guidelines to conclude that the circumstances alleged fall under the green lights and thus there is no requirement of disclosure after observing that the two companies, in which the presiding arbitrator was an independent non-executive director, were not affiliates of HSBC.[88] Tanzanian Courts on the other hand, must therefore evolve their approaches to arbitrator impartiality, incorporating not just the traditional conflict of interest analysis but also considering application and inclusion of grounds for justifiable doubts as to arbitrators' impartiality as provided in the IBA Guidelines to mitigate unconscious bias. This could also involve and require more extensive disclosures about arbitrators' prior experiences, training on recognizing and counteracting bias, or even broader oversight mechanisms within arbitration institutions in Tanzania.

Alternatively, as in the United Kingdom – where in a move to reform the English Arbitration Act, the Law Commission has suggested that the new English Arbitration Act include a provision requiring arbitrators to disclose the circumstances that may plausibly raise "justifiable doubts" about their impartiality,[89] the same could also be done in Tanzania's Arbitration Act. The Law Commission opined that, "what matters instead is that arbitrators are impartial. We propose codifying the common law, which requires an arbitrator to disclose circumstances which might reasonably give rise to justifiable doubts as to their impartiality."[90] The Law Commission further suggested that the duty of disclosure

---

[87] *Avitel Post Stuidoz Limited & Ors. V. HSBC Pl Holdings (Mauritius) Limited,* 2024 SCC Online SC 345. See also, Ekta Tyagi, Anjali Shah (DSK Legal), *Arbitrator's Bias as a Ground for Challenging a Foreign Award: The Indian Perspective* (Kluwer Arbitration Blog, 17th September 2024) https://arbitrationblog.kluwerarbitration.com/2024/09/17/arbitrators-bias-as-a-ground-for-challenging-a-foreign-award-the-indian-perspective/

[88] Ibid

[89] Law Commission, First Consultation Paper, para 3.51.

[90] Law Commission, First Consultation Paper, para 1.5.

should be based on what the arbitrator ought reasonably to know.[91] Incorporating similar provisions in Tanzania's Arbitration Act would enhance the integrity of the arbitration process, ensuring greater transparency and confidence in the impartiality of arbitrators, ultimately aligning with international best practices and reinforcing Tanzania's commitment to fair and equitable dispute resolution.

6. Conclusion: Toward a Balanced Approach to Arbitrator Impartiality

The current landscape of arbitration in Tanzania may be marred by uncertainties regarding the impartiality of arbitrators, which can undermine the confidence of parties involved in arbitration proceedings.[92] The Tanzanian cases of *The Arab Contractors* and *Ramani Consultants* highlight the ongoing challenges of ensuring arbitrator impartiality in a fair and efficient manner. These cases underscore the need for courts to carefully balance the right to an impartial tribunal with the need to protect arbitration from frivolous challenges. To address these issues, this article advocates for the adoption of more detailed and explicit criteria for evaluating potential bias among arbitrators. Such criteria could include specific disclosures that arbitrators must make regarding their relationships, interests, or prior involvement in similar cases.

By incorporating the standards from the IBA Guidelines that detailly assess bias— would serve to clarify expectations and provide a more transparent mechanism for addressing concerns related to arbitrator neutrality. Ultimately, Tanzanian courts must continue to refine their standards for assessing bias. In turn, this would foster a more trustworthy environment that can help ensure that arbitration remains a trusted and reliable means of resolving disputes. This will be critical as

[91] Law Commission, First Consultation Paper, para 3.95. See also, Emma Lindsay, Camilla Gambarini, *'The proposed reform of the English Arbitration Act on arbitrators' independence and impartiality and the duty of disclosure from a comparative perspective,'* Arbitration International, Volume 40, Issue 1, March 2024, p. 41, https://doi.org/10.1093/arbint/aiae007

[92] Juvenalis Ngowi, The New Tanzania Arbitration Act: A Challenge to Party Autonomy? (2022) 10 (1). Alternative Dispute Resolution); Clement Mashamba, Alternative Dispute Resolution in Tanzania: Law and Practice. (Mkuki na Nyota Publishers, 2014).

international arbitration continues to grow in complexity and importance, both in Tanzania and beyond.

Bibliography

Laws & Guidelines:

The Arbitration (Rules of Procedure) GN. No. 146 (2021

The Arbitration Act, CAP 15 R.E. 2020

The IBA Guidelines on Conflicts of Interest in International Arbitration, 2024

Case Laws:

Avitel Post Stuidoz Limited & Ors. V. HSBC Pl Holdings (Mauritius) Limited, 2024 SCC Online SC 345.

Bharya Engineering and Conracting Company Ltd (BECCO) v. The Arab Contractors Limited & *Elsewedy Electric Company,* Misc. Commercial Cause No. 3 of 2023 (TZHC, Comm. Div.), [14-15].

Dhirajlal Walji Ladwa and 2Others vs. Jistesh Jayantilal Ladwa and Another, Commercial Cause No.2 of 2020, (unreported).

Halliburton Company v. Chubb Bermuda Insurance Ltd [2020] UKSC 48

Issack Mwamasika & 2 Others v. CRDB Bank Limited, Court of Appeal of Tanzania, Civil Revision No. 6 of 2016.

Laurean G. Rugaumukamu vs. IGP & Another, Civil Appeal No.13 of 1999.

Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another (CCT 97/07) [2009] ZACC 6
Porter v Magill, [2001] UKHL 67

Ramani Consultants v. Swissport Tanzania PLC, (Misc. Commercial Cause No. 66 of 2023/7309 of 2024).

The Arab Contractors (Osman Ahmed Osman & Co., and Elsewedy Electric Company v. Bharya Engineering and Constructing Company Limited (BECCO) and Larissa Leach, Misc. Commercial Case No. 28 of 2022

Articles, Reports & Books:

Aceris Law LLC, The Impartiality Test: How Unbiased Can an Arbitrator Truly Be? *International Arbitration Attorney,* (28th Sept 2024).

Alberto Jonathas Maia, '*Impartiality of Arbitrators in Brazilian Law: An Intersectional Approach Between Arbitration, Economics, and Psychology,*' in Maxi Scherer (ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2024, Volume 41, Issue 4), pp. [488].

Ben Rayment, 'Bias After Dallaglio' (1996) 1(2) Judicial Rev 102.

Catherine Rogers, 'Arbitrator impartiality: the devil is in the details', in William W. Park (ed), Arbitration International, (© The Author(s); Oxford University Press 2023, Volume 39, Issue 2), pp. 310 – 313

Cleary Gottlieb Alert Memorandum, '*International Bar Association Publishes Revisions to Guidelines on Conflicts of Interest in International Arbitration.*' (Mar. 8, 2024), *https://www.clearygottlieb.com/-/media/files/alert-memos-2024/international-bar-association-publishes-revisions-to-guidelines-on-conflicts-of-interest-in-international-arbitration.pdf*

Clement Mashamba, Alternative Dispute Resolution in Tanzania: Law and Practice. (Mkuki na Nyota Publishers, 2014).

Ekta Tyagi, Anjali Shah (DSK Legal), *Arbitrator's Bias as a Ground for Challenging a Foreign Award: The Indian Perspective* (Kluwer Arbitration Blog, 17th September 2024) https://arbitrationblog.kluwerarbitration.com/2024/09/17/arbitrators-bias-as-a-ground-for-challenging-a-foreign-award-the-indian-perspective/

Emma Garett, *Independence, and impartiality: Australia's arbitrator bias test*. Arbitration International, 2024, 40, 135–155 https://doi.org/10.1093/arbint/aiae004

Emma Lindsay, Camilla Gambarini, *'The proposed reform of the English Arbitration Act on arbitrators' independence and impartiality and the duty of disclosure from a comparative perspective,'* Arbitration International, Volume 40, Issue 1, March 2024, p. 41, https://doi.org/10.1093/arbint/aiae007

IBA Arbitration Committee Subcommittee on Rules & Guidelines, '*Commentary on the revised text of the 2024 Guidelines on Conflicts of Interest in International Arbitration.*' September 2024,

Juvenalis Ngowi, The New Tanzania Arbitration Act: A Challenge to Party Autonomy? (2022) 10 (1). Alternative Dispute Resolution).

Karel Daele, '*Challenge and Disqualification on the Ground of Impartiality Issues,*' in Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration, International Arbitration Law Library, Volume 24 (© Kluwer Law International; Kluwer Law International 2012), pp. 365 – 453.

Khalil Mechantaf, An Arbitrator's Reasonable Apprehension of Bias: Business Relationships Do Not 'Always' Create One According to Ontario's SCJ. (Kluwer Arbitration Blog – 3rd September 2024)

Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Comm No. 246, 2014).

Law Commission, First Consultation Paper, UK (2022). Available at: https://lawcom.gov.uk/document/arbitration-consultation-paper/

Lew, Mistelis, Kröll, *Comparative International Commercial Arbitration*, No. 11-7; Lörcher, Lörcher, Lörcher, Das Schiedsverfahren, No. 108.

Madeline Kimei, 'Tanzania' in Abayomi Okubote (ed), *Arbitration Compass* (Africa Arbitration Academy 2024), at para 22, p. 82. Available at: https://africaarbitrationacademy.org/arbitration-compass/

Redfern and Hunter, *Law and Practice*, Nos 4-52; Gary Born, *International Commercial Arbitration*, 1760 et seq.

Arbitrator Immunity in Kenya: Is Qualified Immunity Sufficient Protection- Comparing Kenya's Legal Framework to the United Kingdom and United States of America

By: **Muyodi Manyasa Silas***

Abstract

This paper argues that qualified arbitrator immunity under Kenya law offers sufficient protection to arbitrators. It compares the approach of Kenya and England to that adopted by the United States of America. Its objective is to show the defects in the argument for absolute immunity as is the case in the United States and as compared to qualified immunity approach in Kenya and the English law. It briefly highlights the application of the jurisdictional and hybrid theories of arbitral immunity. The paper also makes a clear distinction between arbitral power and judicial power hence setting ground for differences in application for immunity. It states that unlike judges who are State official holding public offices hence accountable to the State from where they derive their power and immunity, the arbitrator's power is derived from contractual agreement with the parties and its limited thereby. However, it also acknowledges that arbitrators perform quasi-judicial functions warranting them immunity as judges but not to the same extent. The author opines that while arbitrators are entitled to immunity in exercise of their quasi-judicial functions, their power is limited by the agreement with the parties and therefore the immunity should not be absolute but qualified. Consequently, the author concludes that qualified immunity under Kenya's arbitration

Act offers sufficient protection to arbitrators.

**Muyodi Manyasa Silas, LLB Mount Kenya University; Advocate Trainee (KSL)-Currently Pupil @ Prof. Albert Mumma & Company Advocates*

Introduction

Ronald Dworkins in his book "Law's Empire" observed that in all our human relations "*we live in and by the law. It makes as what we are: citizens and employees and doctors and spouses and people who own things… we are subjects of law's empire (...).*" As impressive as this statement sounds, it raises an important question in the context of judicial and arbitral immunity. How can the subjects of the law's empire be immunized from liability for their wrongdoing under the same law? Why would an arbitrator, being a professional with a duty of care, need immunity from liability for their action in the cause of arbitral proceedings? Arbitral immunity seems to conflict with Ronald Dworkin's position in Law's empire because it exempts arbitrators from liability for certain acts and/or omissions resulting from execution of the functions of their office.

This paper will determine the sufficiency of Kenya's legal framework on arbitration in protecting the arbitrator from liability. It investigates the said immunity by examining legislation, case laws, international treaties, and writings of legal scholars. The paper seeks to explain the concept of arbitrator's immunity; evaluate arguments in favour of and against it; positions of different countries on arbitral immunity; and Kenya's approach and need for reform if any. Nevertheless, due to the restricted nature of this paper, I will not delve into in-depth examination of duties owed by the arbitrator to parties or their relationship. Additionally, the paper will utilize various theories of arbitrator immunity as tools of providing the jurisprudential basis that explain varying attitudes and approaches to questions of immunity.

Origin of the Doctrine of Arbitrator Immunity in Kenya

Arbitral immunity is a concept accepted in both civil and common law legal systems even though the extent of immunity varies from country to country.[1]

[1] Jenny Brown, *Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, The*, 2009 J. Disp. Resol. (2009) https://scholarship.law.missouri.edu/jdr/vol2009/iss1/10

Kenya's arbitral immunity has its roots in the English Common Law doctrine of judicial immunity that is applicable to judges and judicial officers.[2] Donaldson J stated in *Bremer Schiffban v South Indian Shipping Corp Ltd*[3] that:

> "*Courts and arbitrators are in the same business, namely the administration of justice (...) the only difference is that the courts are in the public and arbitrators are in the private sector of the industry.*

Donaldson J, statement has its basis in the English cases of *Floyd v. Barker*[4] and *The Marshalsea*.[5] In these cases, Lord Coke held that judges in the common law court cannot be sued before any court for anything done in the exercise of their judicial duties and authority.

Judicial immunity is also canvased extensively in international law instruments. For instance, the International Bar Association Minimum Standards of Judicial Independence of 1982 give the judges immunity from lawsuits and an obligation to act as witnesses in a case arising from their judicial decision.[6] Equally, the 1985 UN Basic Principles on Independence of the Judiciary accords judicial officer personal immunity from legal actions for damages relating to improper and injurious acts or omissions resulting from execution of the officer's judicial duties.[7] In *McC v Mullan* Lord Bridge stated that:

---

[2] Lee Krystal 'The arbitration vaccine: immunity of arbitrators' (January 2021), http://arbitrationblog.practicallaw.com/the-arbitration-vaccine-immunity-of-arbitrators/

[3] *J. Donaldson, Bremer Schiffban v. South India Shipping Corp. Ltd., 1981, AC 909-921* - Donaldson J equated arbitral immunity to judicial immunity. https://www.arbitratorscompany.org/wp-content/uploads/masters_lecture_2018.pdf

[5] *The Marshalsea*

[6] The 1982 International Bar Association (IBA) Minimum Standards of Judicial Independence

[7] UN Basic Principles on the Independence of the Judiciary 1985.

> *"If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that 999 honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction."*[8]

The argument here is that public interest requires that judges to be able to execute their function freely without the risk of harassment through vexatious litigation because of their decisions. [7] Hence, if a judge conducts themselves in a grossly negligent manner, bad faith, or unfairly, while carrying out their judicial functions, neither party can sue him even where the financial or any loss suffered is high. The victim may get compensation some other way, but no personal liability is levied on the judge.[9] This immunity ensures no undue influence is exerted on the judges.[10]

Kenya adopted this doctrine of judicial immunity through Article 160(5) of the Constitution of Kenya 2010 on independence of the judiciary.[11] The Supreme Court of Kenya in *Bellevue Development Company Ltd v Francis Gikonyo & 3 others*[12] held that:

> *"The immunity granted by article 160(5) encapsulated protection from legal proceedings founded on acts committed or omissions made by judges in the lawful performance of their judicial functions. (...) Judicial immunity was an important tenet in the delivery of justice and the maintenance of the rule of law. For the proper administration of justice, judges should freely express themselves in matters*

[8] *McC v Mullan* [1984] 3 All ER 908. 916D
[9] Dyson, 'The Proper Limits of Arbitrators' Immunity' (2018) 84 Arbitration 196 https://www.arbitratorscompany.org/wp-content/uploads/masters_lecture_2018.pdf
[10] Jenny Brown, *Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, The*, 2009 J. Disp. Resol. (2009) https://scholarship.law.missouri.edu/jdr/vol2009/iss1/10
[11] Article 160(5), The Constitution of Kenya, 2010
[12] Bellevue Development Company Ltd v Francis Gikonyo C 3 others [2020] eKLR

> *brought before them. A judge, as well as other judicial officers, were required to have confidence in carrying out their judicial functions without the fear that they would be prosecuted or harassed for their acts or omissions. (...) judicial immunity was the preservation of independent decision-making capabilities of judicial officers; immunity for judicial acts was thus necessary so that judicial officers could make the sometimes-controversial decisions...*"[13]

The Court went further to state that:

> "*It would be repugnant to the cause of justice if judges would act in fear of legal actions being brought against them for decisions they made while discharging their mandate. The immunity granted by article 160(5) of the Constitution was not necessarily for the benefit of the judicial officer concerned. It was for the public and for litigants appearing before the courts*."[14]

By choosing to litigate before a judge, parties are taking a chance on the officer's integrity and competence.[15] It is possible for the judge to cause either party or both some damage but in our democratic system, that risk is well accepted, hence there is no need to deprive the judicial officer immunity from civil suits.[16] The policy

[13] Ibid para 1-3
[14] Supra footnote 11, para.4
[15] Elliot Bulmer, 'Judicial Tenure, Removal, Immunity and Accountability,' 2017 International Institute for
Democracy and Electoral Assistance (International IDEA) Second edition
[16] Michael Crowell, BASICS OF JUDICIAL IMMUNITY, UNC School of Government (March 2015), https://benchbook.sog.unc.edu/sites/default/files/pdf/Judicial%20Immunity%20Mar.%202015.pdf

position is that a party aggrieved by a judicial officer's decision has a right of appeal.[17] Furthermore, disciplinary action can be taken against the judge.[18]

In the United States (US) the Supreme Court in *Bradley v. Fisher*[19] made a much stronger case for judicial immunity by saying that judges and judicial officer enjoy absolute immunity. Before *Bradley v. Fisher,* the Supreme Court Stated in *Randall v. Brigham that* judicial immunity was "as old as the law, and its maintenance is essential to the impartial administration of justice."[20] In *Bradley v. Fisher*, the Court found that "this exemption of the judges from civil liability [cannot] be affected by the motives with which their judicial acts are performed."[21] Scott A. Keller in his article "Qualified and Absolute Immunity at Common Law" states that the aim of providing absolute immunity for judges was to prevent the institution of vexatious suits and preserve judicial independence.[22] That is, a suit for damages shall not be brought against a judge due to a decision made in the exercise of his or her judicial authority.[23] Allowing civil suit against judges may affect their impartiality.

Comparison of Arbitrator Immunity in the US, England, and Kenya

Treating arbitrators as 'functional equivalents' to judges in the United States (US) gives them form absolute immunity enjoyed by the latter.[24] In *Jones v. Brown* the

---

[17] Rhodes-Vivour San Adedoyin, IMMUNITY OF ARBITRATORS, https://drvlawplace.com/wp-content/uploads/2020/09/Immunity-of-Arbitrators-PDF-Version.pdf
[18] Supra Footnote 14, pp.2
[19] 80 U.S. (13 Wall.) 335, 347, 357 (1872).
[20] Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1869)
[21] Supra Footnote 6
[22] Keller A. Scott, *Qualified and Absolute Immunity at Common Law* Stanford Law Review Vol 73 (June 2021), https://review.law.stanford.edu/wp-content/uploads/sites/3/2021/06/Keller-73-Stan.-L.-Rev.-1337.pdf
[23] Supra Footnote 15
[24] Nolan R. Dennis and Roger I Abrahams, Arbitral Immunity, Industrial Relations Journal (1989) Vol. 11:228; https://repository.library.northeastern.edu/files/neu:333082/fulltext.pdf

Iowa Supreme Court ruled that an arbitrator cannot be sued by a party to arbitral proceedings before him for monetary damages emanating from corrupt or fraudulent conduct.[25] The arbitrator was immune from such proceedings even though he colluded with the opposing attorneys to entice fellow arbitrators to render an unjust award. Absolute immunity in the US means that even if the arbitrator acted in bad faith, did not disclose conflict of interest, and other malfeasance, no suit or liability will arise.[26] Section 14 (a, c) of the 2000 Revised Uniform Arbitration Act of the US codified arbitral immunity by giving it equal status with that of the judges.[27] It states the arbitrator enjoys immunity even though he did not disclose the existence of a conflict of interest.

The English law position is almost like that of the United States of America.[28] Arbitrators have broad immunity with an exemption of acts or omissions done in bad faith or arbitrator's resignation or removal from office.[29] The Act is based on the February 1996 Report of Departmental Advisory Committee ('DAC') on Arbitration Law which recommended that just like judges, arbitrators should have immunity to ensure they stay impartial in decision making and achieve finality resolution of disputes.[30] Section 29(3) of the 1996 Act states that the immunity under Section 29(1) "*does not affect any liability incurred by an arbitrator by reason of resigning.*"[31] Section 25 also allows the arbitrator to agree on the consequences of the arbitrator resigning from the tribunal and any liability the he or she may incur by reason of that resignation.

---

[25] Jones v. Brown (1880) 6 N.W. 140,54 Iowa 74
[26] Born, G., International Arbitration: Law and Practice (Second Edition), Kluwer Law International, 2016, pp. 144;
[27] Uniform Arbitration Act, 2000 Section 14
[28] Tamblyn, N, 'Arbitrator immunity and liability for court costs' (2022), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Open Research Exeter http://hdl.handle.net/10871/128408*
[29] Section 29, The English Arbitration Act of 1996.
[30] Supra, Footnote 28
[31] Section 29(3), The English Arbitration Act of 1996

Kenya's Arbitration Act Cap. 49 Laws of Kenya is a copy-cut of the English Arbitration Act of 1996. It gives the arbitrator qualified immunity from legal action for damages. Section 16B makes provision for Arbitrator immunity. It states:

> (1) "*An arbitrator shall not be liable for anything done or omitted to be done in good faith in the discharge or purported discharge of his functions as an arbitrator*."[32]
>
> (3) "*Nothing in this section affects any liability incurred by an arbitrator by reason of his resignation or withdrawal*."[33]

That is, where an arbitrator acts in bad faith or resigns or withdraws from office, without the consent of parties, liability will arise for any damage or injury suffered by both or either party. In the spirit of Section 16B (1), bad faith means "*(a) malice in the sense of personal spite or a desire to injure for improper reasons; or (b) knowledge of absence of power to make the decision in question*."[34] That extends to circumstances where the arbitrator accepts appointment while aware that he lacks the necessary qualification or is unable to carry out their duties promptly because of other engagements.[35]

Section 16B (3) as read with Section 16A relates to liability arising unreasonable resignation. The arbitrator who wishes to withdraw or resign can apply to the High Court for a grant of relief from liability that may arise on him/her unless he/she agrees otherwise with the parties.[36] The Court must satisfy itself that the

---

[32] Section 16B (1) Arbitration Act Cap. 49 Laws of Kenya
[33] Ibid, section 16B (3)
[34] Cevic A.," Civil Liability of Arbitrators", EU AND MEMBER STATES – LEGAL AND ECONOMIC ISSUES , 1st June 2019; Sutton D.; Gill J., Gearing, M., Russell on arbitration, Sweet C Maxwell, London, 2007, p. 175
[35] Ibid
[36] Section 16A Cap. 49 Laws of Kenya

arbitrator 's resignation is reasonable.[37] Reasonable resignation occurs where parties insist on adopting a procedure which the arbitrator considers to conflict with his/her overriding duty to pick a procedure that is suitable and fair to prevent undue delays or where the arbitration is unfairly burdensome to the arbitrator by taking excessively longer time than expected.[38] In both instances, the parties must in some way be responsible for the arbitrator's intention to resign.[39] The author suggests that other instances of reasonable resignation may include public commitment, unforeseeable relationship between the arbitrator or tribunal and a witness, bereavement, or illness. The requirement for consent of the parties to the withdrawal of the arbitrator hints to the contractual nature of arbitral relationship. The consensual nature of arbitration is often the primary reason for arguments against arbitral immunity.[40]

Argument Against Arbitrator's Immunity

One question that commentors and scholars of law continue to struggle with is whether arbitrators deserve equal treatment with judges.[41] As already stated above, both English and US Court hold that arbitrators in the functions as adjudicators perform the same functions as judges. Donaldson J's statement that "courts and arbitrators are in the same business, namely the administration of

[37] Levine J. Ethical Dimensions of Arbitrator Resignations. *AJIL Unbound*. 2019;113:290-295. doi:10.1017/aju.2019.40

[38] Tamblyn, N, 'Arbitrator immunity and liability for court costs' (2022), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Open Research Exeter http://hdl.handle.net/10871/128408*

[39] Ibid

[40] Peter B. Rutledge, Toward a Contractual Approach to Arbitral Immunity (2004): https://digitalcommons.law.uga.edu/fac_artchop/518

[41] Dyson, 'The Proper Limits of Arbitrators' Immunity' (2018) 84 Arbitration 196 https://www.arbitratorscompany.org/wp-content/uploads/masters_lecture_2018.pdf

justice"[42] and the decision of the Iowa Supreme Court in *Jones v. Brown* discussed early explain this position.

While it is true that arbitrators are like judges in many respects, differences exist. First, judges and other judicial officers derive their authority and power from their positions as State appointees holding public offices, hence the need to use that power in upholding the rule of law.[43] As a tenet of a democratic society, the rule of law requires that judges stay independent to enable them settle disputes justly, fairly, and impartial.[44] Judicial independence under Article 160(5) ensures confidence in the judiciary and prevents members of the public from taking the law into their own hands. It is not the litigants in a case, but the State that holds judicial officers to account.[45] Conversely, an arbitration agreement between parties and the arbitrator is the basis of an arbitrator's authority.[46] An arbitrator is either accountable to the parties or appointing institution not the state. Parties have no say on which judge to appear before but choose the arbitrator and still pay the arbitrator.[47] Such a striking difference speaks to the consensual and contractual nature of arbitration hence the need for differentiating judicial and arbitral immunity.

The finality of arbitral awards is another area of considerable difference. Awards by arbitrators in many jurisdictions are not appealable or appeals may lie in

---

[42] Mullerat, R., The liability of Arbitrators: a survey of current practice, International Bar Association Commission on Arbitration Chicago, 2006, pp. 9
[43] Supra Footnote 41
[44] Supra Footnote 41-pp. 3-4
[45] Ibid pp 4
[46] J. Brown, "Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, The,"2009 J. Disp.
Resol. (2009) p 230 Available at: http://scholarship.law.missouri.edu/jdr/vol2009/iss1/10
[47] Rhodes-Vivour San Adedoyin, IMMUNITY OF ARBITRATORS, https://drvlawplace.com/wp- content/uploads/2020/09/Immunity-of-Arbitrators-PDF-Version.pdf

limited circumstances. For instance, Section 32A of Cap 49 Laws of Kenya states that except where parties agree otherwise, the arbitral award is final and binding and no recourse against the award is available to parties except where limited circumstances under the Act are met. Conversely, judicial decision in Kenya, England, and the US are appealable.[48] In fact, Article 163, 164, and 165 of the Constitution of Kenya provides for appeals with the High Court being the first place of appeal from subordinate courts.[49] Carelessness or recklessness on the part of the arbitrator may cause the losing party unprecedented harm. As such, giving the arbitrator absolute immunity is less compelling than it is for judges.

From the above arguments, several factors emerge against arbitrator's immunity, particularly if immunity is absolute. First, it can encourage recklessness among arbitrators:[50] that is, impunity will emerge because parties cannot hold them accountable through legal action for unjustifiable loss suffered. Secondly, no disciplinary remedy exists against arbitrators; thirdly, while in *Kenya Shell Limited v Kobil Petroleum Limited*[51] the Court of Appeal found that the principle of finality of arbitral award is in line with public policy of bring an end top litigation, it may perpetuate unfairness and injustice blatant disregard of rules of natural justice and

[48] E. Onyeama. Onyeama, International Commercial Arbitration and the Arbitrator's Contract (New York,
Routledge , 2010) p 57; Ibid
[49] Article 163, 164, and 165 of the Constitution of Kenya 2010- provides for the Supreme Court, the Court of Appeal, and the High Court respectively. It refers to jurisdiction including appeals.
[50] Supra, Footnote 40, pp. 193-195
[51] *Kenya Shell Limited v Kobil Petroleum Limited* NRB CA Civil Appl. No. 57 of 2006 [2006] eKL

promote the idea of winner takes it all.[52] Lastly, vacation of arbitral awards and withholding fees are insufficient as remedies.[53]

What informs the different approaches?

The US approach of absolute immunity of arbitrators is based on the public policy of the need to the independence of persons performing quasi-judicial function.[54] This immunity is functionally comparable between arbitrators and judges.[55] Federal Law provides the basis for arbitrator immunity and while the US Courts may set aside arbitral awards, judges have quickly reaffirmed arbitrators' immunity even where arbitrators engaged in misconduct or made erroneous awards.[56] The reason is that the arbitrator is that the arbitrator is performing quasi-judicial functions.[57] As a result, public policy requires that such persons should have the freedom to perform their duties without worrying about the threat of legal action where their actions are challenged.[58]

The practice in the United States of America mirrors a jurisdictional approach. This approach considers an arbitrator as a private judge performing judicial functions.[59]

---

[52] Subra Footnote 2; **Junction Apartments Limited v C.M Construction (E.A) Ltd & another (Commercial Civil Case E030 of 2021) [2021] KEHC 429 (KLR) (Commercial and Tax) (17 December 2021) (Ruling)**

[53] Supra Footnote 40

[54] Supra Footnote 40

[55] Fulena V, Chittoo HB. The "Arbitral Immunity" Dilemma – What is the Balance?. ASSRJ [Internet]. 2023Mar.5 [cited 2025Feb.10];10(2):465-473. Available from: https://journals.scholarpublishing.org/index.php/ASSRJ/article/view/14129

[56] Roitman Sara, Beyond Reproach: Has the Doctrine of Arbitral Immunity been extended too Far for Arbitration Sponsoring Firms?" *Boston College Law Review*Vol. 51:557

[57] Mullerat, R., The liability of Arbitrators: a survey of current practice, International Bar Association Commission on Arbitration Chicago, 2006, pp. 11

[58] Ibid

[59] J. Brown, "Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, The,"2009 J. Disp.
Resol. (2009) p 230 Available at: http://scholarship.law.missouri.edu/jdr/vol2009/iss1/10

It suggests that the powers of the arbitrators, his/her appointment, and the award he/she renders are governed by a nation's law.[60] As a result, if the law considers an arbitrator a functional equal of a judge, he/she must enjoy equal immunity.[61]

The English and Kenyan approaches are a balance between the arbitrator's contractual relationship and the quasi-judicial function of the arbitrator.[62] The system is a hybrid because it looks to reconcile an arbitrator as a statutory creature but their power to arbitrate is derived from the arbitral agreement and appointing parties.[63] The author is in favour of this view because while the arbitrator may performs quasi-judicial function, they offer professional services and are bound by a contract. Appointing parties determine and set the limits of the arbitrator's jurisdiction.[64] While the arbitrator seats to judge, parties donate and prescribe his limits per the law.[65] In *K/S Norjari v Hyundai Heavy Industries Co Ltd* sitting as a judge in the English Court of Appeal, Sir Nicholas Browne-Wilkinson VC stated that:

> *"For myself, I find it impossible to divorce the contractual and status considerations: in truth the arbitrator's rights and duties flow from the conjunction of these two elements. The arbitration agreement is a bilateral contract*

---

[60] Martínez José Ramón Villarreal, The Civil Liability of Arbitrators: A Transition from Absolute to Qualified Immunity in the United States, (April 2024) https://journals.law.harvard.edu/ilj/2024/04/the-civil-liability-of-arbitrators-a-transition-from-absolute-to-qualified-immunity-in-the-united-states/#:~:text=In%20the%20U.S.%2C%20arbitrators%20are,in%20cases%20of%20bad%20faith

[61] Ibid.

[62] E. Onyeama. Onyeama, International Commercial Arbitration and the Arbitrator's Contract (New York,
Routledge , 2010) p 57

[63] Ibid

[64] Peter B. Rutledge, Market Solutions to Market Problems: Re-Examining Arbitral Immunity as a Solution to Unfairness in Securities Arbitration, 26 Pace L. Rev. 113 (2005): https://doi.org/10.58948/2331-3528.1151

[65] Ibid; Supra, Footnote 62

> *between the parties to the main contract. Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status"*[66]

By providing qualified immunity as opposed to absolute immunity, Kenyan and English laws take cognizance that while the arbitrator resolve disputes between the parties, there is a contract between the arbitrator and the parties to remain impartial, fair, and honest hence the requirement to act in good faith.

Conclusion

No uniform approach exists on the question of arbitrator immunity. It varies from jurisdiction to jurisdiction based on different understanding of the parties to arbitrator relationship.[67] The United States of America adopted absolute immunity while Kenya and England adopted qualified immunity.

Absolute immunity means that the arbitrator is equal to judges when performing their quasi-judicial functions.[68] Even where an arbitrator is negligent, reckless, or acts in bad faith, parties have no recourse.[69] Emphasis is laid on the need to ensure independence and freedom to make an award.[70] While independence is vital, this paper posits that absolute immunity encourages arbitrators to act negligently and without skill and care while this may result in unfair outcomes, contravention of rules of natural justice, and irreparable loss mostly for the losing party or both.

---

[66] *K/S Norjari v Hyundai Heavy Industries Co Ltd* [1992] QB 863, [1991] 3 WLR 1025, at [7]
[67] Supra Footnote 57
[68] Supra, Footnote 59
[69] Supra, Footnote 56
[70] Keller A. Scott, *Qualified and Absolute Immunity at Common Law* Stanford Law Review Vol 73 (June 2021), https://review.law.stanford.edu/wp-content/uploads/sites/3/2021/06/Keller-73-Stan.-L.-Rev.-1337.pdf

The element of finality if arbitral awards and limited scope of appeal makes absolute immunity unconducive for Kenya. Consequently, the qualified immunity under Cap 49 Laws of Kenya is sufficient.[71] Qualified immunity has several advantages over absolute immunity. These include: (a) ensures that arbitrators are held to a higher degree as professionals; (b) gives parties an assurance that arbitrator will apply reasonable skill and care; (c) it respects contractual obligations between parties and the arbitrator; and (d) boost confidence of parties in arbitration as a suitable dispute resolution mechanism.[72]

[71] Supra, Footnote 62
[72] Supra Footnote 62.

References

A. Statutes

The Constitution of Kenya 2010

The Arbitration Act Cap 49 Laws of Kenya

The English Arbitration Act of 1996

The Revised Uniform Arbitration Act of 2000 of the United States

The UN Basic Principles on the Independence of the Judiciary 1985

The 1982 International Bar Association (IBA) Minimum Standards of Judicial Independence

B. Case Law

Bellevue Development Company Ltd v Francis Gikonyo & 3 others [2020] eKLR

Bradley v. Fisher 80 U.S. (13 Wall.) 335, 347, 357 (1872)

Floyd v Barker, (1608) 12 Co. Rep. 23,24

Jones v. Brown (1880) 6 N.W. 140,54 Iowa

Junction Apartments Limited v C.M Construction (E.A) Ltd & another (Commercial Civil Case E030 of 2021) [2021] KEHC 429 (KLR) (Commercial and Tax) (17 December 2021) (Ruling)

K/S Norjari v Hyundai Heavy Industries Co Ltd [1992] QB 863, [1991] 3 WLR 1025

McC v Mullan [1984] 3 All ER 908. 916D

Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536 (1869)

Schiffban v. South India Shipping Corp. Ltd., 1981, AC 909-921

The Marshalsea, 77 Eng. Rep. 1027 (1612)

C. Books and Articles

Born, G., International Arbitration: Law and Practice (Second Edition), Kluwer Law International, 2016

Cevic A.," Civil Liability of Arbitrators", EU AND MEMBER STATES – LEGAL AND ECONOMIC ISSUES, 1st June 2019

Dyson, 'The Proper Limits of Arbitrators' Immunity' (2018) 84 Arbitration 196, https://www.arbitratorscompany.org/wp-content/uploads/masters_lecture_2018.pdf

Elliot Bulmer, 'Judicial Tenure, Removal, Immunity and Accountability,' 2017

International Institute for Democracy and Electoral Assistance (International IDEA) Second edition.
E. Onyeama., International Commercial Arbitration and the Arbitrator's Contract (New

York, Routledge , 2010)

J. Brown, "Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion, The,"2009 J. Disp. Resol. (2009) p 230 Available at: http://scholarship.law.missouri.edu/jdr/vol2009/iss1/10

Keller A. Scott, *Qualified and Absolute Immunity at Common Law* Stanford Law Review Vol 73 (June 2021), https://review.law.stanford.edu/wp-content/uploads/sites/3/2021/06/Keller-73-Stan.-L.-Rev.-1337.pdf

Lee Krystal 'The arbitration vaccine: immunity of arbitrators' (January 2021), http://arbitrationblog.practicallaw.com/the-arbitration-vaccine-immunity-of-arbitrators/

Mullerat, R., The liability of Arbitrators: a survey of current practice, International Bar Association Commission on Arbitration Chicago, 2006

Nolan R. Dennis and Roger I Abrahams, Arbitral Immunity, Industrial Relations Journal (1989) Vol. 11:228; *https://repository.library.northeastern.edu/files/neu:333082/fulltext.pdf*

Rhodes-Vivour San Adedoyin, IMMUNITY OF ARBITRATORS, https://drvlawplace.com/wp-content/uploads/2020/09/Immunity-of-Arbitrators-PDF-Version.pdf

Sutton D.; Gill J., Gearing, M., Russell on arbitration, Sweet & Maxwell, London, 2007

Tamblyn, N, 'Arbitrator immunity and liability for court costs' (2022), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Open Research Exeter http://hdl.handle.net/10871/128408*

Arbitrator Integrity: *Kenya Ports Authority v Base Titanium Limited [2021] eKLR*

By: Paul Ngotho HSC, LL.M, Chartered Arbitrator

Abstract

The arbitral tribunal dismissed a challenge under s. 14 of the Act leading to *Kenya Ports Authority v Base Titanium Limited [2021] eKLR*[1] ("**the Subject Case**") in which the court removed the arbitrator for lack of independence.

The case demonstrates the consequences when an arbitrator's unreasonable terms of engagement ("**the TOE**") are accepted by one party, rejected by the other and oscillate to the extent that they become a dispute in which he or she is pitted against one party while the other supports the tribunal's cause. The Court found that this arbitrator had become conflicted and therefore, lacked independence.

Background

The decision in the Subject Case does not give the background of the underlying commercial dispute between the parties but the details are available in *Kenya Ports Authority v Base Titanium Ltd [2023] KECA 449 (KLR)*, which was an appeal of *Mombasa HCCC 92 of 2016* regarding a temporary injunction pending arbitration. Suffice to say that Kenya Ports Authority ("**the Applicant**") and Base Titanium Ltd ("**the Respondent**") had a contractual relationship, which was subject to the Kenya Ports Authority Act[2]. That act then[3] at s. 62.(1) provided for referral of certain types of compensation claims to a sole arbitrator with the Chief Justice of Kenya as the default appointing authority ("**the DAA**"). A dispute arose.

The DAA, further to the Respondent's request in letter dated 23rd August 2016, appointed the Honourable Justice (Rtd) Joseph Nyamu ("**the Arbitrator**" or "**Mr**

[1] High Court Mombasa, Misc. Application No. 82.
[2] Cap 391
[3] The section was subsequently amended by giving that role to the Nairobi Centre for International Arbitration.

Nyamu") the sole arbitrator around February 2017, when Hon Justice David Maraga was the Chief Justice. The Applicant's numerous written protests to the DAA regarding the choice were fruitless.

The TOE, as initially presented by the Arbitrator in writing and signed by the Respondent, had 2 components. First, Ksh. 30,000/= per hour or part thereof being considered half a day of 4 hours and a sitting lasting 4 hours or more constitute a full day of 8 hours. Second, a facility fees of Ksh. 100,000/= per month "to include administrative, secretarial and electronic document management services over and above out of pocket expenses."

Regarding the monthly charge of Ksh. 100,000/=, the Arbitrator explains in his letter of 18th December 2018 that "(T)he intention was that this would be the facility charges per party". That means that he intended to charge both parties a total of Ksh. 200,000/= per month.

The Applicant refused to sign the TOE because as "*a state corporation subject to regulatory frame works, it would be difficult to justify and detained the facility fees of Kshs. 100,000 per month for being excessive*." The Arbitrator, in his words, "upon reflection", reduced the sum to Kshs. 50,000 per month.

The Arbitrator published his award on jurisdiction on 25th June 2018 and subsequently issued a cost award in favour of the Respondent with respect to the jurisdictional challenge. The Applicant challenged the Arbitrator under s. 14 of the Act. It complained that the Arbitrator had failed to address the matters arising from the TOE, unilaterally allowed the Respondent to pay the Applicant's share of the contested fees and claim that from the Applicant, doubled his hourly fee unilaterally and withheld his decision pending payment of fees. The cost award was Ksh. 3,200,000/= or about USD[4] 24,600. The Arbitrator dismissed the challenge in a decision dated 13th December 2020, leading to the Subject Case.

[4] Converted at the rate of Ksh. 130 = USD 1 which was applicable on 19th February 2025 when this case note was written.

The Tribunal withheld its award pursuant to s. 32.B (3) of the Act. It had billed the parties for about 60 hours "at Ksh. 60,000/= per hour and for a facility charge of 100,000/= per month for 30 months, making a whooping sum of Ksh. 3,000,000/= as "facility charge".

The Arbitrator's demand was inconsistent with his earlier position. First, the Arbitrator had already agreed to charge Ksh. 30,000/= per hour for his time but he had billed at the rate of Ksh. 30,000/= per hour per party. Thus, he had effectively doubled his rate to 60,000/= per hour with a stroke of a pen. Secondly, he had reneged on his written agreement to reduce the facility charge from 100,000/= to 50,000/= per month. He had billed the parties at 100,000/= for 30 months.

The Court Decision & Analysis

According to Para 46 of the Court Ruling:

> "The dispute here, even though the respondent says to concentrate around and concern the 1st and 2nd award (sic), is purely the grief the applicant maintains over the manner the arbitration (sic) has calculated his fees and expenses and the manner of ascertainment and quantification of the respondent's fees." (Emphases added.)

The Court was called upon to determine if the Arbitrator had conducted himself in a manner that one or both parties had lost confidence in him. It removed him as arbitrator in Hon Justice Patrick J O Otieno's ruling dated 26th February 2021 ("**the Court Ruling**").

The Court's reasoning, which led to the removal of the Arbitrator is in Para 64 to 67 of the Court Ruling. The Court found that the Arbitrator lost independence and impartiality from the point when his request for fees was accepted by one party and rejected by the other one. It expressed even greater concern regarding the proportionality and conscionability of the non-consensual monthly charge of Ksh. 100,000/= whether the facility was utilised or not and noted that the Applicant,

being a public entity, was obligated to be prudent. It was quick to add that financial prudence extended to private corporate firms as well as individuals.
Beyond the dispute about the Arbitrator's rates themselves, something more disturbing emerges. Mr Nyamu misinterprets or displays a fundamental misunderstanding of the legal nature of the relationship between an arbitrator and the parties. He opines that "the agreement between the arbitrator and each party is bilateral and not tripartite hence the figure of Ksh. 30,000/= in each agreement." That is his explanation for charging Ksh. 30,000/= per hour and a monthly charge of 100,000/= per month to each party. The hourly rate, whatever the figure, should be shared by the parties on 50:50 basis. Mr Nyamu simply doubled the hourly rate instead of dividing it by two. In that letter, he says that "In my own discretion and as a sign of good faith I have reduced the administrative and facility costs from Ksh. 100,000/= a party to Ksh. 50,000/= and applied it retrospectively". The discount was not appreciated by the Applicant as the objection was on the principle of a facility charge itself and not on the figure.

The Court is emphatic, at Para 67, that it "would never venture in questioning any sum, however high, if there had been an agreement by the parties". That the relationship between an arbitrator and the parties is tripartite is trite law. The Bombay High Court recently held that "arbitrators cannot unilaterally decide their fee and have to follow the tripartite agreement with the parties"[5].

The Court set aside the Arbitrator's cost award to the Respondent because of the reasons given at Para 69 of the Court Ruling. It found that the Arbitrator's estimation that the Respondent's counsel had spent 75 hours and that the applicable rate was Ksh. 40,000/= per hour to be without foundation and added that:

> "it begs the question <u>if the figure was not picked from the air</u>… I find and hold that <u>any determination that imposes on parties' obligations and rights</u>

[5] https://www.bwlegalworld.com/article/arbitrator-must-follow-tripartite-agreement-schedule-iv-to-decide-fee-bombay-hc-509333

> ought to have a foundation or justification. A decision must have a basis and a sound one for that matter…. the costs appear to me to be exorbitant and excessive." (Emphases added.)

At Para 70, the Court adds that the Arbitrator was already conflicted and impartial, by the decision on his own fees, at the time he awarded costs to the Respondent. The Court also awarded costs of the suit to the Applicant.

The Respondent had argued that "mere misconduct" was not sufficient for the Arbitrator's removal unless the misconduct raised justifiable doubt as to his impartiality and independence and that the hourly rate and monthly facility charge were not proof of bias. *Chania Gardens Ltd v. Gilbi Construction Co Ltd [2015] eKLR* was cited to support the proposition that perception of bias without proof does not amount to misconduct for the purpose of removal.

The attitude of the Court to the twin requirements in s. 13 of the Act comes through at Paras 42 - 44, read together, of the Ruling, where it states that:

> "42. For that position, the legislature in the model law, at Section 13 set the grounds upon which parties may challenge the suitability of an arbitrator once appointed. In that provision, impartiality and independence are underscored as irreducible qualities and attributes of the person to be appointed an arbitrator in a dispute….
> 43. … To my mind the stipulation in the statute have one incontestable purpose, reinforce and bolster independence and impartiality and therefore confidence in arbitration … That intention tells me that all must be done by all concerned to ensure that the mechanism is not only entrenched and encouraged but is equally guarded against abuse by all concerned including the parties and the arbitral tribunal itself.
> 44. For that reason, … the court of law must at all times retain the control to supervise the process, if not for anything but to ensure that the notions and the minimum requirements of justice are maintained and not vilified…" (Emphases added.)

The Court applied the Mischief Rule, which considers the legislative intent, instead of restricting itself strictly to the narrow definitions of "independence and impartiality" generally or bias against one party. It viewed independence and impartiality as the irreducible minimums and not exhaustive. This enabled the Court deal with a party's merited loss of confidence in the Arbitrator.

The Court followed the Supreme Court in *Nyutu Agrovet limited vs Airtel Networks Kenya Limited (2019) eKLR,* which affirmed the need for courts intervention in arbitral proceedings and quoted the critical paragraph as follows:

> "Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice." (Emphases added.)

Given the criticism that national courts tend to favour home governments against foreign investors, it is worth considering how the Court Ruling compares to jurisprudence from elsewhere, especially in the Commonwealth. In *Sea Containers Ltd v. ICT Limited*, a New South Wales Court of Appeal upheld the High Court ruling removing three arbitrators. One arbitrator was, by coincidence, a retired judge who was also a QC. The other arbitrator was a lawyer. The two were removed for misconduct because of demanding cancellation fees, which were not contemplated in the terms of reference. The third arbitrator was removed anyway because of his complacency - "he did not demur". In this case, as in the Subject Case, one party had agreed to the tribunal's belated variation to the terms of engagement.

The Common Court of Justice and Arbitration (CCJA), a multinational court of the Organization for the Harmonization in Africa of Business Law (OHADA), annulled[6] a Euro 38 million arbitral award in an investor-state dispute on the ground that the arbitrators had improperly entered into a separate fee agreement

[6] https://uk.practicallaw.thomsonreuters.com/w-002-6020?transitionType=Default&contextData=(sc.Default)&firstPage=true

directly with the parties. It carries out administered arbitrations, sets arbitrator's fees and is mandated to annul arbitral awards. CCJA considered any separate arrangement between the parties and the arbitrators concerning their fees to be null and void.

However, in a Ugandan case *Total (Uganda) Ltd v. Buramba General Agencies High Court of Uganda at Kampala No. 3/98*[7], Justice James Ogoola enforced the final award even though Mr Kafuko-Ntuyo, one member of the 3-member arbitral tribunal, who was a lawyer, had behaved himself in a most weird manner. That arbitrator had been appointed by the Law Society of Uganda, pursuant to the arbitration agreement, as Total had defaulted in making an appointment. On receiving the statement of claim, he quickly filed a pleading on behalf of Total but withdrew it later during the tribunal's private deliberations. The Court considered that:

> "Mr Kafuko-Ntuyo could not be accused of acting with partiality. His relationship to Total was not formal and continuous business relationship. He was merely a one-time lawyer for Total who, on the occasion of filing Total's initial arbitration claim, did so only on his own impulse without any verbal or documentary instructions from Total, and without being renumerated; who promptly, at the earliest possible opportunity, made full disclosure of the facts to his peers on the arbitral panel; and who promptly and appropriately withdrew the filed papers …"(Emphases added.)

In that case, Justice James Ogoola added that:

> "while the arbitrator's conduct could perhaps be stated to have been mistaken and naïve, it certainly did not exhibit any dishonesty, bad faith, ill motive, fraud, collusion or corruption – to bring it anywhere near the ambit of the traditional areas of misconduct…" (Emphases added.)

---

7 https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=http://old2.ulii.org/ug/judgment/high-court-uganda/1998/8&ved=2ahUKEwj8pOH-8c6LAxWZTaQEHbytIUoQFnoECBMQAQ&usg=AOvVaw2or7chL3L6nusUIdiqQtm5

The court sympathised, unduly in the reviewer's view, with the arbitrator. Whatever the case, naivety, innocence and mistake were not pleaded or considered and would probably not have been applied to the Honourable Justice Nyamu, given his impeccable credentials as FCIArb and Chartered Arbitrator as well as former judge of Kenya Court of Appeal, Presiding Judge of Constitutional and Judicial Review Division of High Court of Kenya, Chairman of Chartered Institute of Arbitrators Kenya Branch and Senior Partner of one of the most respected law firms in East Africa. Evidently, the Court in the Subject Case restricted itself to the matter before it without regards to the Arbitrator's otherwise impressive profile elsewhere. Incidentally, the reviewer has observed that the knee-jerk reaction of arbitrators under challenge is to quote their unchallenged awards and accolades, which are quite irrelevant to whoever is considering the challenge, except, perhaps as mitigating factors.

The Court described Hon. Justice (Retired) Nyamu as "conflicted", "disproportionate", "unconscionable", "exorbitant", "excessive" and gave its reasons. It just fell short of accusing the Arbitrator of unjust enrichment, the judiciously correct term for financial greed. Furthermore, it did not get out of its way to make a personalised attach as Justice E. K. O. Ogola did with respect to a different arbitrator in Paras 154, 155 and 184 in *Mistry Jadva Parbat & Company Limited v Grain Bulk Handlers Limited [2016] eKLR*.

The Arbitrator is, of course, wholly responsible for his conduct. However, the Respondent is also culpable for having accepted the Arbitrator's skewed TOE and aligned itself with the Arbitrator's obviously indefensible position both in the arbitration and in Court. The Respondent's reward for its labours is that the merits of its dispute with the Applicant remained unresolved for years and had to pay its own and the Applicant's costs in the Subject Case.

Legacy

Parties whose interim or final award are held by an arbitrator under s. 32B (3) of the Act pending the payment of the arbitrator's demand for deposit or fee, if the sum is unreasonable, are faced with strategic and financial dilemmas. The

statutory requirement of a party to deposit in court the disputed sum as a precondition for challenging the arbitrator's fee involves financial commitment and satellite litigation. It deters parties from pursuing the remedy under s. 32B (4) of the Act.

The Respondent asked the Court to dismiss the applicant because the Applicant had not made the payment. However, s. 34B (4) was not applicable because the Arbitrator had, by the time the application was filed, been paid his fees and released the award.

Para 50 of the Court Ruling states as follows:

> "…the tribunal did prepare an award which was then justifiably withheld pursuant to Section 32B (3) pending payment of fees and expenses." (Emphases added.)

That means that the Court took it as given that an arbitrator could lawfully withhold its decision or award on jurisdiction under s. 34B (3) of the Act. This is in sharp contrast with *Kenya Medical Women's Association v Registered Trustees Gertrude's Gardens; Paul Ngotho, Arbitrator (Interested Party) [2021] KEHC 4454 (KLR)* where the arbitrator[8], had similarly, withheld its recusal decision pending payment of its fees. The way he had calculated his fees had not been questioned. However, the court expressed displeasure that the arbitrator had "even withheld a ruling on the basis that his fees had not been settled", without citing a section of the Act or any authority.

The concept of impartiality and independence is traditionally considered in the context of an arbitrator with respect to one or both parties. However, at Para 64, the Court says:

> "64. ... the measure thereof is to me an outright lack of independence from one-self... the tribunal was unfortunately placed in a situation that is difficult to divorce from that of a conflicted arbitrator. That is a sure recipe that does very little to build and sustain confidence in his work as the

[8] Yours truly.

> arbitrator in the matter and the arbitration in general as a mode of dispute resolution. On that finding alone, I would find that by the time the request for fees was made, revised, signed by the respondent but resisted by the respondent, circumstances had arisen to merit questioning the tribunals impartiality and independence going forward." (Emphases added.)

The Court extended the notion of a tribunal's independence from the traditional confines to independence from itself. A tribunal should be judicious, not guided by its self-interest, whenever considering its fees and matters like challenge for bias or jurisdiction.

Epilogue

The Arbitrator's letter of 18th December 2018 says that Ksh. 60,000/= per hour is "the going rate for an arbitrator of my standing." In a bid to persuade the parties that his charges were reasonable, Mr Nyamu informed them in a letter dated 7th January 2019 that "I took into account that the scale fees of the Chartered Institute of Arbitrators Kenya Branch, as at the time was Ksh. 35,000/=". That statement is incorrect. The CIArb Kenya Fee Guidelines & Recommendations effective 1st August 2024 shows that the figure for a Chartered Arbitrator with over 10 years of experience is Ksh. 30,000/= per hour. In February 2017, when Mr Nyamu was appointed, the applicable fee guideline dated 17th April 2013 was applicable. Ksh. 20-25,000/= per hour was the rate for such an arbitrator in 2017. This information was apparently not presented to the Court. Therefore, the Court did not delve into whether Mr Nyamu, a former chairman of the Chartered Institute of Arbitrators Kenya Branch, mis-read, mis-quoted or mis-applied the CIArb K fee guideline for his own benefit.

Considering the Court's comments and findings about the Arbitrator, the question of whether the Chief Justice used well or abused his statutory powers in appointing Justice (Rtd) Nyamu to arbitrate the dispute inevitably arises. The issue is more pertinent in view of the facts that the circumstances under which Mr Nyamu "retired" as a judge and that those circumstances were in public domain courtesy of daily newspapers and several reported cases www.kenyalaw.org.

Thanks to the Kenya Ports Authority for this unfortunate but excellent contribution to the development of Kenyan jurisprudence on arbitrator misconduct and recognition of the need for arbitrators to be independent of self-interest. Also for standing up against bullying!

Integrating Alternative Dispute Resolution in Tribunals' Case Management: Best Practices

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

Abstract

This paper critically discusses best practices towards integrating ADR in tribunals' case management in Kenya. The paper argues that tribunals play a pivotal role in promoting access to justice in Kenya including through reducing pressure on courts. The paper further posits that by embracing ADR, tribunals can enhance their role in delivering justice to Kenyans. It examines the progress made by tribunals in Kenya towards fostering ADR and challenges thereof. The paper further suggests best practices towards integrating ADR in tribunals' case management for enhanced access to justice in Kenya.

1.0 Introduction

Alternative Dispute Resolution (ADR) has been described as an umbrella term for processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them[1]. However, in some ADR processes such as negotiation, parties meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party[2]. According to the United Nations, ADR (sometimes also referred to as "Appropriate Dispute Resolution") is a general term, used to define

* *PhD in Law (Nrb), FCIArb (Chartered Arbitrator), OGW, LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. in Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; ESG Consultant; Advocate of the High Court of Kenya; Professor of Environmental Law and Conflict Management at the University of Nairobi, Faculty of Law; Member of the Permanent Court of Arbitration (PCA) [November, 2024].*

[1] Nairobi Centre for International Arbitration., 'A Manual for Developing a Dispute Management Plan for Government Ministries, Departments & Agencies (MDA)' Available at https://ncia.or.ke/wp-content/uploads/2024/01/NCIA-Dispute-Management-Plan.pdf (Accessed on 12/11/2024)

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

a set of approaches and techniques aimed at resolving disputes in a non-confrontational manner[3]. The United Nations notes that ADR covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution[4]. In addition, it points out that somewhere along the axis of ADR approaches, between these two extremes, lies mediation, a process by which a third party aids the disputants to reach a mutually agreed solution[5].

The term ADR therefore covers a set of mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes[6]. These processes include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others[7]. These techniques are being widely embraced in managing disputes at both the global and national levels. It has been noted that the growth of ADR as an ideal avenue for accessing justice has been spurred to a large extent by a rising dissatisfaction with litigation which is often expensive, time-consuming, and presents uncertainties over the outcomes[8]. ADR mechanisms are characterized by certain attributes which include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost- effective management of

---

[3] United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Available at https://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_background_paper.pdf (Accessed on 12/11/2024)

[4] Ibid

[5] Ibid

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

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

[8] World Intellectual Property Organization., 'WIPO Guide on Alternative Dispute Resolution (ADR) Options for Intellectual Property Offices and Courts' Available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_guide_adr.pdf (Accessed on 12/11/2024)

disputes[9]. These features make ADR processes viable in enhancing access to justice while also addressing the challenges that bedevil formal court processes.

ADR techniques have been recognized at the global level under the *Charter of the United Nations*[10]. The Charter provides that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration,* judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice[11] (Emphasis added). Due to this recognition, ADR processes are being widely utilized to manage disputes at the international level. ADR techniques such as international commercial arbitration and international commercial mediation have emerged as the preferable mode of managing commercial disputes involving parties from different nationalities[12]. The United Nations also often employs ADR techniques including diplomacy and mediation in managing conflicts and fostering international peace and security[13].

Progress has also been made towards embracing ADR in Kenya with courts and tribunals increasingly embracing ADR processes in delivering justice to Kenyans[14].

---

[9] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[10] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI
[11] Ibid, article 33 (1)
[12] World Bank Group., 'Arbitrating and Mediating Disputes : Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment (English)' Available at https://documents.worldbank.org/en/publication/documents-reports/documentdetail/554271468340163221/arbitrating-and-mediating-disputes-benchmarking-arbitration-and-mediation-regimes-for-commercial-disputes-related-to-foreign-direct-investment (Accessed on 12/11/2024)
[13] United Nations., 'Maintain International Peace and Security' Available at https://www.un.org/en/our-work/maintain-international-peace-and-security#:~:text=The%20United%20Nations%20plays%20an,political%20missions%20in%20the%20field. (Accessed on 12/11/2024)
[14] Muigua. K., 'Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management' Available at https://kmco.co.ke/wp-content/uploads/2019/05/Presentation-Tribunals-within-the-Justice-System-in-Kenya-Integrating-Alternative-Dispute-Resolution-in-Conflict-Management-Kariuki-Muigua-23rd-May-2019.pdf (Accessed on 12/11/2024)

The *Constitution of Kenya*[15] mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and Traditional Dispute Resolution mechanisms (TDRMs)[16]. Consequently, the Judiciary has developed the *Alternative Justice Systems Framework Policy*[17]. The Policy seeks to ensure affective and efficient access to justice in Kenya though respecting, protecting and transformation of Alternative Justice Systems (AJS) mechanisms in Kenya[18]. It also seeks to mainstream AJS in Kenya through the formal recognition of AJS; identification of the kinds of cases that can be handled through AJS; strengthening the process for selection, election, appointment and removal of AJS practitioners; and development of procedures and customary law jurisprudence for AJS among other interventions[19]. The *National Alternative Dispute Resolution Policy*[20] of Kenya also seeks to enhance the practice of ADR in Kenya including through providing definitions for key ADR terms, and outlining the scope of ADR; strengthening the legal and institutional frameworks supporting the ADR sector; and increasing harmony and efficiency in the sector by enhancing coordination, collaboration and linkage within the sector, and between ADR actors and the formal justice system[21]. The landscape of ADR in Kenya is therefore growing. Integrating ADR in the justice system in Kenya can enhance access to justice for all Kenyans.

This paper critically discusses best practices towards integrating ADR in tribunals' case management in Kenya. The paper argues that tribunals play a pivotal role in promoting access to justice in Kenya including through reducing pressure on courts. The paper further posits that by embracing ADR, tribunals can enhance

---

[15] Constitution of Kenya., 2010., Government Printer, Nairobi
[16] Ibid, article 159 (2) (c)
[17] The Judiciary of Kenya., 'Alternative Justice Systems Framework Policy.' Available at https://www.unodc.org/documents/easternafrica/Criminal%20Justice/AJS_Policy_Framework_2020_ Kenya.pdf (Accessed on 24/07/2024)
[18] Ibid
[19] Ibid
[20] Republic of Kenya., Office of the Attorney-General and Department of *Justice 'Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy'*
[21] Ibid

their role in delivering justice to Kenyans. It examines the progress made by tribunals in Kenya towards fostering ADR and challenges thereof. The paper further suggests best practices towards integrating ADR in tribunals' case management for enhanced access to justice in Kenya.

2.0 Tribunals and Alternative Dispute Resolution in Kenya: Progress and Challenges

Tribunals are a key component of the justice system in Kenya. The Constitution provides that judicial authority in the Republic of Kenya shall be exercised by courts and tribunals established by or under the Constitution[22]. It classifies tribunals as part of subordinate courts in Kenya alongside Magistrates courts, Kadhis' courts, and Courts Martial[23]. The Constitution of Kenya therefore recognises tribunals as important players in the administration of justice and places them under the Judiciary.

It has been noted that out of the over 50 tribunals in Kenya, more than 20 have been transited to the Judiciary in compliance with the Constitution[24]. Tribunals include the National Environment Tribunal, Rent Restriction Tribunal, Business Premises Rent Tribunal, Political Parties Disputes Tribunal, Sports Disputes Tribunal, Tax Appeals Tribunal, Energy Tribunal, Standards Tribunal, Educations Appeals Tribunal and Competition Tribunal among others[25]. The purpose of transitioning tribunals is to ensure they are delinked from the executive and integrated in the court system in line with the doctrine of separation of powers[26]. Some tribunals in Kenya are coordinated through the office of Registrar Tribunals established by the Judicial Service Commission as provided by the Constitution[27].

---

[22] Constitution of Kenya., 2010, article 159 (1)
[23] Ibid, 169 (1)(d)
[24] The National Council for Law Reporting., 'Know Your Tribunals' Available at https://kenyalaw.org/kl/index.php?id=9050 (Accessed on 13/11/2024)
[25] Ibid
[26] Muigua. K., 'Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management' Op Cit
[27] The National Council for Law Reporting., 'Know Your Tribunals' Op Cit

Tribunals in Kenya play a key role in enhancing access to justice. According to the Judiciary, tribunals are specialised bodies clothed with judicial power to determine disputes between litigating parties on various specialised sectors as provided in their establishing statutes[28]. Tribunals in Kenya exercise judicial and quasi-judicial functions[29]. They provide an expeditious and affordable forum for resolution of disputes in specialised areas such as tax, civil aviation, environment, energy, and copyright among others[30]. The *State of the Judiciary and the Administration of Justice Annual Report 2022/2023* notes that during the period under review, all the tribunals processed a significant caseload, with 8,190 new cases being filed and 9,373 cases successfully resolved[31]. The Report further indicates that there has been a consistent upward trend observed in both filed and resolved cases by tribunals in Kenya[32]. According to the Report, this trend signifies a growing reliance on the tribunals to handle legal disputes, and it is a testament to their effectiveness in managing and adjudicating cases in Kenya[33].

There has been progress towards embracing ADR in tribunals in Kenya. For instance, the *Political Parties Disputes Tribunal (Procedure) Regulations*[34] mandate the Political Parties Dispute Tribunal to utilise ADR mechanisms including reconciliation, mediation, and arbitration in managing disputes involving political parties[35]. Further, the *Sports Act*[36] empowers the Sports Disputes Tribunal in determining disputes to apply ADR methods for sports disputes and provide expertise and assistance regarding ADR to the parties to a dispute[37]. In addition,

---

[28] The Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice: Annual Report 2022/2023' Available at https://judiciary.go.ke/wp-content/uploads/2023/11/SOJAR-2022-2023-1.pdf (Accessed on 13/11/2024)
[29] Ibid
[30] Ibid
[31] Ibid
[32] Ibid
[33] Ibid
[34] Political Parties Disputes Tribunal (Procedure) Regulations, 2017
[35] Ibid, regulation 4 (2) (c)
[36] The Sports Act, Cap 223, Government Printer, Nairobi
[37] Ibid, s 59

the *Legal Education Appeals (Practice and Procedure) Rules*[38] require the Legal Education Appeals Tribunal to consider the possibility of ADR among parties to a dispute after close of pleadings[39]. ADR is therefore being embraced in enhancing access to justice through tribunals in Kenya. However, it has been argued that tribunals also require case management lest they find themselves under the case backlog challenge that is currently facing courts in Kenya[40]. The challenge of backlog is already crawling into tribunals in Kenya. For instance, the *State of the Judiciary and the Administration of Justice Annual Report 2022/2023* notes that there are nearly 22,557 cases pending before tribunals with 16,576 of the pending cases being over one year old, signifying a persistent issue of prolonged litigation within tribunals[41]. In light of this challenge, it is imperative for tribunals in Kenya to upscale the use of ADR for efficient, expeditious, and cost-effective access to justice. Integrating ADR in tribunals' case management is therefore necessary in enhancing access to justice in Kenya.

3.0 Integrating Alternative Dispute Resolution in Tribunals' Case Management

It is necessary to enhance the uptake of ADR mechanisms by tribunals in Kenya in order to enhance access to justice. The Constitution of Kenya mandates tribunals to promote ADR processes including reconciliation, mediation, arbitration and TDRMs[42]. Tribunals should therefore strive to foster processes in applicable cases.

Case management is a judicial process that fosters effective, efficient and purposeful judicial management of a case toward timely and qualitative disposal of disputes[43]. Case management involves early identification of disputed issues of

[38] Legal Education Appeals (Practice and Procedure) Rules, 2021
[39] Ibid, rule 15 (1)
[40] Muigua. K., 'Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management' Op Cit
[41] The Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice: Annual Report 2022/2023' Op Cit
[42] Constitution of Kenya 2010., article 159 (2) (c)
[43] Bhatt. N., 'Case Management- A Modern Concept' Available at https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2023/01/2023010673.pdf (Accessed on 14/11/2024)

fact and law, establishment of procedural timelines for a case, and exploring the possibility of resolution of disputes out of court[44]. It has been noted that case management allows courts and litigants to make the best use of the available judicial and administrative resources including the court's time[45]. Effective case management is therefore key for expeditious and judicious determination of cases[46].

Integrating ADR in tribunals' case management is pivotal in fostering timely and effective disposal of disputes. This involves identification of cases that can be managed through ADR processes after close of pleadings before tribunals[47]. It has been noted that ADR is applicable to wide range of disputes in Kenya some of which fall within the jurisdiction of tribunals including commercial disputes, energy disputes, tax disputes, environment disputes, and sports disputes[48]. In such cases, tribunals should consider referring these disputes to ADR including proving for ADR as a forum of first instance for appropriate cases[49]. Tribunals should also provide expertise and assistance regarding ADR to the parties to a dispute[50]. This includes appointing ADR practitioners including mediators and arbitrators in appropriate cases.

Effective case management can also be achieved through establishing a clear system of referral of cases between tribunals and the ADR sector[51]. Tribunals should put in place effective tools and communication strategies streamline the

---

[44] Ibid
[45] The Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice: Annual Report 2022/2023' Op Cit
[46] Ibid
[47] Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy' Op Cit
[48] Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit
[49] Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy' Op Cit
[50] The Sports Act, s 59
[51] The Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice: Annual Report 2022/2023' Op Cit

process of referral and avoid unnecessary delays, track cases that have been referred to ADR, and gather essential data and feedback in relation to the outcome of disputes referred to ADR[52]. This will enhance transparency and efficiency in relation to use of ADR within tribunals.

It is also imperative to strengthen the legal and policy framework on the application of ADR in Kenya. Some tribunals including the Political Parties Dispute Tribunal, and the Sports Disputes Tribunal have made progress towards embracing ADR through their rules and regulations[53]. It may be necessary to consider revising the rules and regulations of key tribunals in Kenya to provide for the application of ADR in managing disputes. Implementing the ADR Policy in Kenya can also enhance the application of ADR in the country including through tribunals[54]. The Policy sets out key interventions towards strengthening systems of referrals between courts, tribunals and ADR, promoting ADR as a forum of first instance in appropriate cases, establishment of systems to facilitate appropriate cooperation between the courts, tribunals and ADR, and development and adoption of ADR user guidelines for all stakeholders[55]. Implementing the ADR Policy is therefore necessary in enhancing the uptake of ADR in all sectors including tribunals. It is also necessary to foster public awareness on ADR mechanisms in order to encourage the people of Kenya to embrace ADR towards actualizing the right of access to justice.

4.0 Conclusion

Tribunals are key players in the administration of justice in Kenya. They provide an expeditious and affordable forum for resolution of disputes in specialised areas including environment, tax, sports, energy, copyright, and civil aviation[56]. Despite

---

[52] Ibid

[53] Political Parties Disputes Tribunal (Procedure) Regulations, 2017; The Sports Act, s 59

[54] Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy' Op Cit

[55] Ibid

[56] The Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice: Annual Report 2022/2023' Op Cit

their key role in enhancing access to justice in Kenya, the challenge of backlog is already crawling into tribunals. Consequently, it is necessary for tribunals to upscale the use of ADR for efficient, expeditious, and cost-effective access to justice[57]. While carrying out their administrative or quasi-judicial functions, tribunals should strive to encourage parties to make more use of ADR mechanisms[58]. Tribunals should also effectively integrate ADR in their case management practices for timely and judicious disposal of disputes.

[57] Muigua. K., 'Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management' Op Cit
[58] Ibid

References

Bhatt. N., 'Case Management- A Modern Concept' Available at https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2023/01/2023010673.pdf

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

Legal Education Appeals (Practice and Procedure) Rules, 2021

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

Muigua. K., 'Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management' Available at https://kmco.co.ke/wp-content/uploads/2019/05/Presentation-Tribunals-within-the-Justice-System-in-Kenya-Integrating-Alternative-Dispute-Resolution-in-Conflict-Management-Kariuki-Muigua-23rd-May-2019.pdf

Nairobi Centre for International Arbitration., 'A Manual for Developing a Dispute Management Plan for Government Ministries, Departments & Agencies (MDA)' Available at https://ncia.or.ke/wp-content/uploads/2024/01/NCIA-Dispute-Management-Plan.pdf

Political Parties Disputes Tribunal (Procedure) Regulations, 2017

Republic of Kenya., Office of the Attorney-General and Department of *Justice 'Sessional Paper No. 4 of 2024 on The National Alternative Dispute Resolution Policy'*
The Judiciary of Kenya., 'Alternative Justice Systems Framework Policy.' Available at https://www.unodc.org/documents/easternafrica/Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf

The Judiciary of Kenya., 'State of the Judiciary and the Administration of Justice: Annual Report 2022/2023' Available at https://judiciary.go.ke/wp-content/uploads/2023/11/SOJAR-2022-2023-1.pdf

The National Council for Law Reporting., 'Know Your Tribunals' Available at https://kenyalaw.org/kl/index.php?id=9050

The Sports Act, Cap 223, Government Printer, Nairobi

United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI
United Nations., 'Alternative Dispute Resolution Approaches and their Application in Water Management: A Focus on Negotiation, Mediation and Consensus Building' Available at https://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_background_paper.pdf

United Nations., 'Maintain International Peace and Security' Available at https://www.un.org/en/our-work/maintain-international-peace-and-security#:~:text=The%20United%20Nations%20plays%20an,political%20missions%20in%20the%20field

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

World Bank Group., 'Arbitrating and Mediating Disputes : Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment (English)' Available at https://documents.worldbank.org/en/publication/documents-reports/documentdetail/554271468340163221/arbitrating-and-mediating-disputes-benchmarking-arbitration-and-mediation-regimes-for-commercial-disputes-related-to-foreign-direct-investment

World Intellectual Property Organization., 'WIPO Guide on Alternative Dispute Resolution (ADR) Options for Intellectual Property Offices and Courts' Available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_guide_adr.pdf

My Experience as a Young Arbitrator: Lessons on Ethics

By: ***Prince Kanokanga****

Abstract

I am fortunate to have had the pleasure of serving as a young arbitrator in numerous disputes. This has allowed me to appreciate the growing practice of arbitration. The resolution of disputes whether commercial or non – commercial, domestic or international, by means of arbitration, is serious business, which is no less important than litigation. It is for this reason, that I have come up with some Commandments, constituting a code of duties, that I believe every jurisdiction should have in place as a standard for arbitrators whether in the form of a set of by – laws, codes, rules or regulations, by which arbitrators are habitually governed. The instructions or commandments which I set out, are based on my experiences as novice arbitrator, and are not conclusive of the ethical standards which may be expected of an arbitrator. One of the things that I have found to be quite interesting is that the functions and ethical duties of a novice and / or young arbitrator compete on an equal footing with those of a seasoned, qualified and senior arbitrator. Neither is excused from observing ethical standards. In order for the public to maintain its confidence in the arbitral process, it is important for arbitrators to also observe their ethical duties.

Introduction

One of the distinctive features of arbitration, as a dispute resolution, as opposed to litigation, is the parties freedom and ability to nominate and select the decision maker, and in some instances, the process and rules of procedure.[1] Selecting the right arbitrator, is something that cannot be overstated.[2] In selecting, an arbitrator,

* *Prince Kanokanga LLB, BLP is an Advocate of the High Court and Supreme Court of Zimbabwe. He is an Associate and Head of the Pro Bono Department with Kanokanga & Partners in Harare, Zimbabwe with extensive experience in commercial dispute resolution. He also serves on the panels of the Alternative Dispute Solutions Centre (ADSC) in Harare, the African Institute of Mediation and Mediation (AIMA) in Harare and the Commercial Arbitration Centre (CAC) in Harare. He also sits on the Zimbabwe Football Association (ZIFA) Disciplinary Committee. Prince Kanokanga can be reached through prince@kanokangalawfirm.co.zw*

[1] A Redfern & H Munter, Law and Practice of International Commercial Arbitration (Sweet & Maxwell 2004) at 228.

[2] D Kanokanga Commercial Arbitration in Zimbabwe (Juta & Co 2020) at 25, 37.

everyone typically wants to nominate and appoint the crème-de-le-crème i.e., celebrity arbitrators, for various reasons.[3] Infrequently to disputing parties, nominate and appoint, junior counsel.[4] Similarly, junior and novice arbitrators are typical not any disputing parties first pick when selecting someone to determine a dispute as parties tend to refer senior practising lawyers, retired judges or professors with industry experience and technical knowledge.[5]

It is important to note that the functions and ethical duties of a novice and young arbitrator compete on an equal footing with those of a seasoned and qualified arbitrator.[6] Neither is excused from observing ethical standards.[7] I am fortunate and grateful for the opportunity to have been entrusted by parties who have nominated and appointed me to serve as an arbitrator.

I am indebted to the arbitral institutions which have selected me from their list of arbitrators, to serve as arbitrator, and to resolve disputing parties claims and differences. This has resulted in me, having served as tribunal in several disputes, some of which have been domestic and international, commercial and non – commercial, as well as complex and non – complex.

As a young arbitration practitioner and legal practitioner, a lot is demanded from arbitral tribunals. However, arbitrators are not robots. They are people too. Like every human being, arbitrators, like judges presiding of disputes in courts, are

---

[3] P Kanokanga, 'The Southern African Development Community (SADC) Inaugural Panel of International Commercial Arbitration: The Dawn of a Truly Southern African Culture of Arbitration' (2022) 1 *Young Lawyers Association of Zimbabwe Law Journal* 1, 4

[4] Kanokanga (n 2 above) at 66 – 70.

[5] Ibid.

[6] C Rogers, Ethics in International Arbitration (Oxford University Press, 2014).

[7] D Standen, 'Ethics and Professional Conduct in the Practice of Commercial Arbitration' (1995) 13 The Arbitrator 231 – 241; K Harding, 'Arbitration – The Role of Ethics and Its Nature' (1998) 64 (1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 67 – 68; A Zharikov, 'Conflicts and Ethics in International Arbitration' (2019) 85 (1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 36 – 48..

fallible.[8] It is therefore important, for arbitrators, both young and old, to adhere to a code, in terms of which each arbitrator has a responsibility to uphold, maintain and promote the values attaching to the office of an arbitrator.[9] For instance, it is my firm belief that every arbitrator must act diligently and, in the conduct, the arbitral proceedings, he or she should not descend into the arena or assume the role of an attorney (solicitor) or that of an advocate (barrister).[10]

The Conduct Expected of Arbitrators

Every jurisdiction should have in place ethical standards for arbitrators whether in the form of a set of by – laws, codes, rules or regulations, by which arbitrators are habitually governed. It is intrinsic duty for arbitrators as quasi-judicial officers to give special attention to the right to equality before them and to refrain from being biased or prejudiced.[11] Arbitrators are expected to act honourably, and should not be involved in bribery and corruption or other corrupt practices.[12]

(a) Competency, education and qualifications

Leading scholar, Catherine Rogers published an innovative piece on the aptitude of an international arbitrator, in which she noted many notable qualities which include: being multi-cultural, qualified and knowledgeable of practical and technical or industry needs.[13] The mere fact that an arbitrator has received formal training to conduct arbitration, does not necessarily mean that he or she is particularly qualified and or competent.

---

[8] J Frank, 'Are Judges Human? Part Two: As Through a Class Darkly' (1931) *University of Pennsylvania Law Review* 233 – 267.

[9] J Clanchy & C Foty, 'Conflicting Perceptions of Ethics in International Arbitration' (2019) 85 (2) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 185 – 202; I Buckland. 'A Comparative Approach to Consistent Ethical Standards in International Commercial Arbitration' (2019) 85 (3) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 230 – 250

[10] *Jones v National Coal Board* [1957] 2 QB 55 at 64.

[11] Leopard Rock Hotel Co (Pvt) Ltd & Another v Walenn Construction (Pvt) Ltd 1994 (1) ZLR 255 (S) 275.

[12] S Gloppen, 'Courts, corruption and judicial independence' in T Søreide & A Williams (ed) Corruption, Grabbing and Development: Real World Challenges (2013) 68 - 79.

[13] C Rogers, The Vocation of International Arbitrators (2005) 20 American University International Law Review 958 – 984.

It is submitted that arbitrators should only accept appointments that he or she has suitable experience with. Each year, leading arbitral institutions design courses and or other activities for their members, whether the members have received practical experience or not, to develop their skills and knowledge in realistic simulations. It is thus an ethical requirement for arbitrators to acquire and maintain professional skills and abilities, to ensure that quality arbitration.[14]* An ethical arbitrator is one who also accepts appointments based on his or her availability and time to proceed with the matters assigned to him to resolved.[15] It is thus desirable, for an arbitrator to notify the parties in writing on his or her acceptance.[16] In general, the applicable rules, may provide for the time frame, and manner in which an arbitrator should communicate his or her acceptance. It could be argued that, the 'quality of the arbitrators will often determine the quality of the arbitral process and the award.'[17] Arbitrators need not always be lawyers.[18] Neither, is the practice of arbitration, restricted for grand old men and women. Resultantly, 'a law degree or legal qualification is not a prerequisite or requirement for appointment as an arbitrator.'[19]

Some of the most renowned arbitrators, include people drawn from various sectors such as accounting, constructing and engineering with many of the exceptionally talents being drawn from national chambers of commerce, with technical or industry specific expertise.[20]

---

[14] Section 9 of the Zambian Arbitration (Code and Standards) Regulations, 2007. ('The Regulations')

[15] Section 15 of the Regulations.

[16] See generally, E Onyema, *International Arbitration and the Arbitrator's Contract* (2010). In *Compagnie Europeene de Cereals SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301 at 306 it was held that:

> *"It is the arbitration contract that the arbitrators become parties to by accepting appointments under it."*

[17] D Kanokanga, Commercial Arbitration in Zimbabwe (Juta & Co, 2020) at 60.

[18] Ibid 68.

[19] D Kanokanga & P Kanokanga, UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwean Arbitration Act [Chapter 7:15] (Juta & Co, 2022) 122.

[20] P Kanokanga, 'The Southern African Development Community (SADC) Inaugural Panel of International Commercial Arbitration: The Dawn of a Truly Southern

There is no requirement that arbitrators should have a legal qualification or training and experience,[21] although a legal qualification is highly desirable.[22] However, knowledge or skill which is fitted to the nature of the particular dispute,[23] as there are generally no strict eligibility rules to serve as an arbitrator,[24] unless provide otherwise by the parties.[25]

(b) Confidentiality

An arbitrator has a duty to maintain the privacy and confidentiality of the arbitral proceedings.[26]

African Culture of Arbitration' (2022) 1 Young Lawyers Association of Zimbabwe Law Journal 1, 5.

[21] G Cuniberti, The UNCITRAL Model Law on International Commercial Arbitration: A Commentary (Edward Elgar, 2022) 11.14.

[22] A Speaight, Architect's Legal Handbook: The Law for Architects (9 ed) (Elsevier 2010) 261.

[23] Allianz Insurance Plc & Another v Tonicstar Ltd [2018] EWCA Civ 434.

[24] S Greenberg, C Kee & J Weeramanty, International Commercial Arbitration: An Asia Pacific Perspective (Cambridge University Press, 2011) at 6.38 noted that:

> "When considering that is desired in an arbitrator, it is useful to distinguish between qualifications and qualities. Qualifications should be given its natural meaning, which involves some kind of formal, recognised training. Qualities, on the other hand, are attributes. These may not be tangible or easily definable, as they may be something esoteric such as the manner in which an arbitrator approaches a problem."

[25] G Cuniberti, The UNCITRAL Model Law on International Commercial Arbitration: A Commentary (Edward Elgar, 2022) 11.07.

[26] See generally, I Smeureanu, Confidentiality in International Commercial Arbitration (Kluwer Law International, 2011).

Sometimes the duty of confidentiality in arbitration is provided for in the arbitration agreement,[27] the arbitration laws[28] or applicable institutional rules.[29] Arbitration as a dispute resolution process 'is distinguishable from litigation in two essential ways: privacy of the proceedings, and confidentiality of the process.'[30]

Confidentiality and privacy[31] are fundamental principles,[32] which are sacrosanct and essential to the proper functioning of arbitration.[33] Thus, arbitrators should not make disclosures concerning any information or documents which are exchanged in the course of the proceedings to persons who are not parties to any of the arbitral proceedings, not otherwise in the public domain.[34]

---

[27] Replication Technology Group & Others v Gallo Africa Ltd In re: Gallo Africa Ltd v Replication Technology Group & Others 2009 SACLR 183 (SG); 2009 (5) SA 531 (GSJ) para 16

> "There is no legislative basis for the privacy and confidentiality of arbitration proceedings in South Africa. An arbitration agreement may expressly provide that the proceedings and the award are private and confidential, but it has been submitted that 'even in the absence of an express provision to this effect, such a term will be implied.' The term suggested seems to be a term implied by law as being one of the naturalia of the agreement to arbitrate. Courts have the inherent power to develop the law by implying a term into particular types of agreements thereby formulating a new rule of law. This will be done cautiously and on grounds of policy."

[28] Esso Australia Resources Ltd and Others v Plowman (Minister for Energy and Minerals) & Others (1995) 128 ALR 391.

[29] Smeureanu (n 26 above) at 17 – 20.

[30] S Rajoo, 'Privacy, Confidentiality and Disclosure of Information Relating to Arbitral Proceedings' (2021) 1 Malayan Law Journal xiv, xiv.

[31] N Teramura & L Trakman, 'Confidentiality and privacy of arbitration in the digital era: pies in the sky?' (2024) 40 (3) Arbitration International 277 – 306.

[32] H Bagner, 'Confidentiality—A Fundamental Principle in International Commercial Arbitration?' 2001 (18) 2 Journal of International Arbitration 243 – 249.

[33] D Gultutan, 'Confidentiality of arbitrations under English law: sufficiently sacrosanct to warrant legislative shielding? A critical analysis from a Rumian perspective' (2023) 29 (1) International Trade Law and Regulation 5-26.

[34] Section 7 of the Regulations.

Some examples of confidential information and documents, include but are not limited to: the 'mere existence of the arbitration, the nature of the dispute, the amount in dispute, the status of the case, the names of the parties, the names of counsel, the names of arbitrators, parties' submissions, fact exhibits, documents produced in response to a request for production of documents, witness statements, expert reports, pleadings, transcripts of hearings, tribunal's deliberations, the award itself, any details revealing the content of the award, etc.'[35]

The exception or limitations concerning disclosure of information, is with the consent of the parties concerned, the information is being disclosed to a professional or other advisor, or when the information or documents disclose an actual or potential threat to human life or to national security.[36]* Furthermore, disclosure may be permissible disclosure, when subpoenaed by a court or otherwise required to do so by law.[37]

(c) Equality, fairness and impartiality

Essentially all arbitration statutes and institutional rules affirm an arbitrator's adjudicative function,[38] which is to treat the parties with equality, and to give each party the full opportunity to present its case.[39] One author has observed that:

> *"The practical application of the requirement for equal treatment means the arbitral tribunal applies the same standards of treatment to both disputing parties. It does not require the arbitral tribunal to ensure that the parties are legally represented by the same calibre or quality of lawyers. For the arbitrator to comply with this obligation, he*

[35] E Reymond-Eniaeva, Towards a Uniform Approach to Confidentiality of International Commercial Arbitration (Springer, 2019) 451.
[36] Section 7(c) of the Regulations.
[37] Ibid 640.
[38] G Born, International Commercial Arbitration (Wolters Kluwer, 2009) 1617.
[39] Article 18 of the Model Law.

> *cannot be required to default in complying with other terms of his contract, for example obligation to pursue the arbitration diligently and without undue delay."*[40]

An arbitrator should always act fairly and impartially in conducting the arbitral proceedings, in rendering procedural orders and other decisions on matters of procedure as well as evidence, as well as in exercising any powers which may have been conferred on him or her. The right to equality envisaged in Article 18 of the Model Law is sacrosanct.*[41] It is a cornerstone, in terms of which the practice of arbitration is hinged upon, which demands, an impartial adjudication of disputes which come before arbitrators.[42]

The worshipful function of an arbitrators, creates a presumption of impartiality.[43] Thus, fairness and impartiality denote that an arbitrator who is able to determine matters, honestly and without fear, favour or bias and in accordance with those rules and principles or the procedures which the law and / or the practices dictate.[44]

Consequently, the performance of their quasi-judicial duties' arbitrators should resolve disputes by making findings of fact and applying the appropriate law in a fair manner, which includes the duty to observe the letter and spirit of the *audi alteram partem* rule[45] and to remain manifestly impartial,[46] and give adequate reasons for any decision, unless the parties and or applicable rules provide otherwise.[47]

---

[40] E Onyema, International Commercial Arbitration and the Arbitrator's Contract (Routledge, 2010)144.
[41] Sukhbir Singh v Hindustand Petroleum Corporation Ltd 2020 (266) DLT 612.
[42] S v Le Grange & Others 2009 (1) SACR 125 (SCA) 140E-F.
[43] President of the Republic of South Africa & Others v South Africa Rugby Football Union & Others 1999 (4) SA 147 (CC); Bernert v Absa Bank 2011 (3) SA 92 (CC).
[44] S v Tyebela 1989 (2) SA 22 (A) 29G-H.
[45] South African Roads Board v Johannesburg City Council 1991 (4) All SA 722 (A).
[46] R v Hepworth 1928 AD 265 at 277.
[47] Article 31 of the Model Law.

Reasons help disputing parties to appreciate and be satisfied their cases were heard and consider. In general, a successful party is not really interested in knowing how they lost their case, an unsuccessful party wants to know why and how they lost.[48] A failure to give reasons subjects the decision to the criticism of being arbitrary and unreasonable.[49]

It is important that in conducting arbitral proceedings, arbitrators should always maintain order and act in accordance with commonly accepted decorum[50] and remain patient and courteous to the parties and their nominated and or appointed party representatives,[51] and require them to act likewise. Thus, an arbitrator should never show hostility to the parties.[52] Equality of arms, also includes an arbitrator's communication with the parties.

It is useful to note that in many developing and / or developed countries, arbitrators and party counsel, who operate from busy commercial chambers paths are likely to cross, from time to time, during the course of an on-going arbitration.[53] The tribunal and the party's counsel, are likely to interact at different times, and in other instances in different disputes, as well as belong to the same profession,

---

[48] Kanokanga & Kanokanga (n 19 above) 335 – 337.

[49] Mphahlele v First National Bank of South Africa Ltd 1999 (2) SA 667 (CC) para 12.

[50] In Economic Freedom Fighters & Others v Speaker of the National Assembly & Others [2018] 2 All SA 116 (WCC) para 8 it was held that:

> "However, contrary to the above, for the first to third respondents, the case raises important questions regarding the dignity and decorum of proceedings of the National Assembly. It is the manner in which the applicants behaved - and neither the questions to the President, nor his answers – that are at issue in this application. As a result, this case hardly concerns the status of the Public Protector's Report. Of course, that issue has been determined by the Constitutional Court and does not directly arise in this case.

[51] P Kanokanga & OE Monyei, 'Restricted rights of party representation and assistance in arbitration proceedings in the Federation of the Republic of Nigeria: Lessons from Zimbabwe' (2023) 18 (1) Journal of Arbitration 62 - 71.

[52] S v Mangezi 1985 (1) ZLR 272 (S).

[53] Mtemwa Holdings (Pvt) Ltd & Another v Mutunja & Another 2016 (2) ZLR 262 (H) 270 – 271.

share the same advocates chambers, teach at the same college or university or even in the same professional associations.[54] This does not mean, however that counsel cannot have contact with the tribunal in circumstances unrelated to the arbitration or be seated at the same table at an arbitration conference or share the same stage.[55]

It is however, improper for an arbitrator to communicate privately with any party regarding the substantive issues in a case, in the absence of the other.[56] Therefore, arbitrators should avoid impropriety in communicating with the parties. Where an arbitrator communicates in writing with one party, his or her communication should concurrently be sent to the other party.[57]

It is equally important that an arbitrator be hardworking, self-controlled and organised in his or her approach to work.[58] In addition to the aforesaid, an arbitrator should at all times personally avoid and dissociate himself or herself from comments[59] or conduct by persons subject to his or her control that are racist, sexist or otherwise manifest discrimination in violation of the equality which in most cases guaranteed by the Constitution.

---

[54] Ibid.

[55] Navin Premji v. Virunga Limited & 2 others [2023] eKLR is an interesting case concerning impartiality and independence. It is more so, an interesting read, considering the issue of culture in arbitration, in terms of which a court in Kenya held that attendance by counsel to an arbitration to an invite only traditional wedding of an arbitrator leads to reasonable apprehension of lack of impartiality or independence.

[56] Pacific China Holdings Ltd v Grand Pacific Holdings Ltd [2007] HKCFI 71.

[57] M Gusy, H Hosking & F Schwarz, A Guide to the ICDR International Arbitration Rules (Oxford University Press, 2019) at 7.37:

> "It is well accepted in international arbitration that there should principally be no ex parte communication between an arbitrator and one party - that is, that what cannot be done in the open, before the eyes of all parties, should not be done at all. The only generally accepted exception regards contacts of a party with a prospective arbitrator to assess his or her qualifications and availability, and to discuss the appointment of the presiding arbitrator."

[58] G Feltoe Judge's Handbook for Criminal Cases (2009) 3.

[59] Judge Mabel Jansen resigned amid disciplinary proceedings for her remarks in which she had said that rape was part of the culture of black men. See K Ramotsho, 'Judge Mabel Jansen resigned amid disciplinary process by the Judicial Service Commission' (2017) 574 De Rebus 11 – 12.

More so when dealing with parties from countries which are multicultural, multilingual and multiracial, an arbitrator should always be sensitive to these issues.[60] This includes sensitivity to issues of 'sexual orientation, class, rural presentation, language and the like.'[61] Thus, whether in his or her chambers, or outside of the venue of a hearing or meeting (including during tea breaks or lunch), an arbitrator should always be courteous and dignified to disputants', witnesses, and other service providers such as transcribers.[62]

An arbitrator must at all times be equal and even handed to the disputants.[63] Arbitrators as quasi-judicial officers should never be ill-tempered.[64] It is not unusual, for persons appearing before arbitrators to be incompetent or unprepared, however, in the unlikely event that persons appearing before a tribunal are incompetent or unprepared, arbitrators owe it to their own self-esteem and the worshipful office to which they hold themselves as arbitrators to be firm and not ill-tempered.[65] In fact, an arbitrator has a responsibility to be patient and polite, and should be able to command respect and to exercise firm control over the arbitral proceedings.[66]

(d) Diligence

In the performance of their duties, arbitrators should always perform their duties or functions diligently and investigate each matter which is brought before them thoroughly.[67] It is also incumbent arbitrators dispose of matters promptly and in

---

[60] South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another [2022] ZACC 5 para 67.

[61] P de Vos, 'Constitutionalism in South Africa between Promise and Practice: Constitutionalism in South Africa More Than Twenty Years after the Advent of Democracy' in A Meuwese & EH Ballin (eds) Constitutionalism and the Rules of Law: Bridging Idealism and Realism (2017) 245.

[62] L Baum Judges and their Audiences: A Perspective on Judicial Behaviour (Princeton University Press, 2006); K Mack, SR Anleu & J Tutton, 'The Judiciary and the Public: Judicial Perspectives' (2018) 39 Adelaide Law Review 1 – 35.

[63] S v Musindo 1997 (1) ZLR 395 (H).

[64] Jesse v Pratt & Another 2001 (1) ZLR 48 (H).

[65] Cummings v S HMA 17-18.

[66] Ibid.

[67] Kanokanga (n 2 above) 79 – 80.

an efficient and business-like manner. In order to do this, an arbitrator should ensure that reasonable steps are taken to notify the parties and or their representatives of the proceedings and to ensure that the disputants understand the arbitration process. The resolution of disputes by means of arbitration, is serious business, and is no less important than litigation.[68] It is for this reason, that individuals who serve as arbitrator, take have a serious responsibility, not only to the parties or the appointing authority, but also to the public, so as to ensure that there is confidence in the process of arbitration, as an alternative dispute resolution process.[69]

It is also important to note that applications for postponements are an indulgence sought from a tribunal.[70] An application for a postponement is an indulgence and not a right as it is in the public interest that there be an end to arbitration [71] and matters be disposed of as speedily as possible,[72] as well as considerations of the convenience of the court.[73] Thus, arbitrators should avoid unnecessary postponements and point-taking.

An arbitrator should not engage in conduct that is prejudicial to the effective and expeditious administration of justice as they assume full responsibility for their actions, omissions and / or decisions.[74] It is trite, that an arbitrator is precluded from delegating any decision – making function[75] including, but not limited to 'attending hearings or deliberations, or evaluating the parties' submissions and evidence to others.'[76] Should an arbitrator desire to use a tribunal secretary or

[68] Ibid at 10.
[69] M El – Awa, Confidentiality in Arbitration: The Case of Egypt (Springer 2016) at 34.
[70] Schapiro v Schapiro TS 673; Gerry v Gerry 1958 (1) SA 295 (W); Isaac v University of the Western Cape 1974 (2) SA 409 (C); Prinsloo v Saaiman 1984 (2) SA 56 (O).
[71] McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (2) SA 482 (SCA).
[72] Vollenhoven v Hoenson & Mills 1970 (2) SA 368 (C) 373A.
[73] P Kanokanga The Law of Costs in Zimbabwe: Text, Cases & Materials (2021) 508.
[74] Section 14 of the Regulations.
[75] P v Q & Others [2017] EWHC 194 (Comm).
[76] Hashwani v Jivraj [2011] 1 WLR 1872 at para 77.

clerical assistant, he or she can only do so, with the knowledge and consent of the parties.[77]

(e) Disclosure and recusal

It is a principle of law, that 'no man can be a judge in his own cause' nemo judex in sua causa.[78] Fairness[79] is a fundamental principle of law and public policy.[80] It is for this reason that in matters in which there is a real or reasonably perceived conflict of interest,[81] or reasonable suspicion of bias based upon objective facts, that an arbitrator will rescue themselves from a matter.

It is not uncommon for arbitrators to engage in other ordinary actives, during the course of arbitral proceedings.[82] This is because, arbitrators like other citizens, also have the freedom to enjoy their rights as citizens.[83] For instance, arbitrators often are appointed to act as trustees for family trusts and other charitable or other public benefit trusts, and or are serve as directors of private family companies or close corporations.[84]

It would be professional misconduct for an arbitrator to determine a manner in which he or she knows that they are biased or there is a real likelihood of bias.[85] For this reason, an arbitrator should disclose at the earliest opportunity and prior interest or relationship that may affect impartiality and or independent.[86]

---

[77] Sonatrach v Statoil Natural Gas LLC [2014] 1 CLC 473.
[78] Kanokanga (n 2 above) 82.
[79] In Hamman v Moolman 1968 (4) SA 340 (A) 344E it was held, that 'fairness to both sides should be his guiding star, and that his impartiality must be seen to exist.'
[80] Sibanda v Chikumba & Another HH 809-15.
[81] For conflict of interest see also Head and Fortuin v Woolaston NO & De Villiers 1926 TPD.
[82] Kanokanga & Kanokanga (n 19 above) at 142.
[83] Ibid.
[84] Bernert v Absa Bank Ltd [2010] ZACC 28.
[85] City and Suburban Transport (Pty) Ltd v Local Board of Road Transportation, Johannesburg 1932 WLD 100 at 106; Foya & Matimba v R & Jackson NO 1963 R&N 318 (FS) 321E; Standard Chartered Finance Ltd v Georgias & Another 1998 (2) ZLR 547 (H).
[86] Kanokanga & Kanokanga (n 19 above) at 143 – 145.

It would be tantamount to misconduct for an arbitrator to engage in financial and business dealings that may reasonable be perceived to exploit the tribunal's judicial position or such dealings which are incompatible with such office, during the course of the proceedings.[87]

It is critical for an arbitrator to view the suspension of bias objectively.[88] Thus, the test for bias is whether an applicant can show a reasonable fear that the arbitrator will not be impartial. [89] The burden of disclosure rests firmly on an arbitrator, and he or she has a duty to disclose, which is an ongoing obligation, through the proceedings.[90] Thus, no actual bias or partiality need be shown so long as the conduct of the judge, either by their words, actions or inactions in handing the matter,[91] displayed a real likelihood that he/she might not be able to act judicially.[92]

(f) Fees

Under administered proceedings, the costs of the arbitration are determined by the appointing authority, and the appointing authority, generally collects these funds from the parties.[93]* The costs, usually include, the administrative fees, the tribunal fees and the costs associated with the tribunals.[94] 'The formula for calculating theses is set out in institutional rules and in order to avoid suing the

[87] Zemoqos Incorporated (Pvt) Ltd v City Parking (Pvt) Ltd & Others HH 172-20.
[88] S v Mutizwa HB 4-06.
[89] Danisa v British and Overseas Insurance Co Ltd 1960 (1) SA 800 (D) 801B-C; Monnig & Others v Council of Review & Others 1980 (4) SA 866 (C) 876C;; Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A) 12H.
[90] Article 12(1) of the Model Law.
[91] Bias not based on previous extra judicial opinion in relation to a case. See R v T 1953 (3) SA 479 (A).
[92] Koh Bros Building and Civil Engineering Pte Ltd v Scotts Development (Saraca) Pte Ltd [2003] 3 LRC 111 at 119- 120.
[93] S Mau, International Commercial Arbitration in Hong Kong: A Guide (Hong Kong Press, 2020) 197.
[94] J Gotanda, Bringing Efficiency to the Awarding of Fees and Costs in International Arbitrations' in S Kroll, LA Mistelis, P Perales Viscasillas & V Rogers (eds) Liber Amicorum Eric Bergsten, International Arbitration and International Commercial Law: Synergy, Convergence and Evolution (Kluwer Law International, 2011) 144.

parties for non – payment, said rules typically oblige the parties to deposit in advance part or all of the anticipated fees and expenses.'[95] However, in ad hoc arbitration, the costs and fees are fixed by the tribunal, in some instances, in consultation, with the appointing authority, where necessary.[96] It is important, for the tribunal to disclose to the parties, the issue of fees, in a situation where same are not conducted under any institutional rules.[97]

One author noted that, an arbitral is 'entitled to be properly compensated for the services rendered, by the parties who appointed the tribunal, unless the tribunal agrees to a waiver of fees. It is unusual for arbitration, whether domestic or international, commercial or non – commercial to be conducted by an arbitral tribunal on a pro bono basis.'[98] It is submitted that an arbitrator owes an ethical duty to the parties in ad hoc proceedings, to disclose the basis of the fees, disbursements and other charges that he or she shall levy, at the outset of the proceedings i.e., during a preliminary meeting also known as an arbitration management conference.[99]

Leading authors, Kanokanga and Apaloo observed that:

> *"This discussion allows the arbitrator to explain to the parties and their representatives the basis of their fees and expenses. It ensures that the parties and their representatives are fully informed about the arbitral tribunal's approach to costs. Furthermore, it also removes uncertainty, improves predictability and has the potential to minimize unnecessary disputes concerning the arbitral costs. Furthermore, it is quite important that any agreement to costs be reduced to writing. From the aforesaid, a discussion on the fees and expenses of the arbitrator*

---

[95] I Bantekas, An Introduction to International Arbitration (Cambridge University Press, 2015) at 4.12

[96] Mau (n 94 above) 197.

[97] Section 21(3) of the Regulations.

[98] P Kanokanga, 'Is an award of costs by an arbitrator a question of pubic policy?' (2024) 12 (2) Alternative Dispute Resolution 91, 97.

[99] P Kanokanga & R Apaloo,'Is an arbitration management conference mandatory or directory? An analysis of Section 29 of Ghana's Alternative Dispute Resolution Act, 2010 (ACT 798)' (2023) 8 *Ghana School of Law Student Journal* 85 - 94.

> *is necessary, in order to determine an arbitrator's remuneration in the event of their removal, resignation or in other instances, where for example the 'arbitration proceedings are not terminated by an arbitral award."*[100]

Additionally, an arbitrator's fees should always be reasonable.[101] In fixing his or her costs, in ad hoc arbitration, should have regard to the different methods in use.[102] For instance, the tribunal can have regard to the complexity of the matter and the time required. There is nothing that precludes an arbitrator from charging reasonable fees in accordance with his or her experience as an arbitrator or agreeing to a fixed fee, or from charging his or her fees in accordance with any such rates which are customarily levied in his or her profession or as determined by a court or arbitral institution.[103]

Conclusion

Arbitrators, have an important role in the administration of justice internationally.[104] The fact that most governments have enacted laws authorising the use of arbitration to resolve disputes illustrates its growing importance.

Appointing authorities, and its panel members, the arbitrators, have an important role in the administration of justice.[105] They have a duty to promote and protect the institution of arbitration, and ensure that it enjoys public confidence[106]. From my reflections as a junior arbitrator in many domestic and international arbitration, in the same manner as an Attorney General's offices is on equal footing with all other law firms in a country, similarly, it appears that there is hardly a

---

[100] P Kanokanga & R Apaloo, 'An Arbitrator's Power of Lien Against an Arbitral Award for Non – Payment of Fees of Expenses Incurred in Arbitration: A Ghanaian Perspective' (2024) 19 (1) *Journal of Arbitration* 30, 40 – 41.

[101] Section 21(2) of the Regulations.

[102] A Redfern & M Hunter, Law and Practice of International Commercial Arbitration (Sweet & Maxwell 2004) at 228

[103] Kanokanga & Apaloo (n 100 above) at 40 – 41.

[104] see generally M Benedettelli, A Carlevaris, A Crivellaro & M Deli, Arbitration as Balanced Administration of Justice: Essays in Honour of Piero Bernardini (Brill 2024).

[105] Ibid.

[106] El – Awa (n 70 above) at 34.

distinction, between a novice and a senior arbitrator, when it comes to the resolution of disputes or issues of ethics.[107] The parties expect one and the same thing from both, that is justice! Thus, in the performance of their duties, arbitrators should not lose sight of the quasi – judicial nature of the work they have undertaken to do, and they must ensure that the administer justice to all persons alike without fear, favour or prejudice.[108] Hence, arbitrators should ensure that not only is justice done, but that justice is seen to be done.[109] As quasi - judicial officers, arbitrators should conduct arbitral proceedings with an open-mind, and remain impartial and fair to all parties concerned.[110]

[107] BGM Traffic Control Systems v Minister of Transport & Others 2009 (1) ZLR 106 (H).
[108] Section 174(8) of the Constitution.
[109] R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256; S v Rall 1982 (1) SA 828 (A).
[110] S v Wood 1964 (3) SA 103 (O) 105G; Solomon & Another NNO v De Waal 1972 (1) SA 575 (A) 580H.

Bibliography

Cases

Allianz Insurance Plc & Another v Tonicstar Ltd [2018] EWCA Civ 434.

Bernert v Absa Bank 2011 (3) SA 92 (CC).

Bernert v Absa Bank Ltd [2010] ZACC 28.

BGM Traffic Control Systems v Minister of Transport & Others 2009 (1) ZLR 106 (H).

City and Suburban Transport (Pty) Ltd v Local Board of Road Transportation, Johannesburg 1932 WLD 100

Cummings v S HMA 17-18.

Danisa v British and Overseas Insurance Co Ltd 1960 (1) SA 800 (D)

Economic Freedom Fighters & Others v Speaker of the National Assembly & Others [2018] 2 All SA 116 (WCC)

Esso Australia Resources Ltd and Others v Plowman (Minister for Energy and Minerals) & Others (1995) 128 ALR 391.

Foya & Matimba v R & Jackson NO 1963 R&N 318 (FS)

Gerry v Gerry 1958 (1) SA 295 (W)

Hamman v Moolman 1968 (4) SA 340 (A)

Hashwani v Jivraj [2011] 1 WLR 1872 at para 77.

Head and Fortuin v Woolaston NO & De Villiers 1926 TPD.

Isaac v University of the Western Cape 1974 (2) SA 409 (C)

Jesse v Pratt & Another 2001 (1) ZLR 48 (H).

Jones v National Coal Board [1957] 2 QB 55

Koh Bros Building and Civil Engineering Pte Ltd v Scotts Development (Saraca) Pte Ltd [2003] 3 LRC 111

Leopard Rock Hotel Co (Pvt) Ltd v Walenn Construction (Pvt) Ltd 1994 (1) ZLR 225 (S)
McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (2) SA 482 (SCA).

Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A)

Monnig & Others v Council of Review & Others 1980 (4) SA 866 (C)

Mphahlele v First National Bank of South Africa Ltd 1999 (2) SA 667 (CC) para 12.

Navin Premji v. Virunga Limited & 2 others [2023] eKLR

P v Q & Others [2017] EWHC 194 (Comm).

Pacific China Holdings Ltd v Grand Pacific Holdings Ltd [2007] HKCFI 71.

President of the Republic of South Africa & Others v South Africa Rugby Football Union & Others 1999 (4) SA 147 (CC)

Prinsloo v Saaiman 1984 (2) SA 56 (O).

R v Hepworth 1928 AD 265

R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256

R v T 1953 (3) SA 479 (A).

Replication Technology Group & Others v Gallo Africa Ltd In re: Gallo Africa Ltd v Replication

Technology Group & Others 2009 SACLR 183 (SG); 2009 (5) SA 531 (GSJ)

S v Le Grange & Others 2009 (1) SACR 125 (SCA) 140E-F.

S v Mangezi 1985 (1) ZLR 272 (S).

S v Musindo 1997 (1) ZLR 395 (H).

S v Mutizwa HB 4-06.

S v Rall 1982 (1) SA 828 (A).

S v Tyebela 1989 (2) SA 22 (A) 29G-H.

S v Wood 1964 (3) SA 103 (O)

Schapiro v Schapiro TS 673

Sibanda v Chikumba & Another HH 809-15.

Solomon & Another NNO v De Waal 1972 (1) SA 575 (A)

Sonatrach v Statoil Natural Gas LLC [2014] 1 CLC 473.

South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another [2022] ZACC 5.

South African Roads Board v Johannesburg City Council 1991 (4) All SA 722 (A).

Standard Chartered Finance Ltd v Georgias & Another 1998 (2) ZLR 547 (H).

Sukhbir Singh v Hindustand Petroleum Corporation Ltd 2020 (266) DLT 612.
Vollenhoven v Hoenson & Mills 1970 (2) SA 368 (C)

Zemoqos Incorporated (Pvt) Ltd v City Parking (Pvt) Ltd & Others HH 172-20.

Scholars

A Redfern & M Hunter, Law and Practice of International Commercial Arbitration (Sweet & Maxwell 2004)

A Speaight, Architect's Legal Handbook: The Law for Architects (9 ed) (Elsevier 2010) 261.

A Zharikov, 'Conflicts and Ethics in International Arbitration' (2019) 85 (1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 36 – 48

C Rogers, Ethics in International Arbitration (Oxford University Press, 2014).

C Rogers, The Vocation of International Arbitrators (2005) 20 American University International Law Review 958 – 984.

D Gultutan, 'Confidentiality of arbitrations under English law: sufficiently sacrosanct to warrant legislative shielding? A critical analysis from a Rumian perspective' (2023) 29 (1) International Trade Law and Regulation 5-26.

D Kanokanga & P Kanokanga, UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwean Arbitration Act [Chapter 7:15] (Juta & Co, 2022).

D Kanokanga Commercial Arbitration in Zimbabwe (2020) 82.

D Kanokanga, Commercial Arbitration in Zimbabwe (Juta & Co, 2020).

D Standen, 'Ethics and Professional Conduct in the Practice of Commercial Arbitration' (1995) 13 The Arbitrator 231 – 241

E Onyema, International Commercial Arbitration and the Arbitrator's Contract (Routledge, 2010)144.

E Reymond-Eniaeva, Towards a Uniform Approach to Confidentiality of International Commercial Arbitration (Springer, 2019) 451.

G Born, International Commercial Arbitration (Wolters Kluwer, 2009)

G Cuniberti, The UNCITRAL Model Law on International Commercial Arbitration: A Commentary (Edward Elgar, 2022)

G Cuniberti, The UNCITRAL Model Law on International Commercial Arbitration: A Commentary (Edward Elgar, 2022) 11.07.

G Feltoe Judge's Handbook for Criminal Cases (2009)

H Bagner, 'Confidentiality—A Fundamental Principle in International Commercial Arbitration?' 2001 (18) 2 Journal of International Arbitration 243 – 249.

I Bantekas, An Introduction to International Arbitration (Cambridge University Press, 2015)

I Buckland. 'A Comparative Approach to Consistent Ethical Standards in International Commercial Arbitration' (2019) 85 (3) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 230 – 250.

I Smeureanu, Confidentiality in International Commercial Arbitration (Kluwer Law International, 2011).

J Clanchy & C Foty, 'Conflicting Perceptions of Ethics in International Arbitration' (2019) 85 (2) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 185 – 202

J Frank, 'Are Judges Human? Part Two: As Through a Class Darkly' (1931) University of Pennsylvania Law Review 233 – 267.

J Y Gotanda, Bringing Efficiency to the Awarding of Fees and Costs in International Arbitrations' in S Kroll, LA Mistelis, P Perales Viscasillas & V Rogers (eds) Liber Amicorum Eric Bergsten, International Arbitration and International Commercial Law: Synergy, Convergence and Evolution (Kluwer Law International, 2011) 144.

K Harding, 'Arbitration – The Role of Ethics and Its Nature' (1998) 64 (1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 67 – 68

K Mack, SR Anleu & J Tutton, 'The Judiciary and the Public: Judicial Perspectives' (2018) 39 Adelaide Law Review 1 – 35.

K Ramotsho, 'Judge Mabel Jansen resigned amid disciplinary process by the Judicial Service Commission' (2017) 574 De Rebus 11 – 12.

L Baum Judges and their Audiences: A Perspective on Judicial Behaviour (Princeton University Press, 2006)

M Benedettelli, A Carlevaris, A Crivellaro & M Deli, Arbitration as Balanced Administration of Justice: Essays in Honour of Piero Bernardini (Brill 2024).

M Gusy, H Hosking & F Schwarz, A Guide to the ICDR International Arbitration Rules (Oxford University Press, 2019)

N Teramura & L Trakman, 'Confidentiality and privacy of arbitration in the digital era: pies in the sky?' (2024) 40 (3) Arbitration International 277 – 306.

P de Vos, 'Constitutionalism in South Africa between Promise and Practice: Constitutionalism in South Africa More Than Twenty Years after the Advent of Democracy' in A Meuwese & EH Ballin (eds) Constitutionalism and the Rules of Law: Bridging Idealism and Realism (2017) 245.

P Kanokanga & OE Monyei, 'Restricted rights of party representation and assistance in arbitration proceedings in the Federation of the Republic of Nigeria: Lessons from Zimbabwe' (2023) 18 (1) Journal of Arbitration 62 - 71.

P Kanokanga & R Apaloo, 'An Arbitrator's Power of Lien Against an Arbitral Award for Non – Payment of Fees of Expenses Incurred in Arbitration: A Ghanaian Perspective' (2024) 19 (1) Journal of Arbitration 30, 40 – 41.

P Kanokanga & R Apaloo,'Is an arbitration management conference mandatory or directory? An analysis of Section 29 of Ghana's Alternative Dispute Resolution Act, 2010 (ACT 798)' (2023) 8 Ghana School of Law Student Journal 85 - 94.

P Kanokanga The Law of Costs in Zimbabwe: Text, Cases & Materials (2021) 508.

P Kanokanga, 'Is an award of costs by an arbitrator a question of pubic policy?' (2024) 12 (2) Alternative Dispute Resolution 91, 97.

P Kanokanga, 'The Southern African Development Community (SADC) Inaugural Panel of International Commercial Arbitration: The Dawn of a Truly Southern African Culture of Arbitration' (2022) 1 Young Lawyers Association of Zimbabwe Law Journal 1, 5.

S Gloppen, 'Courts, corruption and judicial independence' in T Søreide & A Williams (ed) Corruption, Grabbing and Development: Real World Challenges (2013) 68 - 79.

S Greenberg, C Kee & J Weeramanty, International Commercial Arbitration: An Asia Pacific Perspective (Cambridge University Press, 2011)

S Mau, International Commercial Arbitration in Hong Kong: A Guide (Hong Kong Press, 2020)

S Rajoo, 'Privacy, Confidentiality and Disclosure of Information Relating to Arbitral Proceedings' (2021) 1 Malayan Law Journal xiv.

Emergency Arbitration: A Quick Solution to Urgent Disputes?

By: ***Murithi Antony****

Abstract

Emergency arbitration has become increasingly critical in international commercial arbitration, providing parties a means to secure urgent interim relief before the establishment of a fully constituted. This procedural innovation, endorsed by leading arbitration institutions, addresses the need for quick protective measures in high-stakes disputes. Yet, despite its promise, emergency arbitration faces several setbacks, especially when it comes their enforceability in jurisdictions that lack clear provisions for interim arbitral awards, such as Kenya. Against this contextual background, this paper explores the concept of emergency arbitration, its doctrinal foundations, institutional frameworks, and challenges, with a focus on Kenyan practice and its legal framework. By the legal framework and judicial precedents, the paper evaluates the practicality and effectiveness of emergency arbitration and gives recommendations for greater efficacy and appreciation in the legal system.

1. Introduction

The emergence of emergency arbitration reflects the increasing sophistication of international dispute resolution mechanisms, with arbitration institutions worldwide seeking to offer parties rapid relief options.[1] Traditionally, parties requiring immediate protective measures before the constitution of a tribunal, could either wait for the full constitution of the tribunal or seek court intervention for interim measures.[2] The approach to the courts, however, risked jeopardizing

**LL.B (Hons), University of Embu; Research Assistant, Centre for Climate Change Adaptation and Mitigation (CCCAM) – University of Embu; Email: amurithi326@gmail.com*

[1] Alnaber. R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.' Arbitration International,
Volume 35, Issue 4 (2019)

[2] Havedal Ipp A, 'Urgency, Irreparable Harm and Proportionality: Seven Years of SCC Emergency Proceedings' (Kluwer Arbitration Blog, 29 June 2017) <http://arbitrationblog.kluwerarbitration.com/2017/06/29/urgency-irreparable-harm-and-proportionality-seven-years-of-scc-emergency-proceedings/> accessed 10 November 2024

those elements that are essential to arbitration such confidentiality, autonomy, and procedural speed.[3] In response, institutions like the International Chamber of Commerce (ICC), Singapore International Arbitration Centre (SIAC), and London Court of International Arbitration (LCIA) incorporated emergency arbitration into their rules, allowing for expedited interim measures issued by an emergency arbitrator.[4]

In Kenya, the growth of arbitration as a dispute resolution mechanism reflects a trend toward Alternative Dispute Resolution (ADR) mechanisms, particularly as enshrined in Article 159 of the Constitution of Kenya, which encourages the use of alternative forms of dispute resolution including Arbitration, to enhance access to justice.[5] This paper critically analyzes the role and limitations of emergency arbitration with a particular focus of Kenya, assessing how local courts in Kenya have treated emergency arbitration orders and their enforceability under both local and international law. The paper discusses whether emergency arbitration can be a truly swift and effective solution for urgent disputes in Kenya and beyond.

2. The Doctrine of Emergency Arbitration

Emergency arbitration is anchored on the need for urgent relief in circumstances where the delay in the constitution of the tribunal will cause irreparable damage.[6] The concept of emergency arbitration is underpinned by party autonomy insofar as parties can opt to arbitrate rather than litigate, yet still have the arbitral process

---

[3] Mattli W, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) 55(4) International Organization 919 <http://www.jstor.org/stable/3078620> accessed 10 November 2024

[4] International Chamber of Commerce, *ICC Arbitration and ADR Commission Report on Emergency Arbitrator Proceedings* (2019) <https://iccwbo.org/wp-content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf> accessed 10 November 2024

[5] Constitution of Kenya, 2010.

[6] 'Definition and Regulation of Emergency Arbitration' (The Lawyer Africa, 9 January 2024) <https://thelawyer.africa/2024/01/09/definition-and-regulation-of-emergency-arbitration/#:~:text=Under%20the%20International%20Chamber%20of,an%20application%20for%20such%20measures36> accessed 10 November 2024

be responsive and protective.[7] Through emergency arbitration, parties can apply for interim measures directly within the arbitration process, thereby bypassing the need to seek recourse from the courts.[8] An emergency arbitrator, usually appointed within days of an application being made, may issue orders to secure assets, preserve evidence, or maintain the *status quo* until a full tribunal is established.[9]

In Kenya, arbitration and interim measures have a legal basis in the Arbitration Act, which adopts some provisions of the UNCITRAL Model Law.[10] This Act allows for interim relief before and during arbitral proceedings, provided that parties have agreed to arbitrate under Kenyan law.[11] However, the Act does not specifically provide for emergency arbitration, creating a lacuna that Kenyan courts have tried to fill through judicial pronouncements.[12] Generally, courts have upheld interim measures in arbitration, especially when the parties have an agreement to resolve their dispute though arbitration.[13] For instance, in ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 others***, the Court of Appeal outlined the principles governing grant of interim orders of protection under the Arbitration Act by stating as follows:

---

[7] 'Emergency Arbitrators: The Limits of Party Autonomy' (i-law, 2024) https://stage.i-<law.com/ilaw/doc/view.htm?id=386812&environment=stage> accessed 10 November 2024

[8] 'Re-Examining the Doctrine of Emergency Arbitration' (KMCO, 2023) <http://kmco.co.ke/wp-content/uploads/2023/08/Re-Examining-the-Doctrine-of-Emergency-Arbitration.pdf> accessed 10 November 2024

[9] 'The Role of Emergency Arbitrators in International Arbitration' (2021) *Vilnius University Law Review* <https://sciendo.com/pdf/10.2478/vjls-2021-0014> accessed 10 November 2024

[10] Jeptoo SA, *A Critical Analysis of Arbitral Interim Measures of Protection in Kenya* (PhD thesis, University of Nairobi 2019) <http://erepository.uonbi.ac.ke/handle/11295/109790> accessed 10 November 2024

[11] *Ibid*

[12] *Ibid*

[13] Kituku, James K. "Facilitating International Arbitration in Kenya: A General Analysis of Arbitration in the Country and International Arbitration in Other Selected Countries." PhD diss., University of Nairobi, 2018.

> *"….Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the Tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must consider before issuing the interim measures of protection are: -*
>
> 1. *The existence of an arbitration agreement.*
> 2. *Whether the subject matter of arbitration is under threat.*
> 3. *In special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.*
> 4. *For what period must the measure be given especially if requested for before the commencement of the arbitration to avoid encroaching on the tribunal's decision-making power as intended by the parties."*[14]

Despite this, the issue of enforceability remains complex. Courts have, on occasion, made parties apply for judicial enforcement of arbitral interim orders; an approach that delays relief and contradicts the urgency that led to emergency arbitration.[15] While the doctrinal basis of emergency arbitration is essentially sound and compatible with Kenyan principles encouraging ADR, effective operation requires a platform where emergency orders are enforceable without going through judicial intervention, a challenge that Kenyan legal system has so far failed to resolve fully.[16]

---

[14] Civil Application No. NAI 327 of 2009 [2010] eKLR

[15] Muigua K, 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya' (Paper presented at the Chartered Institute of Arbitrators course on "Advocacy in Mediation and Arbitral Proceedings", 5 February 2009)

[16] Georgios I Zekos, 'Constitution, Courts and Arbitration' in *Advanced Artificial Intelligence and Robo-Justice* (Springer International Publishing 2022) 41.

3. Institutional Approaches to Emergency Arbitration

Several international arbitration institutions have already incorporated rules on emergency arbitration into their respective procedural frameworks, tailoring them to meet the specific needs of parties seeking interim relief.[17] Each institutional approach reflects its emphasis speedy response and procedural safeguards, thereby allowing emergency arbitration to operate as an effective alternative to court-ordered interim relief.[18] For Kenya, the choice of institutional rules often influences the feasibility of emergency arbitration, as these frameworks provide varied levels of accessibility, procedural flexibility, and cross-border enforceability, as discussed hereunder.[19]

The International Chamber of Commerce (ICC), headquartered in Paris, for instance, has set a global standard for emergency arbitration through its well-structured procedural rules, introduced in 2012 and refined thereafter.[20] Under the ICC Arbitration Rules, a party in need of urgent interim relief may initiate emergency arbitration, which sets off a two-day period for the ICC to appoint an emergency arbitrator. This arbitrator is then expected to render a decision on the requested interim measures within 15 days.[21] This fast-tracked process ensures that parties can rely on prompt actions to protect assets, maintain *status quo* or preserve evidence.[22] Significantly, the ICC rules require that applicants for

---

[17] **Wasel & Wasel Arbitrator Services Inc., 'A Breakdown of Emergency Arbitrations' (Lexology, 8 November 2021) <**https://www.lexology.com/library/detail.aspx?g=34ea291c-af8e-4605-8516-5075521f0e98**> accessed 10 November 2024.**

[18] Dr Vikrant Yadav, 'Emergency Arbitration under Institutional Arbitration Rules: A Comparative Study' (2017) 3 *International Journal of Law* 158 <https://ssrn.com/abstract=3621191> accessed 10 November 2024.

[19] Gunawan Widjaja, Andryawan and Victoria Liando, '"Emergency Arbitration"; Comparative Analysis' (2020) 10.2991/assehr.k.200917.010 <https://doi.org/10.2991/assehr.k.200917.010> accessed 10 November 2024.

[20] International Chamber of Commerce, *2021 Arbitration Rules* (ICC 2021) <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> accessed 10 November 2024.

[21] *Ibid*

[22] Herbert Smith Freehills, 'The New ICC Arbitration Rules: Promoting a Modern View of International Arbitration' (Herbert Smith Freehills, October 2011) <https://www.herbertsmithfreehills.com/notes/arbitration/2011-10/the-new-icc-

emergency relief demonstrate that the requested measures cannot await the constitution of the full tribunal, thereby preventing misuse of emergency arbitration and maintaining procedural fairness.[23] Incontestably, the ICC's procedural rigor and international credibility make it a favorable choice for Kenyan parties in cross-border disputes, as its orders carry significant weight in many jurisdictions.[24]

Similarly, the Singapore International Arbitration Centre (SIAC) has also excelled in emergency arbitration by establishing rules that balance the need for swift relief with flexibility.[25] The SIAC Rules allow parties to apply for emergency arbitration either concurrently with or after submitting a notice of arbitration, ensuring that requests for interim measures are linked to a formal arbitral process.[26] Under SIAC rules, an emergency arbitrator is appointed within one day of receiving the application, with interim measures often issued within a few days.[27] This rapid appointment process is particularly advantageous even for African companies that frequently engage in commerce across Asia, as Singapore's role as a regional arbitration hub ensures that emergency arbitration proceedings are accessible and

---

arbitration-rules-promoting-a-modern-view-of-international-arbitration> accessed 10 November 2024.

[23] Norton Rose Fulbright, 'Emergency Arbitrators in Singapore' (Norton Rose Fulbright, 12 October 2017) <https://www.nortonrosefulbright.com/en-ke/knowledge/publications/0c310fce/emergency-arbitrators-in-singapore> accessed 10 November 2024.

[24] Saksham Barsaiyan, 'SSRN-id2710552' (SSRN, 1 January 2020) <https://www.scribd.com/document/444760312/SSRN-id2710552> accessed 10 November 2024.

[25] Addleshaw Goddard, 'Upcoming Changes to SIAC Emergency Arbitration' (Addleshaw Goddard, 2024) <https://www.addleshawgoddard.com/en/insights/insights-briefings/2024/dispute-resolution/upcoming-changes-siac-emergency-arbitration/> accessed 10 November 2024.

[26] Uría Menéndez, 'Singapore's Recipe for Becoming a Top International Arbitration Hub' (Uría Menéndez, 20 December 2019) https://www.uria.com/en/publicaciones/8662-singapores-recipe-for-becoming-a-top-international-arbitration-hub accessed 10 November 2024.

[27] *Ibid*

expedited.[28] Unlike the ICC, which requires prior submission of notice, SIAC allows more flexibility in the timing of applications, which is critical for parties requiring immediate intervention.[29] Notably, SIAC is increasingly preferred due to its operational efficiency and compatibility with Singaporean legislation on emergency arbitration enforcement.[30]

In contrast, the London Court of International Arbitration (LCIA) adopts a more adaptable approach by permitting emergency relief requests even before filing an official arbitration request.[31] This flexibility is especially relevant in cases where delays by respondents might hinder proceedings or where immediate relief is necessary to prevent irreparable harm.[32] LCIA rules require the appointment of an emergency arbitrator within three days, with a decision rendered within 14 days, ensuring procedural efficiency without compromising the opportunity for parties to present their cases.[33] The LCIA's adaptable approach is well-suited for parties dealing with disputes involving pre-arbitral claims or urgent cross-border issues.[34]

---

[28] Kluwer Arbitration Blog, 'The 2023 SIAC Draft Rules: Raising the Bar for Efficiency' (Kluwer Arbitration Blog, 26 October 2023) <https://arbitrationblog.kluwerarbitration.com/2023/10/26/the-2023-siac-draft-rules-raising-the-bar-for-efficiency/> accessed 10 November 2024.

[29] WilmerHale, 'International Arbitration: Issues for the Future' (WilmerHale, 2013) <https://www.wilmerhale.com/-/media/147a609172e94fd18eb38ecc89ace662.pdf> accessed 10 November 2024.

[30] *Ibid*

[31] Juan Carlos Herrera-Lasso, 'International Arbitration in Latin America: Myths and Realities' (2012) 3(1) American University Business Law Review <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1041&context=ab> accessed 10 November 2024.

[32] *Ibid*

[33] LCIA, 'LCIA Arbitration Rules 2020' (LCIA, 2020) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> accessed 10 November 2024.

[34] Dentons, 'Will the New LCIA Rules Persuade Users That Arbitration Is Preferable to Litigation?' (Dentons, 26 October 2020) <https://www.dentons.com/en/insights/articles/2020/october/26/will-the-new-lcia-rules-persuade-users-that-arbitration-is-preferable-to-litigation> accessed 10 November 2024.

In Kenya, the Nairobi Centre for International Arbitration (NCIA) has adopted emergency arbitration procedures to provide solutions for parties requiring interim relief within the country or region.[35] The NCIA rules on emergency arbitration, closely formulated in line with international standards, require the appointment of an emergency arbitrator within two days of the application, with interim orders to be issued within 15 days.[36] The NCIA, however, remains a developing institution, and its emergency arbitration provisions have seen limited utilization.[37] One factor contributing to this underuse is the relative lack of judicial precedent on the enforceability of NCIA-issued emergency orders.[38] Generally, while Kenyan courts have continued to support arbitration especially in post-2010 constitution, NCIA orders lack the international enforceability associated with institutions like the ICC or SIAC, limiting their attractiveness for cross-border disputes.[39] While international institutions such as the ICC, SIAC, and LCIA offer well-established frameworks with high enforceability standards, local institutions like the NCIA face challenges in gaining recognition.[40] Parties often prioritize institutions with strong international reputations to ensure enforceability.[41] Arbitration practitioners must therefore consider institutional differences when advising clients on emergency arbitration, weighing the accessibility and efficiency of each framework against the practical realities of enforcement.[42]

---

[35] Nairobi Centre for International Arbitration, 'Nairobi Centre for International Arbitration' (NCIA) <https://ncia.or.ke/> accessed 10 November 2024.

[36] Nairobi Centre for International Arbitration, 'Training & Accreditation' (Nairobi Centre for International Arbitration) <https://ncia.or.ke/training-accreditation/> accessed 10 November 2024.

[37] *Ibid*

[38] *Ibid*

[39] James Nthenya, 'A Critical Analysis of the Legal Framework on Appeals on Domestic Arbitral Awards in Kenya from the High Court' (SSRN, 1 December 2022) **https://ssrn.com/abstract=4290735** accessed 10 November 2024.

[40] White & Case LLP, 'Institutional Arbitration in Africa: Opportunities and Challenges' (White & Case, 2020) <https://www.whitecase.com/insight-our-thinking/institutional-arbitration-africa-opportunities-and-challenges> accessed 10 November 2024.

[41] *Ibid*

[42] International Bar Association, 'Challenges with Recognition and Enforcement of Arbitral Awards in Africa' (International Bar Association, 2021) <https://www.ibanet.org/challenges-with-recognition-enforcement-arbitral-awards-Africa> accessed 10 November 2024.

4. Challenges in Enforcement of Emergency Arbitration Orders in Kenya

The effectiveness of emergency arbitration in Kenya is primarily undermined by enforcement challenges, a hurdle that is also common in other comparable jurisdictions.[43] Under the New York Convention, which Kenya ratified in 1989, only final and binding arbitral awards are eligible for recognition and enforcement across member states.[44] Since emergency arbitration orders are typically interim and not final, they often fall outside the scope of the Convention, creating enforcement gaps that limit the effectiveness of emergency arbitration for parties operating across jurisdictions.[45]

In Kenya, the Arbitration Act, Cap. 49 incorporates aspects of the UNCITRAL Model Law, which provides limited guidance on the enforcement of interim measures issued by emergency arbitrators.[46] Section 18 of the Act grants arbitral tribunals the authority to issue interim measures, but it does not specifically address emergency arbitration or clarify whether emergency orders qualify as enforceable interim measures.[47] This silence has led to inconsistent enforcement practices in Kenyan courts.[48] In some instances, judges have imposed additional procedural requirements, such as re-evaluating the necessity of the order or requiring evidence of reciprocal enforcement in the jurisdiction that issued the order.[49] These procedural hurdles contradict the intended expediency of

---

[43] Francis Kariuki, 'Challenges Facing the Recognition and Enforcement of International Arbitral Awards within the East African Community' (2014) 232 *Dispute Resolution Journal* 233.

[44] United Nations, 'Contracting States' (New York Convention) <https://www.newyorkconvention.org/contracting-states> accessed 10 November 2024.

[45] Nairobi Centre for International Arbitration, 'Training & Accreditation' (Nairobi Centre for International Arbitration) <https://ncia.or.ke/training-accreditation/> accessed 10 November 2024.

[46] Arbitration Act, Cap 49, (Kenya).

[47] Arbitration Act, Cap 49, s 18 (Kenya).

[48] *Ibid*

[49] Kituku, James K. "Facilitating International Arbitration in Kenya: A General Analysis of Arbitration in the Country and International Arbitration in Other Selected Countries." PhD diss., University of Nairobi, 2018.

emergency arbitration, compelling parties to navigate a potentially time-consuming judicial process to have interim orders recognized.[50]

The lack of uniformity in enforcing emergency arbitration orders also poses risks for cross-border disputes.[51] While jurisdictions like Singapore and Hong Kong have enacted legislative reforms that explicitly recognize and enforce emergency arbitration orders, Kenya has not adopted similar measures, placing Kenyan parties at a disadvantage.[52] For instance, when assets or evidence are located in Kenya, foreign parties often struggle to enforce emergency orders, especially if these orders do not meet the "final and binding" criteria under Kenyan law.[53] This creates significant obstacles for businesses relying on emergency arbitration to secure assets or prevent evidence dissipation, as they may need to resort to Kenyan courts for enforcement, potentially losing the speed essential to emergency arbitration.[54]

To address these challenges, legal scholars and arbitration practitioners have recommended amending the Arbitration Act to explicitly recognize emergency arbitration orders as enforceable interim measures.[55] Such reforms could draw from legislative advancements in Singapore, which provide a robust legal basis for

---

[50] Paul Musili Wambua, 'The Challenges of Implementing ADR as an Alternative Mode of Access to Justice in Kenya' (2013) 15 *Alternative Dispute Resolution*.

[51] Edward Nii Adja Torgbor, *A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, with Particular Reference to Current Problems in Kenya* (PhD diss, Stellenbosch University 2013).

[52] 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).

[53] Muigua, David K. "Building legal bridges: Fostering eastern Africa integration through commercial arbitration." (2015).

[54] Kariuki Muigua, 'The Modernisation of Other ADR Processes in Africa: Experience from Kenya and Her 2010 Constitution' in *Fifth SOAS Arbitration in Africa Conference* (2019) 12-14.

[55] Sempasa, Samson L. "Obstacles to international commercial arbitration in African countries." *International & Comparative Law Quarterly* 41, no. 2 (1992): 387-413.

enforcing emergency orders.[56] Kenyan courts could also benefit from targeted training in emergency arbitration procedures to better appreciate their purpose, thereby reducing unnecessary judicial intervention.[57] A judiciary that respects the autonomy and expediency of emergency arbitration would complement an improved arbitration framework in Kenya, increasing its appeal to international parties seeking effective interim relief.[58]

Finally, an international framework addressing the enforceability of emergency arbitration orders could provide a harmonized solution to the cross-border recognition issue.[59] Such a framework could function as an extension of the New York Convention, establishing guidelines specifically for interim measures and emergency orders.[60] Without this, Kenyan parties will continue to face limitations when relying on emergency arbitration in multi-jurisdictional disputes.[61] Thus, while emergency arbitration shows promise as a quick intervention for urgent disputes, its effectiveness in Kenya remains contingent on legislative and judicial reforms that acknowledge and support its unique procedural attributes.[62]

5. Prospects and Recommendations for Emergency Arbitration in Kenya

To harness the full potential of emergency arbitration within Kenya's legal and commercial framework, several legislative, institutional, and practical reforms are

---

[56] *Ibid*

[57] Inshakova, Agnessa O., Evgenia E. Frolova, Elena P. Ermakova, and Sergei Shakirov. "Recognition, enforcement and challenges of decisions of the general court of justice and arbitration of the organization for the harmonization of commercial law in Africa (OHADA)." *Supporting Inclusive Growth and Sustainable Development in Africa-Volume I: Sustainability in Infrastructure Development* (2020): 103-118.

[58] Kariuki Muigua, 'The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya' (2022) 10(3) *ADR Journal*.

[59] Daisy O Ajima, *Making Kenya a Hub for Arbitration of International Financial Services Disputes* (PhD diss, University of Nairobi 2014) <http://erepository.uonbi.ac.ke/handle/11295/75602> accessed 10 November 2024.

[60] *Ibid*

[61] *Ibid*

[62] Kituku, James K. "Facilitating International Arbitration in Kenya: A General Analysis of Arbitration in the Country and International Arbitration in Other Selected Countries." PhD diss., University of Nairobi, 2018.

necessary.[63] As emergency arbitration becomes increasingly relevant for parties involved in cross-border and high-stakes disputes, ensuring its enforceability and operational efficiency in Kenya will go a long way in cementing the country's position as a competitive arbitration hub in Africa.[64] The following recommendations address certain key areas where improvements might enhance the effectiveness and reliability of emergency arbitration in Kenya.

5.1. Legislative Reform to Clarify Enforceability of Emergency Orders

There is an urgent need for the Arbitration Act to explicitly recognize and enforce emergency arbitration orders as binding interim measures.[65] The Act is currently silent on the specific enforceability of emergency arbitration orders, hence creating inconsistent interpretations and reliance on judicial discretion.[66] Kenya could borrow from successful legislative reforms from jurisdictions like Singapore to amend the Arbitration Act to include express provisions that recognize emergency orders as enforceable without the need for judicial re-evaluation.[67]

This would, indisputably, bring the Kenyan arbitration framework into conformity with international best practices and provide a similar legal regime for emergency arbitration.[68] Such a law should prescribe the requirements for enforceability, the binding nature of a provisional order, and the limited

---

[63] *The Lawyer Africa*, 'Prospects and Problems in Emergency Arbitration' (The Lawyer Africa, 9 January 2024) <https://thelawyer.africa/2024/01/09/prospects-and-problems-in-emergency-arbitration/> accessed 10 November 2024.

[64] Mwangi, Anne W. "A Critique of the Contribution of International Commercial Arbitration Toward the Realization of the Right of Access to Justice in Kenya." PhD diss., University of Nairobi, 2017.

[65] Kadima E Wesonga, *The Status and Enforceability of Emergency Arbitration Relief in Kenya* (PhD thesis, University of Nairobi 2018) <http://hdl.handle.net/11295/104606> accessed 10 November 2024.

[66] *Ibid*

[67] *Ibid*

[68] *Journal of CMSD*, 'Vol 112' (2024) <https://journalofcmsd.net/wp-content/uploads/2024/02/Journal-of-cmsd-Vol-112_compressed-1.pdf> accessed 10 November 2024.

discretionary powers of a court to refuse enforcement.[69] By introducing specific statutory provisions, Kenya will eliminate the uncertainty currently holding back emergency arbitration and, as a result, increase the confidence of local and foreign parties in the enforceability of emergency orders granted within the country.[70]

5.2. Enhancing the Nairobi Centre for International Arbitration (NCIA) as a Regional Hub

For emergency arbitration to flourish locally, the NCIA must develop its institutional reputation and build trust among African businesses and legal practitioners.[71] This calls for NCIA to actively promote its emergency arbitration capabilities and demonstrate that it can issue and enforce emergency orders as efficiently as other established international institutions like the ICC and SIAC.[72] One way to achieve this is by establishing partnerships and cooperation agreements with other leading arbitration bodies to help facilitate expertise sharing and strengthen NCIA's procedural frameworks.[73]

Additionally, NCIA should prioritize the training and certification of arbitrators who will decide on emergency arbitration cases.[74] These arbitrators need to develop a deep familiarity with the unique procedural features and legal nuances

---

[69] Kituku, James K. "Facilitating International Arbitration in Kenya: A General Analysis of Arbitration in the Country and International Arbitration in Other Selected Countries." PhD diss., University of Nairobi, 2018.

[70] Kariuki, Francis. "Challenges facing the recognition and enforcement of international arbitral awards within the East African Community." *Dispute Resolution Journal* 232 (2014): 233.

[71] Nairobi Centre for International Arbitration, 'Training & Accreditation' (Nairobi Centre for International Arbitration) <https://ncia.or.ke/training-accreditation/> accessed 10 November 2024.

[72] Nairobi Centre for International Arbitration, 'Training & Accreditation' (Nairobi Centre for International Arbitration) <https://ncia.or.ke/training-accreditation/> accessed 10 November 2024.

[73] Chartered Institute of Arbitrators (Kenya), *Vol 121, 2023* (Chartered Institute of Arbitrators Kenya, March 2024) <https://ciarbkenya.org/wp-content/uploads/2024/03/Vol-121-2023.pdf> accessed 10 November 2024.

[74] Nairobi Centre for International Arbitration, 'Training & Accreditation' (Nairobi Centre for International Arbitration) <https://ncia.or.ke/training-accreditation/> accessed 10 November 2024.

associated with interim measures.[75] Developing a pool of highly trained emergency arbitrators could significantly improve the quality and efficiency of NCIA's emergency procedures, which would make it more attractive, not only to Kenyan parties but also to African businesses seeking reliable, localized emergency arbitration services.[76]

5.3. Promoting Judicial Understanding and Support for Emergency Arbitration

Kenyan courts play a pivotal role in the enforcement of emergency arbitration orders, making judicial familiarity with this mechanism essential for its success.[77] Currently, the lack of specialized knowledge among some judges regarding emergency arbitration can lead to inconsistent enforcement, with courts often re-evaluating the necessity and merits of such interim orders.[78] To address this, Kenya's Judiciary Academy could introduce specialized training programs focusing on international arbitration and the key procedural aspects of emergency arbitration.[79] These programs should delve into the doctrinal foundations of emergency arbitration, the enforceability criteria under the New York Convention, and the limited circumstances under which enforcement may be denied.[80]

Moreover, Kenyan judges should be guided on recognizing emergency orders issued by foreign institutions, understanding the procedural safeguards

---

[75] *Ibid*

[76] *Ibid*

[77] Kenya Law, 'Kenya Law Reports' (Kenya Law) <https://kenyalaw.org/kl/index.php?id=1923> accessed 10 November 2024.

[78] D Onsare, *Impact of Court Intervention on Arbitration in Kenya* (LLM thesis, University of Nairobi 2020) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/166443/OnsareImpactofCourtInterventiononArbitrationinKenyaaThesisSubmittedtotheFacultyofLawoftheUniversityofNairobi.pdf? > accessed 10 November 2024.

[79] Goswami, Dr Parineeta. "Emergency Arbitration Procedures." *Emergency Arbitration Procedures, Satyam Law International* (2024).

[80] Onsare, David A. "Impact of Court Intervention on Arbitration in Kenya a Thesis Submitted to the Faculty of Law of the University of Nairobi." PhD diss., University of Nairobi, 2023.

embedded in such orders, and adhering to principles of judicial restraint.[81] With improved knowledge and a supportive approach to emergency arbitration, Kenyan courts can uphold its autonomy and ensure the expediency critical to its success.[82]

5.4. Developing a Regional Framework for Recognition of Emergency Arbitration Orders

Given the cross-border nature of many disputes involving Kenyan parties, a regional approach to enforcing emergency arbitration orders could offer a harmonized solution to persisting enforceability challenges.[83] Countries could work together through existing frameworks such as the East African Community (EAC) or the African Continental Free Trade Area (AfCFTA) to establish a regional treaty or guidelines specifically for recognizing emergency arbitration orders relating to commercial disputes, among others. Such a framework could set out standards for enforceability that apply across member states.[84]

Such a regional framework would, irrefutably, benefit member states businesses, especially Kenya, by providing certainty that emergency orders issued under recognized arbitration institutions would be enforceable in neighboring countries without any or further judicial scrutiny.[85] This would not only enhance Kenya's standing as an arbitration hub but also promote greater commercial integration in the continent by ensuring that businesses have reliable access to enforceable interim measures across jurisdictions.[86]

---

[81] Zhang, Junmin. *The Enforceability of the Interim Measures Granted by an Emergency Arbitrator in International Commercial Arbitration*. Springer Nature, 2024.

[82] *Ibid*

[83] García Martínez, Álvaro. "Provisional and protective measures in commercial conflict of laws: a jurisdictional study of international litigation and international arbitration." (2022).

[84] Krasulova, Katarina Resar. "Should I Stay or Should I Go: The Evolution of Emergency Arbitration Procedure within Private International Law." *Cardozo Int'l & Comp. L. Rev.* 6 (2022): 819.

[85] *Ibid.*

[86] Bono, Marta. "The International Commercial Arbitration in BRICS: toward a common framework for dispute resolution." (2024).

5.5. Increasing Awareness and Accessibility for Businesses

Raising awareness about the benefits and operational aspects of emergency arbitration among Kenyan businesses is essential to promoting its use.[87] Many firms, particularly small and medium enterprises (SMEs) may be unaware of emergency arbitration as an option or may be deterred by the perceived complexity and costs.[88] NCIA and legal professionals could collaborate to host informational workshops, publish guidance materials, and engage with trade associations to educate businesses about the procedural ease and potential cost effectiveness associated with emergency arbitration as compared to court-ordered interim relief.[89]

Additionally, promoting accessible arbitration packages for SMEs could make emergency arbitration a viable option for a wider range of businesses.[90] By offering tiered fee structures or subsidized emergency arbitration services for smaller companies, Arbitral Institutions could foster a culture of arbitration within Kenya's business community, positioning emergency arbitration as an accessible, efficient and effective mechanism for urgent dispute resolution.[91]

6. Conclusion

Emergency arbitration holds significant potential as a quick and effective solution for urgent disputes, allowing parties to access interim relief without compromising the autonomy and confidentiality that characterize arbitration. However, in Kenya, the full benefits of emergency arbitration are curtailed by legal

---

[87] Hartendorp, Rogier, Tim Lubbers, and Priscilla Haricharan. "Access portals for citizens and small businesses." (2024): 1-280.

[88] Abin, Alireza, Zeinab Haghtalab, and Hadi Ghorbani. "Examining The Provisional Order in Arbitration in Domestic Law, Explaining the Needs, Gaps, And Harms of The Current Situation." *Russian Law Journal* 11, no. 10S (2023): 223-236.

[89] Stipanowich, Thomas, and Zachary Ulrich. "Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators." *Columbia American Review of International Arbitration* 25 (2014).

[90] Rantsane, Ditaba Petrus. *Consumer Arbitration in South Africa and its Effect on the Consumer's Right to Redress and Enforcement*. University of Pretoria (South Africa), 2017.

[91] Ruggie, John. "Protect, respect and remedy: A framework for business and human rights." *Innovations: Technology | Governance | Globalization* 3, no. 2 (2008): 189.

ambiguities, inconsistent enforcement practices, and limited local familiarity with this mechanism. By implementing targeted reforms to the Arbitration Act, enhancing the capabilities of the NCIA, fostering judicial understanding, and considering a regional enforcement framework, Kenya can position itself as a leader in emergency arbitration within East Africa.

List of References

Abin, Alireza, Zeinab Haghtalab, and Hadi Ghorbani. "Examining The Provisional Order in Arbitration in Domestic Law, Explaining the Needs, Gaps, And Harms of The Current Situation." *Russian Law Journal* 11, no. 10S (2023): 223-236.

Addleshaw Goddard, 'Upcoming Changes to SIAC Emergency Arbitration' (Addleshaw Goddard, 2024) https://www.addleshawgoddard.com/en/insights/insights-briefings/2024/dispute-resolution/upcoming-changes-siac-emergency-arbitration/ accessed 10 November 2024.

Alnaber, R., 'Emergency Arbitration: Mere Innovation or Vast Improvement.'

Arbitration International, Volume 35, Issue 4 (2019).

Arbitration Act, Cap 49, (Kenya).

Arbitration Act, Cap 49, s 18 (Kenya).

Barsaiyan, Saksham, 'SSRN-id2710552' (SSRN, 1 January 2020) https://www.scribd.com/document/444760312/SSRN-id2710552 accessed 10 November 2024.

Bono, Marta. "The International Commercial Arbitration in BRICS: toward a common framework for dispute resolution." (2024).

Chartered Institute of Arbitrators (Kenya), *Vol 121, 2023* (Chartered Institute of Arbitrators Kenya, March 2024) https://ciarbkenya.org/wp-content/uploads/2024/03/Vol-121-2023.pdf accessed 10 November 2024.
Civil Application No. NAI 327 of 2009 [2010] eKLR.

Constitution of Kenya, 2010.

Dentons, 'Will the New LCIA Rules Persuade Users That Arbitration Is Preferable to Litigation?' (Dentons, 26 October 2020) https://www.dentons.com/en/insights/articles/2020/october/26/will-the-new-lcia-rules-persuade-users-that-arbitration-is-preferable-to-litigation accessed 10 November 2024.

García Martínez, Álvaro. "Provisional and protective measures in commercial conflict of laws: a jurisdictional study of international litigation and international arbitration." (2022).

Georgios I Zekos, 'Constitution, Courts and Arbitration' in *Advanced Artificial Intelligence and Robo-Justice* (Springer International Publishing 2022) 41.

Goswami, Dr Parineeta. "Emergency Arbitration Procedures." *Emergency Arbitration Procedures*, Satyam Law International (2024).

Gunawan Widjaja, Andryawan and Victoria Liando, '"Emergency Arbitration"; Comparative Analysis' (2020) 10.2991/assehr.k.200917.010 https://doi.org/10.2991/assehr.k.200917.010 accessed 10 November 2024.

Havedal Ipp A, 'Urgency, Irreparable Harm and Proportionality: Seven Years of SCC Emergency Proceedings' (Kluwer Arbitration Blog, 29 June 2017) http://arbitrationblog.kluwerarbitration.com/2017/06/29/urgency-irreparable-harm-and-proportionality-seven-years-of-scc-emergency-proceedings/ accessed 10 November 2024.

Hartendorp, Rogier, Tim Lubbers, and Priscilla Haricharan. "Access portals for citizens and small businesses." (2024): 1-280.

Herbert Smith Freehills, 'The New ICC Arbitration Rules: Promoting a Modern View of International Arbitration' (Herbert Smith Freehills, October 2011) https://www.herbertsmithfreehills.com/notes/arbitration/2011-10/the-new-icc-arbitration-rules-promoting-a-modern-view-of-international-arbitration accessed 10 November 2024.

Inshakova, Agnessa O., Evgenia E. Frolova, Elena P. Ermakova, and Sergei Shakirov. "Recognition, enforcement and challenges of decisions of the general court of justice and arbitration of the organization for the harmonization of commercial law in Africa (OHADA)." *Supporting Inclusive Growth and Sustainable Development in Africa-Volume I: Sustainability in Infrastructure Development* (2020): 103-118.

International Bar Association, 'Challenges with Recognition and Enforcement of Arbitral Awards in Africa' (International Bar Association, 2021)

https://www.ibanet.org/challenges-with-recognition-enforcement-arbitral-awards-Africa accessed 10 November 2024.

International Chamber of Commerce, *ICC Arbitration and ADR Commission Report on Emergency Arbitrator Proceedings* (2019) https://iccwbo.org/wp-content/uploads/sites/3/2019/03/icc-arbitration-adr-commission-report-on-emergency-arbitrator-proceedings.pdf accessed 10 November 2024.

International Chamber of Commerce, *2021 Arbitration Rules* (ICC 2021) https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ accessed 10 November 2024.

James Nthenya, 'A Critical Analysis of the Legal Framework on Appeals on Domestic Arbitral Awards in Kenya from the High Court' (SSRN, 1 December 2022) https://ssrn.com/abstract=4290735 accessed 10 November 2024.

Jeptoo SA, *A Critical Analysis of Arbitral Interim Measures of Protection in Kenya* (PhD thesis, University of Nairobi 2019) http://erepository.uonbi.ac.ke/handle/11295/109790 accessed 10 November 2024.

Juan Carlos Herrera-Lasso, 'International Arbitration in Latin America: Myths and Realities' (2012) 3(1) *American University Business Law Review* https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1041&context=ab accessed 10 November 2024.

Kariuki Muigua, 'The Evolving Alternative Dispute Resolution Practice: Investing in Digital Dispute Resolution in Kenya' (2022) 10(3) *ADR Journal*.

Kariuki Muigua, 'The Modernisation of Other ADR Processes in Africa: Experience from Kenya and Her 2010 Constitution' in *Fifth SOAS Arbitration in Africa Conference* (2019) 12-14.

Kariuki, Francis. "Challenges facing the recognition and enforcement of international arbitral awards within the East African Community." *Dispute Resolution Journal* 232 (2014): 233.

Kenya Law, 'Kenya Law Reports' (Kenya Law) https://kenyalaw.org/kl/index.php?id=1923 accessed 10 November 2024.

Kituku, James K. "Facilitating International Arbitration in Kenya: A General Analysis of Arbitration in the Country and International Arbitration in Other Selected Countries." PhD diss., University of Nairobi, 2018.

Kluwer Arbitration Blog, 'The 2023 SIAC Draft Rules: Raising the Bar for Efficiency' (Kluwer Arbitration Blog, 26 October 2023) https://arbitrationblog.kluwerarbitration.com/2023/10/26/the-2023-siac-draft-rules-raising-the-bar-for-efficiency/ accessed 10 November 2024.

Krasulova, Katarina Resar. "Should I Stay or Should I Go: The Evolution of Emergency Arbitration Procedure within Private International Law." *Cardozo Int'l & Comp. L. Rev.* 6 (2022): 819.

LCIA, 'LCIA Arbitration Rules 2020' (LCIA, 2020) https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx accessed 10 November 2024.

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." (2019).

Mattli W, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) 55(4) *International Organization* 919 http://www.jstor.org/stable/3078620 accessed 10 November 2024.

Muigua, David K. "Building legal bridges: Fostering eastern Africa integration through commercial arbitration." (2015).

Muigua K, 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya' (Paper presented at the Chartered Institute of Arbitrators course on "Advocacy in Mediation and Arbitral Proceedings", 5 February 2009).

Mwangi, Anne W. "A Critique of the Contribution of International Commercial Arbitration Toward the Realization of the Right of Access to Justice in Kenya." PhD diss., University of Nairobi, 2017.

Nairobi Centre for International Arbitration, 'Nairobi Centre for International Arbitration' (NCIA) https://ncia.or.ke/ accessed 10 November 2024.

Nairobi Centre for International Arbitration, 'Training & Accreditation' (Nairobi Centre for International Arbitration) https://ncia.or.ke/training-accreditation/ accessed 10 November 2024.

Norton Rose Fulbright, 'Emergency Arbitrators in Singapore' (Norton Rose Fulbright, 12 October 2017) https://www.nortonrosefulbright.com/en-ke/knowledge/publications/0c310fce/emergency-arbitrators-in-singapore accessed 10 November 2024.

Onsare, David A. "Impact of Court Intervention on Arbitration in Kenya a Thesis Submitted to the Faculty of Law of the University of Nairobi." PhD diss., University of Nairobi, 2023.

Paul Musili Wambua, 'The Challenges of Implementing ADR as an Alternative Mode of Access to Justice in Kenya' (2013) 15 *Alternative Dispute Resolution*.
Rantsane, Ditaba Petrus. *Consumer Arbitration in South Africa and its Effect on the Consumer's Right to Redress and Enforcement*. University of Pretoria (South Africa), 2017.

Ruggie, John. "Protect, respect and remedy: A framework for business and human rights." *Innovations: Technology | Governance | Globalization* 3, no. 2 (2008): 189.

Sempasa, Samson L. "Obstacles to international commercial arbitration in African countries." *International & Comparative Law Quarterly* 41, no. 2 (1992): 387-413.

Stipanowich, Thomas, and Zachary Ulrich. "Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators." *Columbia American Review of International Arbitration* 25 (2014).

The Lawyer Africa, 'Definition and Regulation of Emergency Arbitration' (The Lawyer Africa, 9 January 2024) https://thelawyer.africa/2024/01/09/definition-and-regulation-of-emergency-arbitration/#:~:text=Under%20the%20International%20Chamber%20of,an%20application%20for%20such%20measures36 accessed 10 November 2024.

United Nations, 'Contracting States' (New York Convention) https://www.newyorkconvention.org/contracting-states accessed 10 November 2024.

Uría Menéndez, 'Singapore's Recipe for Becoming a Top International Arbitration Hub' (Uría Menéndez, 20 December 2019) https://www.uria.com/en/publicaciones/8662-singapores-recipe-for-becoming-a-top-international-arbitration-hub accessed 10 November 2024.

Wasel & Wasel Arbitrator Services Inc., 'A Breakdown of Emergency Arbitrations' (Lexology, 8 November 2021) https://www.lexology.com/library/detail.aspx?g=34ea291c-af8e-4605-8516-5075521f0e98 accessed 10 November 2024.

White & Case LLP, 'Institutional Arbitration in Africa: Opportunities and Challenges' (White & Case, 2020) https://www.whitecase.com/insight-our-thinking/institutional-arbitration-africa-opportunities-and-challenges accessed 10 November 2024.

WilmerHale, 'International Arbitration: Issues for the Future' (WilmerHale, 2013) https://www.wilmerhale.com/-/media/147a609172e94fd18eb38ecc89ace662.pdf accessed 10 November 2024.

Zhang, Junmin. *The Enforceability of the Interim Measures Granted by an Emergency Arbitrator in International Commercial Arbitration.* Springer Nature, 2024.

The Role of the Prosecution in Facilitating ADR in Terrorism-Related Cases: A Means to Foster Disengagement, De-radicalization, Rehabilitation and Reintegration

By: Michael Sang [*]

Abstract

This paper examines the role of the prosecution in facilitating Alternative Dispute Resolution (ADR) in terrorism-related cases, focusing on Kenya's Disengagement, De-radicalization, Rehabilitation, and Reintegration (DDRR) Programme. It explores the legal and policy frameworks, challenges, lessons, and proposals aimed at enhancing the prosecution's effectiveness in integrating ADR into counterterrorism efforts. Drawing lessons from comparative experiences and international best practices, the paper proposes measures to strengthen the prosecution's role, including legal reforms, trust-building initiatives, whole-of-community approaches, and governmental and non-state actor cooperation. The paper emphasizes the importance of collaboration among stakeholders and the need for tailored approaches to address the complexities of terrorism cases. Overall, it advocates for a comprehensive approach that balances justice, human rights, and prevention of radicalization.

Keywords*: Prosecution, Alternative Dispute Resolution (ADR), Terrorism, Disengagement, De-radicalization, Rehabilitation, Reintegration.*

1. Introduction

Terrorism remains a persistent threat to global peace and security, posing complex challenges for law enforcement agencies, judicial systems, and societies at large.[1]

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

[1] ESAAMLG (2022), *Anti-money laundering and counter-terrorist financing measures - Kenya, Second Round Mutual Evaluation Report*, ESAAMLG, Dar es Salaam available at http://www.esaamlg.org/reports/me.php accessed 19 March 2024

In the pursuit of justice and security, traditional approaches to counterterrorism have often focused on prosecution and punishment.[2] However, the evolving landscape of terrorism calls for innovative and holistic strategies that go beyond punitive measures.[3] The concept of Alternative Dispute Resolution (ADR) has emerged as a promising avenue for addressing terrorism-related cases.[4] ADR encompasses a range of methods, such as mediation, negotiation, and rehabilitation, aimed at resolving conflicts and reintegrating individuals back into society[5]. In the context of terrorism, ADR offers an opportunity to not only adjudicate cases but also to address the underlying factors that lead individuals to radicalization and violence.[6]

This paper delves into the role of the prosecution in facilitating ADR in terrorism-related cases, with a specific focus on the Kenyan context. Kenya, like many other countries, faces the challenge of combating terrorism while ensuring respect for human rights and promoting sustainable peace. The Office of the Director of Public Prosecutions (ODPP) plays a pivotal role in this process, shaping the legal and policy frameworks that guide the prosecution of terrorism offenders.[7] Through an examination of legal and policy frameworks, case studies, comparative experiences, and stakeholder perspectives, this paper aims to shed light on the opportunities and challenges faced by the prosecution in implementing ADR in terrorism cases. Drawing on lessons from international practices, particularly from countries such as the United States, the United Kingdom, Canada, and others, it seeks to provide insights and recommendations for strengthening the role of the prosecution in Kenya's Disengagement, De-radicalization, Rehabilitation, and Reintegration (DDRR) Programme.

---

[2] Ibid
[3] Ibid
[4] Ibid
[5] Ibid
[6] Ibid
[7] Ibid

The paper is structured as follows: Firstly, it provides an overview of the legal and policy framework for ADR in terrorism-related cases, including Kenya's Diversion Policy, Plea Bargaining Guidelines, Deferred Prosecution Agreements, and Inter-Agency Cooperation Guidelines. Secondly, it examines the challenges faced by the prosecution in the DDRR Programme, such as gaps in the legal framework, inherent trust deficits, varying individual needs for rehabilitation, and international cooperation failures. Subsequently, the paper presents proposals for enhancing the role of the prosecution in facilitating ADR, drawing lessons from comparative experiences. These proposals include legal and policy reforms for individualized risk and needs assessment, investing in trust-building initiatives, adopting whole-of-community approaches, and promoting governmental and non-state actor cooperation. Lastly, the conclusion synthesizes key findings and recommendations, emphasizing the importance of a multi-faceted approach that integrates legal, policy, and practical considerations. By exploring the intersection of law, prosecution strategies, and societal needs, this paper aims to contribute to the ongoing discourse on effective counterterrorism measures that uphold the rule of law, human rights, and long-term stability.

In navigating the complexities of terrorism cases, the prosecution stands at the forefront of efforts to seek justice, promote reconciliation, and prevent future radicalization. Through a comprehensive exploration of the role of the prosecution in facilitating ADR, this paper seeks to illuminate pathways towards a more effective and sustainable approach to addressing terrorism-related challenges in Kenya and beyond.

2. Legal and Policy Framework for Using ADR in the Rehabilitation and Reintegration of Terrorism Offenders in Kenya

2.1 National Strategy to Counter Violent Extremism, 2016

The National Strategy to Counter Violent Extremism in Kenya, established in 2016, was a response to the significant threat posed by terrorist groups like Al Shabaab

and ISIS (Dae'sh) in the region[8]. Kenya faced a growing threat from terrorist organizations, particularly Al Shabaab and ISIS, since the 1998 bombing of the US Embassy in Nairobi.[9] The primary goal was to rally all sectors of Kenyan society to reject violent extremist ideologies and actions, thereby reducing the pool of individuals susceptible to radicalization.[10] The strategy was developed through extensive collaboration across various sectors, including social, economic, political, and religious.[11]

It encourages patriotism, adherence to the Kenyan way of life as per the Constitution, and rejection of violent extremist ideologies.[12] It advocates for developing early warning and intervention tools against radicalization and supporting disengagement from terrorist groups and promoting de-radicalization and reintegration.[13] It calls for coordinated efforts from all stakeholders, Sustained support from national and local leaders, availability of resources for CVE initiatives and Evidence-driven and locally relevant approaches.[14] Its broad-Based Priorities include: Countering violent extremist ideologies; Promoting patriotism; supporting communities targeted by extremists; early intervention measures; Rehabilitation and reintegration of former extremists; Non-coercive approaches to CVE; Utilizing law enforcement for deterrence and prosecution; Research on extremist ideologies and methodologies and; providing guidelines for stakeholder engagement in CVE.[15]

The strategy outlined nine work pillars to engage stakeholders effectively:
1. Psychosocial Pillar: Addressing the needs of radicalized individuals and their

[8] National Strategy to Counter Violent Extremism, 2016
[9] Ibid
[10] Ibid
[11] Ibid
[12] Ibid
[13] Ibid
[14] Ibid
[15] Ibid

families.

2. Education Pillar: Addressing radicalization in learning institutions.
3. Political Pillar: Engaging political leaders at all levels.
4. Security Pillar: Ensuring legal measures against radicalization.
5. Faith-Based and Ideological Pillar: Countering extremist ideologies.
6. Training and Capacity Building Pillar: Equipping stakeholders with necessary skills.
7. Arts and Culture Pillar: Protecting and promoting Kenya's heritage.
8. Legal and Policy Pillar: Establishing supportive legal frameworks.
9. Media and Online Pillar: Using media for CVE campaigns and countering online radicalization.[16]

It focuses on: Building capabilities to rehabilitate and reintegrate former extremists into society; distinction between national and local levels for effective planning and implementation; Working closely with local committees and civil society; Evidence-based approach rooted in local contexts and communities; Involving government bodies, leaders, partners, religious figures, civil society, private sector, and researchers and; National Counter Terrorism Centre (NCTC) to assess the impact of programs and initiatives on violent extremism. NCTC leads coordination efforts among state, non-state, and international partners.[17]This strategy reflects Kenya's commitment to addressing the root causes of radicalization and promoting a resilient society against the threats posed by terrorist organizations.[18]

[16] Ibid
[17] Ibid
[18] Ibid

2.2 Office of the Director of Public Prosecution Policies on Alternatives to Prosecution

2.2.1 Policy on Diversion 2019

Historically, Kenya's criminal justice system focused on retributive justice, but modern practices emphasize restitution, restoration, and reintegration.[19] The aim is to consider the impact of punishment on both individuals and society.[20] The previous approach of prosecuting all cases has led to a backlog of cases and increased numbers of suspects held in custody.[21] This strains resources, particularly for those unable to meet bail conditions, which is exacerbated for minor offenses.[22] The ODPP has introduced the Diversion Policy as a novel approach.[23] This policy allows prosecutors to divert cases from the court process, resolving matters out of court based on merit and agreed structures.[24]

Diversion offers offenders a second chance in life.[25] It allows individuals to avoid a criminal record while still being held accountable for their actions.[26] The focus is on providing options that range from issuing apologies to compensation for losses.[27] More complex options include rehabilitation and counseling services for offenders.[28] Diversion helps the ODPP manage case backlog in the judicial system.[29] It reduces overcrowding in prisons by diverting cases away from incarceration.[30] Diversion enables victims and offenders to settle cases outside of

[19] ODPP Diversion Policy, 2019
[20] Ibid
[21] Ibid
[22] Ibid
[23] Ibid
[24] ODPP Diversion Policy, 2019
[25] Ibid
[26] Ibid
[27] Ibid
[28] Ibid
[29] Ibid
[30] Ibid

court, promoting reconciliation.[31] The Policy on Diversion aligns with Article 159 of the Constitution of Kenya 2010, which emphasizes reconciliation and alternative dispute resolution methods.[32]

The Policy on Diversion represents a significant shift towards a more rehabilitative and restorative approach to justice in Kenya. By offering alternatives to prosecution, it aims to reduce the burden on the judicial system, particularly in dealing with minor offenses that contribute to the backlog.[33] Diversion acknowledges the need for individuals to take responsibility for their actions while providing avenues for rehabilitation and reconciliation.[34] This approach not only benefits offenders by offering them a chance to avoid a criminal record but also supports victims by providing opportunities for restitution and resolution outside of lengthy court proceedings.[35]

2.2.2 Plea Bargaining Guidelines 2019

The Plea Bargaining Guidelines were developed in line with Section 137A-O of the Criminal Procedure Code (CAP 75) and the Plea Bargaining Rules gazetted on February 14, 2018.[36] They serve to elaborate on these rules and are meant to guide prosecutors in the best practices and application of plea bargaining within the Kenyan context.[37] Plea bargaining has been a theoretical part of the Kenyan criminal justice system, but its use has been limited.[38] The aim is to resolve cases through alternative means rather than prosecuting every case to trial.[39] The goal is to ensure justice is done, parties are treated fairly, and resources are used

[31] Ibid
[32] Ibid
[33] Ibid
[34] Ibid
[35] Ibid
[36] ODPP Plea Bargaining Guidelines, 2019
[37] Ibid
[38] Ibid
[39] Ibid

efficiently.[40] Recognizing that remandees may stay in prison custody during proceedings, the guidelines aim to embrace creative provisions in the law to decongest prisons.[41]

The accused may agree to plead guilty in exchange for concessions from the prosecution.[42] This could involve pleading to some but not all charges, a different or less serious offense, or agreeing to testify against others.[43] The guidelines outline the procedure for prosecutors to conduct discussions with the accused or their legal representative.[44] Transparency, accountability, integrity, consistency, predictability, and credibility are emphasized to ensure public and judicial confidence.[45] While the burden is on the prosecution to prove a case beyond reasonable doubt, the guidelines encourage advising clients to consider plea bargains, especially with overwhelming evidence. The ODPP has discretionary powers to accept plea bargain proposals.[46]

Plea bargaining aims to expedite the justice process by reaching agreements on acceptable pleas and potential sentences swiftly.[47] The guidelines emphasize the prosecutor's role in deciding whether or not to charge and which charges to prefer, guided by principles outlined in the National Prosecution Policy.[48] Transparency, fairness, and public confidence are key aspects of the plea bargaining process, ensuring that decisions are made accountably and ethically.[49] By providing an avenue for resolving cases without lengthy trials, the guidelines contribute to

[40] Ibid
[41] ODPP Plea Bargaining Guidelines, 2019
[42] Ibid
[43] Ibid
[44] Ibid
[45] Ibid
[46] Ibid
[47] Ibid
[48] Ibid
[49] Ibid

reducing overcrowding in prisons.[50] Plea bargaining aligns with global trends in criminal justice, focusing on rehabilitation and resolution rather than solely punitive measures.[51] The guidelines are anchored in the Criminal Procedure Code and are applicable to both public and private prosecutors, ensuring uniformity in approach.[52] By offering a forum for efficient dispensation of justice, the ODPP aims to inspire confidence in the criminal justice system among citizens.[53]

2.2.3 Policy on Deferred Prosecution Agreements

The ODPP introduced Deferred Prosecution Agreements (DPAs) as an alternative to traditional prosecution, pursuant to Article 157 and 159 of the Constitution of Kenya, 2010, the National Prosecution Policy 2015, and the Diversion Policy 2019.[54] DPAs allow offenders to defer prosecution for a set period if they meet specific conditions.[55] This is particularly applicable to certain classes of offenses, such as economic crimes.[56] Offenders agree to terms such as cooperation with investigations, admission of facts, penalties, fines, restitutions, and other remedial actions.[57] If an offender commits similar offenses during the DPA period or breaches its terms, the ODPP can prosecute the offender for those crimes, including the ones subject to the DPA.[58] DPAs are intended to result from voluntary cooperation between the offender and the ODPP.[59] Once the ODPP

---

[50] Ibid
[51] Ibid
[52] Ibid
[53] Ibid
[54] Bowmans (2020) 'Deferred Prosecution Agreements as an alternative to the prosecution of corporate organizations in Kenya: fresh jurisprudence' available at https://bowmanslaw.com/insights/deferred-prosecution-agreements-as-an-alternative-to-the-prosecution-of-corporate-organizations-in-kenya-fresh-jurisprudence/#:~:text=The%20Features%20of%20the%20DPA&text=It%20is%20taken%20as%20an,crimes%20subject%20to%20the%20DPA. Accessed 18 March 2024
[55] Ibid
[56] Ibid
[57] Ibid
[58] Ibid
[59] Ibid

certifies the case for prosecution, either party can issue a notice to enter a DPA.[60] Parties negotiate the terms, and the ODPP monitors compliance or appoints a third party for monitoring.[61]

Benefits of DPAs include: Enhancing good governance through compliance; saving taxpayers money that would be spent on trials and post-conviction processes; Quick disposal of cases and; Avoidance of ongoing litigation and potential damage to an entity's brand for corporate offenders.[62] Implications and Concerns include: Uncertainty about who decides breaches of a DPA may lead to further litigation; Concerns about the level of court involvement for independent scrutiny; Questions about whether the ODPP can commence fresh proceedings for offenses covered by the DPA need clarification; Statements of facts under the DPA could be treated as formal admissions in subsequent proceedings; DPAs may encroach on judicial functions like adjudging guilt and imposing sentences and; Balancing public interest in publishing DPA details with the need for confidentiality, especially for certain crimes.[63]

DPAs offer an efficient and effective tool for resolving cases without the need for lengthy trials. Offenders must comply with specific terms, including cooperation with investigations and taking remedial actions.[64] DPAs allow for tailored agreements based on individual cases and circumstances.[65] There is a need for clear guidelines on enforcement, judicial oversight, subsequent prosecutions, and the effect of admissions. The ODPP's role in the DPA process, including its quasi-judicial functions, needs to be clearly defined. Lawyers need to carefully advise their clients on the risks and benefits of entering into a DPA.[66]

---

[60] Ibid
[61] Ibid
[62] Ibid
[63] Ibid
[64] Ibid
[65] Ibid
[66] Ibid

2.3 Inter-Agency Guidelines on Cooperation and Collaboration in the Investigation and Prosecution of Terrorism and Terrorism Financing, 2022

These guidelines were issued under Section 50(3) of the Office of the Director of Public Prosecutions Act No. 2 of 2013, allowing the ODPP to work with law enforcement agencies to create guidelines for investigating crimes. With the evolving trends in crime, especially terrorism, there is a need for a coordinated approach in responding to these emerging threats.[67] The guidelines aim to address the challenges posed by disjointed approaches to serious crimes like terrorism and terrorism financing.[68] The guidelines facilitate a Multi-Agency/ Multi-Stakeholder/ Multi-Sectoral approach to investigation and prosecution. They bring together more than ten law enforcement agencies responsible for investigating terrorism and terrorism financing.[69]

The Government of Kenya prioritizes the safety and security of its citizens and visitors.[70] These guidelines align with the commitment to fight terrorism and terrorism financing by ensuring a collaborative and coordinated effort among various agencies.[71] This ensures the optimal use of shared information between law enforcement agencies for efficient and effective prosecution.[72] Familiarity among law enforcement agencies improves their capacity to handle emerging issues during investigations and prosecution, particularly in crisis situations.[73] The DPP, under Section 50(3) of the ODPP Act, is mandated to issue guidelines on cooperation and collaboration in investigations upon consultation with the Inspector-General of Police and other investigative agencies. The guidelines provide a framework and model for cooperation, collaboration, and coordination

---

[67] Inter-Agency Guidelines on Cooperation and Collaboration in the Investigation and Prosecution of Terrorism and Terrorism Financing, 2022

[68] Ibid

[69] Inter-Agency Guidelines on Cooperation and Collaboration in the Investigation and Prosecution of Terrorism and Terrorism Financing, 2022

[70] Ibid

[71] Ibid

[72] Ibid

[73] Ibid

among agencies involved in countering terrorism and terrorism financing. They are based on the primary laws governing the mandate and operations of each agency.[74]

2.4 Disengagement, De-radicalization, Rehabilitation and Reintegration (DDRR) Programme

The National Counter Terrorism Centre (NCTC), the Danish Embassy in Kenya, and the International Organization for Migration (IOM) jointly organized the Breakfast Forum on Disengagement and Reintegration as a side event at the African Regional High-level Conference on Counterterrorism and the Prevention of Violent Extremism on 11 July 2019.[75] The forum aimed to highlight field and practice-based models in disengagement and reintegration, focusing on government-to-government cooperation, multi-agency coordination, crime prevention, civil society advocacy, and social cohesion and protection initiatives.[76]

Key Points from the Forum:

A stakeholder shared examples of IOM's 25 years of experience in reintegration. This included assisting governments in Nigeria with former Boko Haram members, in Somalia with former Al Shabaab individuals during transition, and in the Lake Chad Basin for rehabilitation and reintegration. Another highlighted the lessons from the Kenya and Denmark partnership on disengagement for former terrorist fighters. The Danish model emphasized equivalence of mandates, buy-in of senior management, trust and competence, multi-stakeholder engagement, and partnership towards institutionalization. Another explained the NCTC's Disengagement, De-radicalization, Rehabilitation, and Reintegration

---

[74] Ibid

[75] International Organization for Migration (IOM) (2019) 'Breakfast Forum on Disengagement and Reintegration' available at https://www.iom.int/news/breakfast-forum-disengagement-and-reintegration accessed 18 March 2024

[76] International Organization for Migration (IOM) (2019) 'Breakfast Forum on Disengagement and Reintegration' available at https://www.iom.int/news/breakfast-forum-disengagement-and-reintegration accessed 18 March 2024

(DDRR) model. This model is anchored on UN Security Council Resolutions (2396 and 2178) and national strategies, focusing on an individualized approach alongside risk assessments of the community. Key lessons included training, language use, mentorship, information sharing among partners, and engagement of non-state actors.[77]

The Reintegration dimension through the Programme on Human Security and Stabilization (PHSS) emphasizes partnership with the government (NCTC and counties) and civil society (like the Coast Interfaith Council of Clerics - CICC). The comprehensive approach addresses prevention, countering violent extremism, and social protection. The forum highlighted the Integrated Border Management lens as part of the IOM comprehensive approach. It highlighted the need for cross-border and international cooperation against transnational crimes, noting the exploitation of migration routes by terrorist and crime networks. Voices in the plenary discussed learning from the Kenya model, the diverse needs of former terrorist fighters, women's roles, interfaith experiences, and success stories like a woman beneficiary setting up a hair salon and training others for alternative options.[78]

3. The Role of the Prosecution in Facilitating ADR in the DDRR Programme

3.1 Referral of Terrorism Suspects to the DDRR Programme

In the context of the Disengagement, De-radicalization, Rehabilitation, and Reintegration (DDRR) Programme, the referral of terrorism suspects to this program involves the role of the prosecution in facilitating ADR.[79] The referral of terrorism suspects to the DDRR Programme is a crucial step in the process of

[77] Ibid
[78] Ibid
[79] ESAAMLG (2022), *Anti-money laundering and counter-terrorist financing measures - Kenya, Second Round Mutual Evaluation Report*, ESAAMLG, Dar es Salaam available at http://www.esaamlg.org/reports/me.php accessed 19 March 2024

addressing radicalization and reintegrating individuals back into society.[80] The prosecution plays a significant role in this referral process, particularly in cases where suspects have been charged with terrorism-related offenses.[81]

The prosecution, in collaboration with law enforcement agencies and other stakeholders, identifies individuals suspected of involvement in terrorism-related activities.[82] These suspects may range from active participants to those on the fringes of extremist groups.[83] The prosecution assesses the cases of these suspects to determine their eligibility for the DDRR Programme.[84] Factors considered include the level of involvement in extremist activities, willingness to disengage, and potential for rehabilitation.[85] The referral process is guided by the legal framework governing terrorism offenses and the DDRR Programme. The prosecution collaborates closely with the National Counter Terrorism Centre (NCTC), the International Organization for Migration (IOM), and other stakeholders involved in the DDRR Programme. This collaboration ensures a comprehensive approach to the referral process, including information sharing and coordination of efforts.[86]

Referring terrorism suspects to the DDRR Programme can be seen as an alternative to traditional prosecution. It recognizes that some individuals, especially those on the periphery of extremist groups or with limited involvement, may benefit more from rehabilitation and reintegration efforts rather than lengthy criminal proceedings.[87] The prosecution continues to monitor the progress of referred

---

[80] Ibid
[81] ESAAMLG (2022), *Anti-money laundering and counter-terrorist financing measures - Kenya, Second Round Mutual Evaluation Report*, ESAAMLG, Dar es Salaam available at http://www.esaamlg.org/reports/me.php accessed 19 March 2024
[82] Ibid
[83] Ibid
[84] Ibid
[85] Ibid
[86] Ibid
[87] Ibid

individuals within the DDRR Programme.[88] This includes ensuring compliance with program requirements, such as participation in de-radicalization sessions, vocational training, and community reintegration efforts.[89] One challenge for the prosecution is to strike a balance between security concerns and the rehabilitation of terrorism suspects.[90] Referral to the DDRR Programme should not compromise national security but should aim to prevent future radicalization and violent extremism.[91] Each referral is treated on a case-by-case basis, considering the unique circumstances and risks posed by the individual. The prosecution exercises discretion in determining the suitability of referral, taking into account public safety and the potential for successful reintegration.[92]

3.2 Cooperation with Multi-Agency Partners

Cooperation with multi-agency partners is essential for the prosecution's role in facilitating ADR in the DDRR Programme.[93] The prosecution understands that addressing radicalization and reintegrating individuals involved in terrorism-related activities requires a collaborative and multi-agency approach.[94] Cooperation with various partners is crucial for the success of ADR within the DDRR Programme.[95] The prosecution collaborates closely with law enforcement agencies such as the police, intelligence services, and the National Counter Terrorism Centre (NCTC).[96] These agencies often play a significant role in identifying and referring individuals to the DDRR Programme.[97]

---

[88] Ibid
[89] Ibid
[90] Ibid
[91] Ibid
[92] Ibid
[93] Ibid
[94] Ibid
[95] Ibid
[96] Ibid
[97] Ibid

The NCTC is a key partner for the prosecution.[98] It serves as the coordinating body for counter-terrorism efforts and plays a central role in the implementation of the DDRR Programme.[99] The prosecution works closely with the NCTC to ensure effective referral processes and program implementation.[100] Cooperation with international organizations, such as the IOM, can provide valuable expertise and resources.[101] These organizations often have experience in similar programs globally and can contribute to best practices in ADR and rehabilitation. Engaging with civil society organizations (CSOs) is important for community outreach and support.[102] CSOs may be involved in providing counseling, mentorship, and reintegration services to individuals in the DDRR Programme. The prosecution collaborates with these organizations to ensure a holistic approach to ADR.[103]

Multi-agency cooperation extends to social services agencies that provide support in areas such as mental health, education, vocational training, and family counseling.[104] These services are integral to the rehabilitation and reintegration process. Effective cooperation involves sharing relevant information among agencies while respecting privacy and legal frameworks.[105] Information sharing helps in the assessment of individuals for the DDRR Programme and ensures a comprehensive understanding of their background and needs.[106] Collaboration with partners includes joint training sessions and capacity-building efforts.[107] This ensures that all stakeholders, including prosecutors, law enforcement, and social service providers, are equipped with the necessary skills and knowledge to

[98] Ibid
[99] Ibid
[100] Ibid
[101] Ibid
[102] Ibid
[103] Ibid
[104] Ibid
[105] Ibid
[106] Ibid
[107] Ibid

support ADR initiatives effectively.[108] The prosecution adopts a "whole-of-government" approach, recognizing that successful ADR and reintegration require the involvement of various government departments and agencies. This approach ensures a coordinated response to radicalization and terrorism.[109]

3.3 Challenges Faced by the Prosecution in the DRRR Programme

3.3.1 Gaps in the Legal Framework

One of the challenges is the lack of clarity in the legal framework regarding the place of ADR and the specific role of the ODPP in facilitating it.[110] There is a need for clear guidelines or laws outlining how ADR should be utilized in terrorism-related cases and the extent of ODPP's involvement in the process.[111]

There is an urgent need to recognize and codify the critical role of psychosocial reports in guiding the handling of terrorism-related offenders. Currently, there may be ambiguity or inconsistency in how these reports are used and valued in judicial and prosecutorial practice.[112] The psychosocial report should be institutionalized to operate similarly to psychological reports used in cases like murder, providing valuable insights into the individual's rehabilitation needs and risk assessment.[113] To address this challenge, there is a call for the institutionalization of psychosocial reports within judicial and prosecutorial

---

[108] Ibid

[109] Ibid

[110] United Nations Office on Drugs and Crime (UNODC) 'Kenya Training Manual on Human Rights and Criminal Justice Responses to Terrorism' available at https://css.unodc.org/documents/terrorism/Publications/Kenya%20HR%20manual/Kenya_Manual_e-book.pdf accessed 21 March 2024

[110] Ibid

[111] United Nations Office on Drugs and Crime (UNODC) 'Kenya Training Manual on Human Rights and Criminal Justice Responses to Terrorism' available at https://css.unodc.org/documents/terrorism/Publications/Kenya%20HR%20manual/Kenya_Manual_e-book.pdf accessed 21 March 2024

[112] Ibid

[113] Ibid

practices. This means creating clear guidelines or legal provisions that mandate the use of these reports, outlining their significance in decision-making processes related to the prosecution, sentencing, and rehabilitation of terrorism offenders.[114] Comparing psychosocial reports to psychological reports in murder cases highlights the need for similar importance and consideration in terrorism cases. Just as psychological reports help judges and prosecutors understand the mental state and background of a murder suspect, psychosocial reports can provide insights into radicalization factors, rehabilitation potential, and risk assessment for terrorism offenders. By codifying the role of psychosocial reports, the legal framework can enhance prosecutorial decision-making in terrorism cases. Prosecutors would have clearer guidelines on how to consider and utilize these reports, leading to more informed decisions on whether to pursue prosecution, recommend ADR, or determine appropriate sentencing and rehabilitation measures.[115]

3.3.2 The Inherent Trust Deficit

One significant challenge is the lack of trust from the accused individuals who are part of the DDRR Programme.[116] These individuals, often former terrorists or radicalized individuals, may harbor deep-seated mistrust towards the prosecution, law enforcement, and the government.[117] This lack of trust can hinder their willingness to engage in the programme fully, cooperate with authorities, or adhere to the terms of their rehabilitation.[118] Similarly, there may be a lack of trust from security forces towards the accused individuals who are undergoing the DDRR Programme.[119] Law enforcement agencies and security personnel may view these individuals with suspicion, considering their past involvement in terrorism-

[114] Ibid
[115] Ibid
[116] Ibid
[117] Ibid
[118] Ibid
[119] Ibid

related activities. This mistrust can lead to challenges in effective communication, cooperation, and monitoring of the individuals' progress in the programme.[120]

The community where the DDRR Programme participants are reintegrating also plays a crucial role.[121] If the community perceives these individuals as threats or remains distrustful of their intentions post-rehabilitation, it can create significant barriers to successful reintegration.[122] Community support is vital for the success of reintegration efforts, including access to employment, housing, and social acceptance.[123] The inherent trust deficit among the accused, security forces, and the community can significantly impact the success of the DDRR Programme.[124] Lack of trust may lead to resistance or non-compliance from the accused, challenges in monitoring and supervision, and difficulties in gaining community support for reintegration efforts.[125] Addressing the trust deficit becomes a key challenge for the prosecution in the DDRR Programme.[126] Efforts to build trust through transparent communication, fair treatment, and demonstrating the effectiveness of the rehabilitation process are essential.[127] This may involve engagement with community leaders, religious institutions, and civil society organizations to foster understanding and support for the programme.[128]

3.3.3 Varying Individual Needs for Rehabilitation and Reintegration

Individuals who have been radicalized or involved in terrorism-related activities often exhibit varying degrees of radicalization.[129] Some may have deep-rooted

---

[120] Ibid
[121] Ibid
[122] Ibid
[123] Ibid
[124] Ibid
[125] Ibid
[126] Ibid
[127] Ibid
[128] Ibid
[129] Center on Global Counterterrorism Cooperation and IGAD Security Sector Program (2012) 'Fighting Terror through Justice: What Are the Existing Arrangements for Legal

extremist ideologies, while others may have been influenced to a lesser extent.[130] This variability in radicalization levels requires a nuanced approach to rehabilitation and reintegration.[131] Participants in the DRRR Programme come from diverse backgrounds and may have had different experiences that contributed to their radicalization.[132] Factors such as socioeconomic status, education, family background, and personal trauma can all influence their needs for rehabilitation and reintegration.[133]

Many individuals in the DRRR Programme may have underlying mental health issues resulting from their experiences, including trauma, PTSD (Post-Traumatic Stress Disorder), depression, or anxiety.[134] Addressing these mental health needs alongside rehabilitation efforts is crucial but adds complexity to the process.[135] The process of reintegration into communities varies greatly depending on factors such as the community's acceptance, the presence of support networks, availability of employment, and housing opportunities.[136] Some individuals may face stigma and discrimination upon return, making successful reintegration challenging.[137] The challenge lies in the impracticality of implementing a uniform, one-size-fits-all model for rehabilitation and reintegration. Each participant requires a tailored approach that considers their specific needs, circumstances, and level of radicalization.[138]

Cooperation against Terrorism in the IGAD Subregion?' *Global Center on Cooperative Security* available at https://www.jstor.org/stable/pdf/resrep20388.9.pdf accessed 21 March 2024

[130] Ibid
[131] Ibid
[132] Ibid
[133]Ibid
[134] Ibid
[135] Ibid
[136] Ibid
[137] Ibid
[138] Ibid

Providing individualized rehabilitation plans requires significant resources, including trained professionals such as psychologists, social workers, and counselors.[139] The availability of such resources may be limited, making it challenging to meet the diverse needs of all participants effectively.[140] Assessing the risk posed by each participant and developing appropriate risk management strategies is complex when considering varying levels of radicalization and potential for re-engagement in extremist activities.[141] Effective monitoring and follow-up after individuals leave the programme are crucial for successful reintegration.[142] However, the varying needs of participants make it challenging to develop standardized monitoring procedures that adequately address individual circumstances.[143]

3.3.4 International Cooperation Failures

International cooperation in cases involving terrorism suspects can often be hindered by needless bureaucracy and a lack of willingness to assist.[144] This includes delays in sharing critical information, evidence, or intelligence needed for effective prosecution or rehabilitation efforts.[145] Some countries may also be hesitant to cooperate fully due to political reasons or concerns about privacy and human rights.[146] There is an urgent need for Mutual Legal Assistance Memorandums of Understanding (MLA MoUs) between the ODPP and national prosecution agencies in jurisdictions of interest. These MoUs would facilitate the exchange of information, evidence, and expertise between countries, streamlining the process of gathering necessary materials for prosecution and rehabilitation. When dealing with international terrorism cases, extradition or transfer of

[139] Ibid
[140] Ibid
[141] Ibid
[142] Ibid
[143] Ibid
[144] Ibid
[145] Ibid
[146] Ibid

offenders between countries can be complicated.[147] Differences in legal systems, human rights considerations, and diplomatic challenges can hinder the swift and efficient transfer of individuals to face justice or participate in rehabilitation programmes.[148]

Effective prosecution and rehabilitation of terrorism suspects often require seamless cross-border collaboration.[149] However, the lack of established channels for cooperation and communication between different countries' prosecution agencies can impede progress.[150] This includes challenges in coordinating investigations, sharing evidence, and implementing joint strategies.[151] International terrorism cases can be sensitive and involve diplomatic considerations.[152] Some countries may be reluctant to fully cooperate due to political considerations or concerns about their own national security interests.[153] This can result in delays or incomplete information sharing, hampering the prosecution and rehabilitation process.[154] National prosecution agencies, including the ODPP, may face resource and capacity constraints when engaging in international cooperation efforts. This includes limitations in personnel, expertise, technology, and funding needed to effectively navigate international legal processes and collaboration. The absence of standardized procedures and protocols for international cooperation in terrorism cases can lead to confusion and inefficiencies.[155] Clear guidelines and frameworks for sharing information, conducting joint investigations, and coordinating rehabilitation efforts across borders are essential for overcoming these challenges.[156]

---

[147] Ibid
[148] Ibid
[149] Ibid
[150] Ibid
[151] Ibid
[152] Ibid
[153] Ibid
[154] Ibid
[155] Ibid
[156] Ibid

4. Proposals for Strengthening the Role of the Prosecution in Facilitating ADR in Terrorism-Related Cases: Lessons from Comparative Experience

4.1 Legal and Policy Reform for Individualized Risk and Needs Assessment

4.1.1 US or UK Law/Policy

In the United States, the "Individualized Reentry Plan" under the Federal Bureau of Prisons (BOP) provides a framework for assessing and addressing the unique risks and needs of each offender.[157] This plan includes comprehensive assessments of factors such as criminal history, substance abuse, mental health, and education, to tailor rehabilitation and reintegration programs accordingly.[158] Additionally, the UK's "Desistance and Disengagement Programme" offers a similar approach, focusing on individualized plans based on thorough risk assessments to support offenders in leaving extremist groups and reintegrating into society.[159]

4.1.2 Lessons for Kenya

Kenya should urgently update its National Strategy for Countering Violent Extremism (NSCVE) to incorporate provisions for individualized risk and needs assessments. This update should involve input from all stakeholders, including law enforcement, judicial bodies, community organizations, and experts in rehabilitation and reintegration. Implementing a system similar to the US "Individualized Reentry Plan" or the UK's "Desistance and Disengagement Programme" would allow Kenya to conduct thorough assessments of terrorism offenders. These assessments should cover a range of factors such as radicalization history, psychological profile, education, employment, and family support. Based on these assessments, Kenya can develop tailored intervention plans for each

---

[157] United Nations Office on Drugs and Crime UNODC (2009) 'Handbook on Criminal Justice Responses to Terrorism' *Criminal Justice Handbook Series* available at https://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf accessed 21 March 2024

[158] Ibid

[159] Ibid

offender, including access to education, vocational training, counseling, and community support programs. This individualized approach recognizes that not all terrorism offenders have the same needs or risk factors, and addresses these needs in a targeted and effective manner.[160]

Collaboration between the ODPP, law enforcement agencies, correctional facilities, social services, and community organizations is crucial. Establishing clear protocols and guidelines for sharing information and coordinating efforts will ensure a holistic approach to rehabilitation and reintegration.[161] Kenya may need legislative reforms to formalize the process of individualized risk and needs assessment in terrorism cases. This could involve amendments to existing laws or the development of new legislation that mandates such assessments and the development of corresponding rehabilitation plans. Training programs for prosecutors and other stakeholders on conducting risk assessments and developing tailored intervention plans would be essential. Building capacity within the justice system to effectively implement these strategies is key to their success.[162]

4.2 Investing in Trust-Building Initiatives

4.2.1 Canada's National Strategy on Countering Radicalization to Violence

Canada's National Strategy on Countering Radicalization to Violence places a significant emphasis on disengagement programs as a key component of countering violent extremism. The strategy recognizes the importance of building trust with individuals who may be vulnerable to radicalization and violence, offering tailored disengagement programs to support their transition away from extremist ideologies and activities. These programs aim to provide a supportive

[160] Ibid
[161] Ibid
[162] Ibid

environment for individuals to disengage from radical groups, access counseling and support services, and reintegrate into mainstream society.[163]

4.2.2 Lessons for Kenya

Kenya can learn from Canada's approach by adopting a multi-actor approach to trust-building initiatives. This involves collaboration among various stakeholders, including government agencies, civil society organizations, religious leaders, and community members. Each actor plays a distinct role in creating a supportive environment for individuals at risk of radicalization. Trust-building initiatives should be tailored to the specific needs and contexts of the communities and individuals involved. Kenya can benefit from developing a range of programs and interventions that address the diverse factors contributing to radicalization, such as social, economic, and political grievances.

Engaging with communities directly affected by terrorism and violent extremism is essential.[164] This includes fostering open dialogue, building relationships of trust, and involving community members in the design and implementation of initiatives. Community-led efforts are often more effective in addressing local concerns and building sustainable trust.[165] Investing in education and awareness programs can also help dispel myths and misinformation about terrorism and extremism. By promoting understanding and tolerance, these initiatives contribute to building trust within communities and reducing the appeal of extremist ideologies.[166]

---

[163]Public Safety Canada 'National Strategy on Countering Radicalization to Violence' available at https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-strtg-cntrng-rdclztn-vlnc/index-en.aspx accessed 21 March 2024

[164] Ibid

[165] Ibid

[166] Ibid

Providing access to counseling, mental health support, and reintegration services for individuals disengaging from radical groups is crucial.[167] Kenya can establish specialized centers or hotlines where individuals can seek help confidentially and receive assistance tailored to their needs. In addition, identifying and supporting credible community leaders and role models who advocate for peace, tolerance, and inclusivity can have a significant impact. These individuals can serve as trusted voices within communities, challenging extremist narratives and promoting positive alternatives.

4.3 Whole-of-community Approaches

4.3.1 Focus on Information-Sharing and Collaboration

In the context of facilitating ADR in terrorism-related cases, a whole-of-community approach emphasizes the importance of information-sharing and collaboration among various stakeholders. The Organization for Security and Co-operation in Europe (OSCE) guidebook on non-custodial rehabilitation and reintegration provides valuable insights.[168] According to the OSCE guidebook, non-custodial rehabilitation and reintegration efforts can involve a range of actors, including government and non-governmental entities, national and local organizations, law enforcement, and non-law enforcement agencies. Each actor brings unique expertise and resources to support an individual's resocialization while ensuring community safety. Individuals and their families in the rehabilitation process have diverse vulnerabilities and needs.[169] No single

[167] Ibid

[168] Organization for Security and Co-operation in Europe (OSCE) (2020) 'Non-custodial Rehabilitation and Reintegration in Preventing and Countering Violent Extremism and Radicalization That Lead to Terrorism *A Guidebook for Policymakers and Practitioners in South-Eastern Europe* pg. 79-80 available at https://www.osce.org/files/f/documents/d/7/444838.pdf accessed 18 March 2024

[169] Ibid

institution or professional can address all these needs effectively. Therefore, an approach that allows for multiple actors or agencies to be involved is essential.[170] Collaborating among various actors can be challenging due to conflicting interests, competing ideas, and differing professional frameworks. This underscores the importance of establishing clear guidelines, protocols, agreements, and oversight mechanisms for effective and safe information-sharing.[171] When designing an intervention or support plan, it is crucial to review all relevant information on an individual, gathered from different sources and professions. This comprehensive approach ensures a thorough assessment of risks and vulnerabilities.[172]

4.3.2 Lessons for Kenya

Kenya can benefit from establishing networks dedicated to information-sharing in both law enforcement and non-law enforcement sectors. These networks should facilitate the exchange of relevant information among various stakeholders involved in rehabilitation and reintegration efforts. Clear guidelines, protocols, and agreements should be developed to govern information-sharing practices. These frameworks should outline how information will be shared, who can access it, and how to ensure confidentiality and data protection. Kenya should promote interdisciplinary collaboration among professionals from different fields, such as law enforcement, social services, mental health, and community organizations. This approach allows for a holistic assessment of individuals' needs and effective planning of interventions.

Providing training on information-sharing protocols and interdisciplinary collaboration is essential for all professionals involved in the DDRR Programme. This ensures that stakeholders understand their roles, responsibilities, and ethical considerations when sharing sensitive information. Engaging communities directly affected by terrorism in the information-sharing process builds trust and

[170] Ibid
[171] Ibid
[172] Ibid

enhances the effectiveness of rehabilitation and reintegration efforts. Communities can provide valuable insights and support in assessing risks and developing tailored interventions.

4.4 Governmental and Non-State Actor Cooperation

4.4.1 Role of Non-Governmental Rehabilitation and Reintegration Intervention Providers

In the realm of facilitating ADR in terrorism-related cases, the involvement of non-governmental rehabilitation and reintegration intervention providers is crucial.[173] These non-state actors often bring specialized expertise, community connections, and innovative approaches to support individuals' rehabilitation and reintegration into society.[174] To enhance their effectiveness, non-governmental organizations (NGOs) involved in intervention programs should be granted formal status and recognition by the government.[175] This recognition would validate their role and efforts, facilitating better cooperation with governmental bodies and stakeholders.[176]

4.4.2 Lessons for Kenya

Kenya can learn from international experiences by formalizing the status of NGO intervention providers in the terrorism-related DDRR Programme. This formal recognition can be achieved through legal frameworks or policies that outline the roles, responsibilities, and rights of NGOs involved in rehabilitation and reintegration efforts. Collaboration between governmental agencies and recognized NGOs is essential. Kenya should establish partnerships and

---

[173] United Nations Office on Drugs and Crime UNODC (2009) 'Handbook on Criminal Justice Responses to Terrorism' *Criminal Justice Handbook Series* available at https://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf accessed 21 March 2024

[174] Ibid

[175] Ibid

[176] Ibid

frameworks for cooperation to ensure seamless coordination between state and non-state actors in the DDRR Programme. NGOs involved in intervention programs should receive capacity-building support and training. This includes training on ADR principles, rehabilitation techniques, cultural sensitivity, and community engagement. Building the capacity of these organizations enhances their effectiveness and professionalism in supporting terrorism offenders' reintegration.[177]

Establishing mechanisms for monitoring and evaluating the effectiveness of NGO interventions is critical.[178] Kenya can develop guidelines for assessing the impact of NGO programs on rehabilitation and reintegration outcomes. This data-driven approach helps in identifying successful strategies and areas for improvement. NGOs play a vital role in community engagement and awareness campaigns. Kenya should leverage the expertise of NGOs to conduct community outreach, raise awareness about the DDRR Programme, and promote social cohesion. Engaging communities in the rehabilitation process fosters understanding and support for individuals seeking to reintegrate into society.[179] Finally, providing legal protections and support to NGO intervention providers ensures their safety and autonomy in carrying out their activities.[180] Kenya can establish legal frameworks that protect NGOs from undue interference and provide avenues for collaboration with law enforcement and judicial authorities.

Conclusion

The role of the prosecution in facilitating Alternative Dispute Resolution (ADR) in terrorism-related cases is a multifaceted and crucial aspect of the justice system.[181]

---

[177] Ibid

[178] Ibid

[179] Ibid

[180] Ibid

[181] ESAAMLG (2022), *Anti-money laundering and counter-terrorist financing measures - Kenya, Second Round Mutual Evaluation Report*, ESAAMLG, Dar es Salaam available at http://www.esaamlg.org/reports/me.php accessed 19 March 2024

Throughout this paper, I have explored the legal and policy frameworks, challenges, lessons, and proposals aimed at enhancing the prosecution's effectiveness in this domain, particularly in the context of Kenya's Disengagement, De-radicalization, Rehabilitation, and Reintegration (DDRR) Programme. My examination of Kenya's legal and policy frameworks, including the Diversion Policy, Plea Bargaining Guidelines, Deferred Prosecution Agreements, and Inter-Agency Cooperation Guidelines, highlights the groundwork laid for incorporating ADR into counterterrorism efforts. However, gaps in the legal framework, inherent trust deficits, varying individual needs for rehabilitation, and international cooperation failures present significant hurdles that must be addressed.

Drawing lessons from comparative experiences, such as the United States, the United Kingdom, Canada, and others, the paper has proposed a range of measures to strengthen the prosecution's role in facilitating ADR. These include legal and policy reforms for individualized risk and needs assessment, investing in trust-building initiatives, adopting whole-of-community approaches, and promoting governmental and non-state actor cooperation. The importance of a multi-faceted approach, integrating legal, policy, and practical considerations, cannot be overstated. As the prosecution navigates the complexities of terrorism cases, it must balance the imperatives of justice, human rights, reconciliation, and prevention of future radicalization. Collaboration among stakeholders, including law enforcement agencies, civil society, international partners, and affected communities, is essential for success.

In the pursuit of effective counterterrorism measures, the prosecution must evolve to meet the challenges of the modern terrorism landscape. By embracing ADR, tailored to individual circumstances and needs, the prosecution can play a pivotal role in not only adjudicating cases but also addressing the root causes of radicalization and promoting sustainable peace. As we look to the future, it is imperative that the recommendations presented in this paper be seriously considered and implemented. Strengthening the prosecution's role in facilitating

ADR will require a concerted effort from all stakeholders, guided by a commitment to the rule of law, human rights, and long-term stability. The paper emphasizes that the prosecution's role in ADR is not just about resolving cases—it is about fostering trust, promoting reconciliation, and preventing future radicalization. By embracing innovative approaches and building partnerships, the prosecution can contribute significantly to a more effective and sustainable response to terrorism-related challenges in Kenya and beyond.

References

Bowmans (2020) 'Deferred Prosecution Agreements as an alternative to the prosecution of corporate organizations in Kenya: fresh jurisprudence' available at https://bowmanslaw.com/insights/deferred-prosecution-agreements-as-an-alternative-to-the-prosecution-of-corporate-organizations-in-kenya-fresh-jurisprudence/#:~:text=The%20Features%20of%20the%20DPA&text=It%20is%20taken%20as%20an,crimes%20subject%20to%20the%20DPA.

Center on Global Counterterrorism Cooperation and IGAD Security Sector Program (2012) 'Fighting Terror through Justice: What Are the Existing Arrangements for Legal Cooperation against Terrorism in the IGAD Subregion?' *Global Center on Cooperative Security* available at https://www.jstor.org/stable/pdf/resrep20388.9.pdf

ESAAMLG (2022), Anti-money laundering and counter-terrorist financing measures - Kenya, Second Round Mutual Evaluation Report, ESAAMLG, Dar es Salaam available at http://www.esaamlg.org/reports/me.php

Inter-Agency Guidelines on Cooperation and Collaboration in the Investigation and Prosecution of Terrorism and Terrorism Financing, 2022

International Organization for Migration (IOM) (2019) 'Breakfast Forum on Disengagement and Reintegration' available at https://www.iom.int/news/breakfast-forum-disengagement-and-reintegration

National Strategy to Counter Violent Extremism, 2016

ODPP Diversion Policy, 2019

ODPP Plea Bargaining Guidelines, 2019

Organization for Security and Co-operation in Europe (OSCE) (2020) 'Non-custodial Rehabilitation and Reintegration in Preventing and Countering Violent

Extremism and Radicalization That Lead to Terrorism. *A Guidebook for Policymakers and Practitioners in South-Eastern Europe* available at https://www.osce.org/files/f/documents/d/7/444838.pdf

Public Safety Canada 'National Strategy on Countering Radicalization to Violence' available at https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-strtg-cntrng-rdclztn-vlnc/index-en.aspx

United Nations Office on Drugs and Crime (UNODC) 'Kenya Training Manual on Human Rights and Criminal Justice Responses to Terrorism' available at https://css.unodc.org/documents/terrorism/Publications/Kenya%20HR%20manual/Kenya_Manual_e-book.pdf

United Nations Office on Drugs and Crime UNODC (2009) 'Handbook on Criminal Justice Responses to Terrorism' *Criminal Justice Handbook Series* available at https://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf

Arbitration Practice in Kenya: Challenges, Opportunities and Future Perspectives

By: ***Charity Chepkoech****

Abstract

Arbitration in Kenya has emerged as an indispensable Alternative Dispute Resolution mechanism since it is faster, flexible, and more confidential than litigation. Recent evidence however suggests that despite these advantages, arbitration in Kenya is still facing major setbacks including judicial interference, excessive costs, limited expertise, and low levels of public awareness. However, opportunities for growth of arbitration in Kenya exists including constitutional recognition, establishment of the Nairobi Centre for International Arbitration, and an increasing demand in the use of arbitration by different sectors. This paper critically examines the present state of arbitration in Kenya, its challenges, opportunities, and prospects for the future. The future of arbitration in Kenya can be strengthen through the development and enhancement of the legal framework supporting arbitration, investment in capacity building, increasing public awareness, embracing innovative technologies, and regional and global partnerships. Embracing these steps will position Kenya as a regional hub for dispute resolution and a hub for international arbitration.

1. Introduction

Arbitration has been recognized as an efficient and flexible alternative to litigation and has since undergone significant changes in Kenya.[1] It has been enshrined in the Constitution of Kenya 2010 under article 159(2)(c), which mandates the

**LL.B (Cnd), UoEm, Research Assistant at Centre for Climate Change Adaptation and Mitigation (CCCAM) – University of Embu; Projects Director at the International Students Environmental Coalition (ISEC) – Kenya.*

[1] Muigua, K. "The Arbitration Acts: A Review of Arbitration Act, 1995 Of Kenya Vis-A-Viz Arbitration Act 1996 Of United Kingdom." *lecture on Arbitration Act, 1995 and Arbitration Act 1996 of UK delivered at the Chartered Institute of Arbitrators-Kenya Branch Entry Course held at College of Insurance on 25-26th August 2008 (Revised on 2nd March 2010)* (2016).

judiciary to promote Alternative Dispute Resolution (ADR), including arbitration.[2] There have been increased backlog of cases in court with the formal ways of resolving disputes proving to be inefficient. This constitutional provision is a paradigm shift in dispute resolution as it prioritizes solving disputes outside court thus reducing the backlog of cases in the judiciary. To address this, the Arbitration Act, 1995 aligns Kenya's arbitration laws with international standards, specifically the UNCITRAL Model Law, to ensure compatibility with practices worldwide.[3]

However, arbitration in Kenya remains at its emerging stage, facing a number of challenges but with immense opportunities.[4] Real-life experiences and cases illustrate both the gaps and the measures and steps taken within the Kenyan context. Nyutu Agrovet Limited v Airtel Networks Kenya Limited 2015, for instance, presented critical jurisprudential questions about the scope of judicial intervention in arbitration, hence reflecting Kenya's struggle to strike a balance between autonomy and oversight.[5]

This paper examines Arbitration in Kenya, highliting issues like judicial interference, costs, and lack of public awareness alongside the opportunities presented by constitutional recognition and the establishment of the Nairobi Centre for International Arbitration. Case studies and legal precedents shed light on the evolving nature of arbitration and offer insight into prospects.

---

[2] Gaker, Jacob K. "Placing Kenya on the global platform: an evaluation of the legal framework on arbitration and ADR." (2011).

[3] Nguyo, Wachira P. "Arbitration in Kenya Facilitating Access to Justiceby Identifying and Reducing Challenges Affecting Arbitration." PhD diss., 2015. <https://erepository.uonbi.ac.ke/bitstream/handle/11295/93192/Nguyo_Arbitration%20in%20Kenya%3A%20facilitating%20access%20to%20justice%20by%20identifying%20and%20reducing%20challenges%20affecting%20arbitration.pdf?sequence=3&isAllowed=y .> Accessed on 23rd December 2024.

[4] Mwangi, C. (2014). *The Role of Kenyan Courts in Arbitration, Enabling or Constraining?* (Doctoral dissertation, University of Nairobi).

[5] Nyutu Agrovet Limited v Airtel Network Kenya Limited [2024] (eKLR)

2. Challenges in Arbitration

2.1. Judicial Interference and the Finality of Awards

Judicial intervention in arbitration has emerged as a pressing issue.[6] While the Arbitration Act under Section 10 has given a clear directive that courts should not interfere in matters governed by arbitration, there are exceptions where parties approach the courts to annul awards.[7] A notable case is that of *Anne Mumbi Hinga v Victoria Njoki Gathara 2009*, where the Court of Appeal had expressed the principle of non-interference but controversially set aside an arbitral award for procedural irregularity.[8] The said decision showed how the judiciary was reluctant to give up control wholly and thus called into question the finality of arbitration awards.

The Supreme Court judgment in *Synergy Industrial Credit Ltd v Cape Holdings Ltd* once again stirred the discussions on the role of courts in arbitration.[9] The court held that the grounds for setting aside arbitral awards under Section 35 of the Arbitration Act must be interpreted narrowly.

2.2. High Costs and Limited Accessibility

In Kenya, arbitration is considered an expensive form of dispute resolution mechanism because of the high costs involved.[10] In litigation, parties have subsidized court fees whereas arbitration involves massive costs in terms of arbitrators' fees, institutional charges, and legal representation.[11] For instance, in international arbitrations such as *Geothermal Development Company v Lantech Africa*

---

[6] Abedian, Hossein. "Judicial Review of Arbitral Awards in International Arbitration–A Case for an Efficient System of Judicial Review." *Journal of International Arbitration* 28, no. 6 (2011).
[7] Arbitration Act, 1995 sec 10
[8] Anne Mumbi Hinga v Victoria Njoki Gathara [2009] KECA 466 (KLR)
[9] Synergy Industrial Credit Ltd v Cape Holdings Ltd [2020] (eKLR)
[10] *Ibid*
[11] *Ibid*

Limited 2021, the costs amounted to millions of shillings, thus scaring away small businesses from opting for arbitration.[12]

The problem exacerbated by the absence of uniform fee guidelines for arbitrators in Kenya. A comparative analysis with India, where arbitration costs is regulated through institutional frameworks, reveals the possibility of reform within Kenya.[13]

2.3. Lack of Awareness and Expertise

Studies have shown that a larger percentage of the public is still unaware of the benefits of arbitration with many still opting for litigation.[14] Most people, especially SMEs, have limited understanding of the procedural advantages of arbitration, such as confidentiality and flexibility.[15] Secondly, Kenya has a limited number of arbitrators with sector-specific knowledge.[16] For example, in construction and energy sectors, parties usually prefer to use foreign arbitrators, increasing costs and making the process vulnerable to cultural and jurisdictional barriers.[17] This has proved to be the challenge faced in *WS Insight (K) Limited v Parbat Siyani Construction Limited & another,* where the selection of arbitrators became an issue, due to the perception that they would have no idea about local industry standards.[18]

---

[12] Joel, Mogesi. "Promoting International Arbitration in Kenya Through Third-Party Funding: Prospects, Challenges & Lessons–A Call for Reform." *Challenges & Lessons–A Call for Reform (December 1, 2023)* 12, no. 1 (2023).

[13] Kituku, James K. "Facilitating International Arbitration in Kenya: A General Analysis of Arbitration in the Country and International Arbitration in Other Selected Countries." PhD diss., University of Nairobi, 2018. < https://erepository.uonbi.ac.ke/handle/11295/2/browse?authority=55b14ad9-a78d-418f-88f0-1abb6785375a&type=author.> Accessed on 23rd December 2024.

[14] Stipanowich, Thomas. "Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals." *Columbia American Review of International Arbitration* 25 (2014).

[15] *Ibid.*

[16] Gaker, Jacob K. "Placing Kenya on the global platform: an evaluation of the legal framework on arbitration and ADR." (2011).

[17] *Ibid*

[18] Ng'etich, Raphael. "The current trend of costs in arbitration: Implications on access to justice and the attractiveness of arbitration." *Alternative Dispute Resolution* 5, no. 2 (2017).

3. Opportunities in Arbitration

Arbitration in Kenya has proved to be an area filled with opportunities.[19] The prospects of deepening arbitration go beyond the legal frameworks into the social, institutional and technological spheres.[20] Building on its relative strengths and with focused strategies, Kenya can be a leader in dispute resolution in Africa.[21] These opportunities are rooted on constitutional mandates, institutional developments, growing sectoral adoption and the integration of innovative technologies.[22]

3.1. Constitutional Mandate and Judicial Support

The Constitution of Kenya 2010 revolutionized the dispute resolution regime by incorporating Alternative Dispute Resolution mechanisms.[23] Article 159(2)(c) of the Constitution stipulates that courts are under obligation to actively encourage the use of Alternative Dispute Resolution methods such as arbitration, conciliation, and mediation, among others.[24] This constitutional pronouncement is more than a policy statement since it is an address to the courts and public institutions to consider arbitration as an alternative means of settling disputes.

Besides, the judiciary has adopted a pro-arbitration attitude by continuing to narrow the grounds available for setting aside an award.[25] In the case of *Kenya Shell Limited v Kobil Petroleum Limited,* the court held that setting aside an arbitral award was to occur under exceptional and rare circumstances as provided under the

---

[19] *Ibid.*

[20] Fitrianingrum, Agustina, Rina Shahriyani Shahrullah, and Elza Syarief. "Legal approaches to online arbitration: Opportunities and challenges in Indonesia." *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 28, no. 2 (2016): 314-321.

[21] *Ibid*

[22] Mbithi, Peter Mutuka. "International commercial arbitration in Kenya: is arbitration a viable alternative in resolving commercial disputes in Kenya?" (2014).

[23] Abwunza, Allan Agesa. "Development of a Framework for Effective Construction Arbitration: A Comparative Case Study of Construction Disputes in Kenya." PhD diss., JKUAT-COETEC, 2021.

[24] *Ibid*

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

UNCITRAL Model Law.[26] Judicial restraint in such a manner would build confidence in the parties assure them that their agreements to arbitrate will be upheld and the resultant awards enforced without undue delay.[27]

3.2. Establishment of the Nairobi Centre for International Arbitration (NCIA)

The establishment of the Nairobi Centre for International Arbitration constitutes one of the cornerstones for the institutionalization of arbitration in Kenya.[28] Set up through the Nairobi Centre for International Arbitration Act, 2013, NCIA is intended to conduct both domestic and international arbitrations, providing the necessary infrastructure and expertise to efficiently conduct the resolution of disputes.[29]

Several facilities underlie the NCIA that boost the arbitration capacity in Kenya, like its state-of-the-art hearing room, administrative support facilities, and its panel of diverse arbitrators.[30] These resources further significantly lessen the logistical bottlenecks encountered by parties while considering international arbitration.[31] For instance, *Fracht Kenya Ltd v Nyayo Tea Zones Development Corporation 2020*, was able to proceed with arbitration properly and resolve their disputes amicably simply because of the procedural guidance and technical facilities from NCIA.[32]

---

[26] Brunet, Edward. "Arbitration and constitutional rights." *NCL Rev.* 71 (1992): 81.
[27] Fitrianingrum, Agustina, Rina Shahriyani Shahrullah, and Elza Syarief. "Legal approaches to online arbitration: Opportunities and challenges in Indonesia." *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 28, no. 2 (2016): 314-321.
[28] Pittman, Larry J. "Mandatory Arbitration: Due Process and Other Constitutional Concerns." *Cap. UL Rev.* 39 (2011): 853.
[29] Muyala, Michael IW. "Strengthening the Legal and Institutional Framework of International Commercial Arbitration in Kenya: The Case of Nairobi Centre for International Arbitration." PhD diss., University of Nairobi, 2017.
[30] Omwega, Annah N. "The Role of Arbitration in Promoting Access to Justice in Nairobi County, Kenya"." PhD diss., University of Nairobi, 2023.
[31] Mutubwa, Wilfred. "The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013." *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 82, no. 2 (2016).
[32] *Ibid.*

Furthermore, the NCIA positions Kenya as a regional hub for arbitration in East Africa. The strategic location, combined with adherence to the UNCITRAL Model Law, has made it a popular venue for cross-border disputes.[33] Now that AfCFTA has just become operational, NCIA can help in the settlement of trade-related disputes arising amongst the member states.[34] This will not only raise the economic profile of Kenya but will also consolidate the country's position as a hub for arbitration within the continent.

3.3. Growing Demand for Arbitration in Key Sectors.

Arbitration is preferred in Kenya mainly because of its flexibility, confidentiality, and the binding nature of its awards.[35] Other areas that are increasingly becoming interested in arbitration are construction, finance, and energy.[36] This may be because most disputes arising in such areas are complex and technical in nature.[37] Construction disputes arise due to delays, cost overruns, and ambiguity in the contractual provisions.[38] Arbitration's ability to accommodate sector-specific expertise is a significant advantage. *WS Insight (K) Limited v Parbat Siyani Construction Limited & another,* the arbitration process was pivotal in resolving a high-stakes dispute related to project deliverables, emphasizing the importance of arbitrators who understand the industry's nuances.[39] The case also highlighted the preference for arbitration in the construction industry, given its ability to arbitrate complex technical matters with confidentiality.

---

[33] *Ibid.*
[34] Mutuma, Kenneth W. "The Emergence of the International Commercial Court: A Threat to Arbitration of Investor-State Dispute in Kenya by: Marion Injendi Wasike & Dr. Kenneth W. Mutuma, PhD." *Alternative Dispute Resolution*: 20.
[35] *Ibid,*
[36] Stipanowich, Thomas. "Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals." *Columbia American Review of International Arbitration* 25 (2014).
[37] *Ibid*.
[38]Zand Pazandi, Amir, Farrokh Forootan, Towhid Pourrostam, and Mehdi Ravanshadnia. "Arbitration of Disputes in the Construction Industry." *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 16, no. 4 (2024): 04524021.
[39] Amin, Parag. "Explain The Arbitration in Specific Industries: Tailored Approaches." *Arbitration Business and Commercial Laws*: 54.

Arbitration is also on the rise in the financial sector.[40] Loan agreements and commercial contracts often contain arbitration clauses for amicable and swift dispute resolution.[41] For instance, in *Hadar Limited v Housing Finance Company Limited [2024]*, the court enforced an arbitration clause in a loan agreement and further entrenched the sector's trust in arbitration as a viable mechanism.[42]

3.4. Technological Advancement

The integration of technology in the arbitration proceedings presents some of the most promising opportunities for Kenya.[43] Virtual hearings, e-filings, and management of evidence electronically have modernized the arbitral process to be more rapid, accessible, and cheaper.[44] These methods found prominence in COVID-19, when physical meetings had been limited, and arbitrators were obliged to move virtual platforms.[45]

These changes have been embraced by Kenyan arbitration institutions with relative success. For instance, *Don-Woods Company Limited v Kenya Airports Authority*, the arbitration by the parties was conducted wholly online, the first case of virtual arbitration in Kenya.[46] Not only did this reduce the costs but also improved the efficiency of the proceedings, since parties could attend hearings from any part of the world.

---

[40] Desai, Meena. "Review of the Future of Arbitration: Innovations And Challenges." *Arbitration Business and Commercial Laws*: 67.
[41] *Ibid.*
[42] Hatami Alamdari, Bahar. "The emerging popularity of international arbitration in banking and financial sector–Is this a fashionable trend or a viable replacement?" PhD diss., University of London, 2016.
[43] Desai, Meena. "Review of the Future of Arbitration: Innovations and Challenges." *Arbitration Business and Commercial Laws*: 67.
[44] Łągiewska, Magdalena. "New technologies in international arbitration: a game-changer in dispute resolution?" *International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique* 37, no. 3 (2024): 851-864.
[45] *Ibid.*
[46] Don-Woods Company Limited v Kenya Airports Authority

Looking ahead, new technologies such as AI and blockchain are further affording new opportunities to improve arbitration.[47] AI can help with document review, case analysis, and even the drafting of arbitral awards, reducing the time and other resources needed to handle complex cases.[48] Blockchain technology provides safe and tamper-proof systems for storing evidence and ensuring transparency in arbitral processes.[49]

3.5. Regional and Global Collaboration

Strategic partnerships with international arbitration bodies will go a long way in furthering Kenya's ambitions to be a regional hub for arbitration.[50] Partnerships with bodies like the International Chamber of Commerce, the London Court of International Arbitration, among others, will increase local expertise and place Kenya on the global map as a destination for global arbitration.[51]

NCIA has taken steps by holding international arbitration conferences and signing cooperation agreements with regional arbitration centers.[52] Besides building credibility for Kenya, such activities provide great avenues for learning among local practitioners.[53] With the regional economic integration at an advanced stage through initiatives such as the East African Community and AfCFTA, Kenya stands strategically positioned to deal with increased cross-border disputes that shall inevitably arise.[54]

---

[47] *Ibid.*
[48] Solhchi, Mohammad Ali, and Faraz Baghbanno. "Artificial Intelligence and Its Role in the Development of the Future of Arbitration." *Int'l JL Changing World* 2 (2023): 56.
[49] *Ibid.*
[50] Negi Advocate, Chitranjali. "Unlocking Potential: International Arbitration Trends in Central Asia and Caucasus." *Available at SSRN 4926177* (2024).
[51] Nigmatullina, Dilyara. "Aligning Dispute Resolution Processes with Global Demands for Change: Enhancing the Use of Mediation and Arbitration in Combination." *b-Arbitra | Belgian Review of Arbitration* 2019, no. 1 (2019).
[52] *Ibid.*
[53] *Ibid.*
[54] Ajuwan, Muhammadhu, and Fathima Safreena. "Arbitration and Dispute Resolution Mechanisms in the Belt and Road Initiative: A Comprehensive Analysis of Legal

4. The Future of Arbitration

The future of arbitration in Kenya is both bright and obscure.[55] With the country gearing up to position itself as a regional hub for ADR, it is imperative that any number of critical paths be pursued to ensure that the place of arbitration is secure as an effective and accessible dispute resolution mechanism.[56] These would include improving the legal framework, investment in capacity building, enhancing public awareness, utilizing technological changes, and engaging in regional and global cooperation.[57] All of these options provide an avenue that, when explored and nurtured, may fill the loopholes and provide a route of attaining developmentally sustainable arbitration practice.

4.1. Strengthening Legal Framework

A sound legal framework is without doubt the foothold for any successful arbitration system.[58] One of the areas in dire need of reform is the extent of judicial intervention in arbitration.[59] Although Section 10 of the Arbitration Act confines court interference, some exceptions such as setting aside the award under Section 35 have, at times, been abused to the detriment of disputing parties, keeping them in limbo.[60] Such cases as *Synergy Industrial Credit Ltd v Cape Holdings Ltd* also call for clarity on such issues.[61] Decisions such as this indicate the requirement for clear legislation to avoid judicial inconsistency. The courts should take ample time to determine whether the award can be set aside on the grounds of public policy.

Challenges and Prospects within the Framework of International Trade Law." *Available at SSRN 4802451* (2024).

[55] Böckstiegel, Karl-Heinz. "Past, present, and future perspectives of arbitration." *Arbitration International* 25, no. 3 (2009): 293-302.

[56] Menon, Sundaresh. "Arbitration and the Transnational System of Commercial Justice: Charting the Path Forward." *Asian International Arbitration Journal* 20, no. 2 (2024).

[57] Stipanowich, Thomas J. "Arbitration: The new litigation." *U. Ill. L. Rev.* (2010): 1.

[58] Gaker, Jacob K. "Placing Kenya on the global platform: an evaluation of the legal framework on arbitration and ADR." (2011).

[59] Muigua, Ph D. "Promoting international commercial arbitration in Africa." (2016).

[60] Onsare, D.A., 2023. *Impact of Court Intervention on Arbitration in Kenya a Thesis Submitted to the Faculty of Law of the University of Nairobi* (Doctoral dissertation, University of Nairobi).

[61] *Ibid.*

Kenya should also take into consideration incorporating provisions for expedited arbitration and emergency relief. Expedited arbitration allows for expedited hearings of disputes, it is notably relevant for commercial transactions that rely on time-sensitive decisions.[62] Some countries, such as Singapore, have adapted these provisions quite well, thereby making their arbitration systems even more appealing.[63] The arrangements in India and Hong Kong also reveal that, through emergency arbitration, parties can apply for interim measures even before the constitution of the tribunal.[64] Adoption of such mechanisms would make arbitration in Kenya more responsive to urgent needs.[65]

Finally, third-party funding provisions for arbitration should be developed. Third-party funding allows external financiers to fund arbitration in return for a share of the award, in case of success.[66] This can ensure access to arbitration for parties on a low budget and democratize justice.[67]

4.2. Capacity Building and Training

Currently, there is a limited number of arbitrators in Kenya.[68] This gap can be filled through training, mentorship, and certification programs. Organizations such as the Chartered Institute of Arbitrators, CIArb-Kenya Branch, play a vital role in that

---

[62] Ma, Yiyang. "The Legal Basis for the Expansion of the Effectiveness of Arbitration Agreements: Taking Principal and Guarantee Contracts as Examples." *International Theory and Practice in Humanities and Social Sciences* 2, no. 1 (2025): 315-325.
[63] Hayford, Stephen L. "The Federal Arbitration Act: Key to stabilizing and strengthening the law of labor arbitration." *Berkeley J. Emp. & Lab. L.* 21 (2000): 521.
[64] *Ibid.*
[65] *Ibid.*
[66] Benz, Stephen. "Strengthening interim measures in international arbitration." *Geo. J. Int'l L.* 50 (2018): 143.
[67]Stipanowich, Thomas. "Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals." *Columbia American Review of International Arbitration* 25 (2014).
[68] Jones, Doug. "Acquisition of Skills and Accreditation in International Arbitration." *Arbitration International* 22, no. 2 (2006): 275-290.

direction.[69] Their outreach however, needs to be further expanded by way of sector-specific training, especially in areas relating to construction, energy, and intellectual property.[70] Arbitrators with experience in specific areas can ensure more efficient and informed decision-making, an aspect well portrayed in cases such as *Geothermal Development Company v Lantech Africa Limited,* whereby specialized knowledge of a technical nature played a vital role.[71]

Collaboration with the International Chamber of Commerce, the London Court of International Arbitration among others will promote best practices of arbitrations at the Kenyan practitioners globally.[72] Such opportunities will equip the Kenyan Arbitrators and thereby manage complex disputes border crossings through scholarships, internships, and exchanges of programs.[73]

4.3. Increasing Public Awareness

Despite its potential, arbitration has been an underutilized dispute resolution method in Kenya due to limited awareness among the public.[74] Most individuals and businesses perceive it to be an elite and expensive process, a misconception that must be addressed through targeted awareness campaigns.[75]

---

[69] Gonstead, Mariana Hernandez-Crespo. "Beyond Investor-State Disputes: Intercultural Capacity Building to Optimize Negotiation, Mediation, and Conflict Management." *U. St. Thomas LJ* 17 (2020): 251.
[70] *Ibid.*
[71] *Ibid.*
[72] Reyes, Anselmo. "Judicial capacity-building and sustainable diversity under the Model Law." In *Diversity in International Arbitration*, pp. 150-166. Edward Elgar Publishing, 2022.
[73] Franck, Susan D. "Development and outcomes of investment treaty arbitration." *Harv. Int'l LJ* 50 (2009): 435.
[74] Stipanowich, Thomas. "Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals." *Columbia American Review of International Arbitration* 25 (2014).
[75] Lasswell, Harold D., and Myres S. McDougal. "Legal education and public policy: Professional training in the public interest." *Yale Lj* 52 (1942): 203.

Public education on arbitration programs should explain its merits, such as confidentiality, flexibility, and speed.[76] This can be driven through partnerships between arbitration institutions, like the Nairobi Centre for International Arbitration, and academic institutions.[77] Workshops, seminars, and outreach programs targeted at SMEs will increase awareness and use of arbitration within the economy.[78]

The media also has a role to play in shaping the perception of the public. Positive coverage of successful arbitration cases, such as *Fracht Kenya Ltd v Nyayo Tea Zones Development Corporation*, helps in gaining more trust and confidence in the process.[79]

4.4. Leveraging Technological Advancements

Technology is transforming arbitration worldwide, and Kenya is not an exception if it intends to remain relevant.[80] The COVID-19 pandemic accelerated virtual hearings, the adoption of e-filing systems, and electronic evidence management, proving that indeed technology can serve to increase efficiency and reduce time and costs.[81] Virtual hearings, as in the case of *Don-Woods Company Limited v Kenya Airports Authority*, dispensed with the need to travel physically and thus made arbitration accessible for parties at different locations.[82]

---

[76] *Ibid.*
[77] Resnik, Judith. "A2J/A2K: access to justice, access to knowledge, and economic inequalities in open courts and arbitrations." *NCL rev.* 96 (2017): 605.
[78] Franck, Susan D., James Freda, Kellen Lavin, Tobias Lehmann, and Anne Van Aaken. "The diversity challenge: exploring the invisible college of international arbitration." *Colum. J. Transnat'l L.* 53 (2014): 429.
[79] Marginson, Simon. *Education and public policy in Australia*. Cambridge University Press, 1993.
[80] Mwangolo, Shaibu Kombo. "Leveraging Technologies in International Commercial Arbitration." *Alternative Dispute Resolution*: 149.
[81] Desai, Meena. "Review Of the Future of Arbitration: Innovations and Challenges." *Arbitration Business and Commercial Laws*: 67.
[82] Solhchi, Mohammad Ali, and Faraz Baghbanno. "Artificial Intelligence and Its Role in the Development of the Future of Arbitration." *Int'l JL Changing World* 2 (2023): 56.

Despite this, arbitration in Kenya has not yet fully embraced technology. Adopting new technologies such as AI and blockchain can create more opportunities for arbitration modernization.[83] AI-powered tools can help with document review, case analysis, and even drafting arbitral awards, greatly reducing the time and resources needed in complex disputes.[84] On the other hand, blockchain technology provides secure, tamper-proof systems for storing evidence and managing transactions, which increases the level of transparency and trust in the arbitration process.[85]

4.5. Cooperation at Regional and Global Level

Kenya's aspirations of becoming a regional arbitration hub lie in building collaborations within the African continent and beyond.[86] As AfCFTA currently takes shape, one of the side effects will be increasing demand for dispute resolution mechanisms.[87]

In this regard, the collaboration between Kenya and regional bodies like the East African Court of Justice will increase Kenya's capacity in arbitration by developing joint training programs, standardization of arbitration rules, and recognition of arbitral awards across member states for cross-border dispute resolution.[88]

---

[83] *Ibid.*
[84] *Ibid,*
[85] Chauhan, Jai. "Transformation of Dispute Resolution: Technological Innovations in Dispute Resolution and Its Effect on the International Law." *Available at SSRN 4640977* (2023).
[86] Karton, Joshua. "International arbitration culture and global governance." *International Arbitration and Global Governance: Contending Theories and Evidence (Oxford University Press, 2014)* (2013).
[87] *Ibid.*
[88] Koh, Pearlie MC. "Enhancing economic co-operation: a regional arbitration center for Asean?" *International & Comparative Law Quarterly* 49, no. 2 (2000): 390-412.

On the international scene, partnerships with international arbitration centers like the ICC and LCIA raise Kenya's profile and credibility.[89] International arbitration conferences and workshops held in Kenya will attract foreign practitioners and disputing parties to showcase Kenya's arbitration facilities and expertise.[90]

Furthermore, Kenya should be an active player on the international scene in arbitration networks such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[91] Increased adherence to international treaties will insulate investors and more parties from countries that may opt for Kenya as an arbitration venue.[92]

5. Conclusion

Alternative Dispute Resolution in Kenya, through arbitration, holds a huge promise of change.[93] This can be realized through the constitutional endorsement of ADR and establishment of institutions like the NCIA.[94] On the other hand, there is much to overcome regarding judicial interference, inflated costs, limited expertise among arbitrators, and low awareness of the process.[95]

For a way forward, Kenya should streamline the legal framework by reducing the instances of procedural ambiguity, judicial interference, and by including expedited arbitration, third-party funding, and emergency interim relief

[89] Gu, Weixia. "China's Belt and Road Development and a New International Commercial Arbitration Initiative in Asia." *Vand. J. Transnat'l L.* 51 (2018): 1305.
[90] *Ibid.*
[91] Babu, Rajesh. "International Commercial Arbitration and the Developing Countries." *AALCO Quarterly Bulletin* 4 (2006): 386.
[92] Bono, Marta. "The International Commercial Arbitration in BRICS: toward a common framework for dispute resolution." (2024).
[93] Aronovsky, Ronald G. "The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm." *Sw. L. Rev.* 42 (2012): 131.
[94] *Ibid.*
[95] *Ibid.*

provisions.[96] In this direction, the integration of technology with virtual hearings and AI-driven instruments would bring efficiency and cost reduction.[97]

These measures put Kenya in an excellent position to break the existing barriers and emerge with a robust arbitration system to ensure international best practice.[98] It, however, must continue to take affirmative steps in widening access to justice while attracting economic development, foreign investments, and more importantly, consolidating its position as a hub of arbitration in the continent of Africa.[99]

[96] Hobér, Kaj. "II. Does Investment Arbitration have a Future?" In *International Investment Law*, pp. 1873-1878. Nomos Verlagsgesellschaft mbH & Co. KG, 2015.
[97] *Ibid.*
[98] Baker, Todd. "Arbitration: Arbitration in the 21st Century: Where We've Been, Where We're Going." *Okla. L. Rev.* 53 (2000): 653.
[99] *Ibid.*

Bibliography

Abwunza, Allan Agesa. "Development of a Framework for Effective Construction Arbitration: A Comparative Case Study of Construction Disputes in Kenya." PhD diss., JKUAT-COETEC, 2021.

Abedian, Hossein. "Judicial Review of Arbitral Awards in International Arbitration–A Case for an Efficient System of Judicial Review." *Journal of International Arbitration* 28, no. 6 (2011).

Aluoch, Joyce. "Judicial Intervention at an Early Stage of Arbitral Proceedings: Recognizing the Effect of Arbitral Agreement and Interpreting its Scope." *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 83, no. 4 (2017).

Amin, Parag. "Explain the Arbitration in Specific Industries: Tailored Approaches." *Arbitration Business and Commercial Laws*: 54.
Arbitration Act, 1995 sec 10.

Aronovsky, Ronald G. "The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm." *Sw. L. Rev.* 42 (2012): 131.

Babu, Rajesh. "International Commercial Arbitration and the Developing Countries." *AALCO Quarterly Bulletin* 4 (2006): 386.

Baker, Todd. "Arbitration: Arbitration in the 21st Century: Where We've Been, Where We're Going." *Okla. L. Rev.* 53 (2000): 653.

Benz, Stephen. "Strengthening Interim Measures in International Arbitration." *Geo. J. Int'l L.* 50 (2018): 143.

Böckstiegel, Karl-Heinz. "Past, present, and future perspectives of arbitration." *Arbitration International* 25, no. 3 (2009): 293-302.

Brunet, Edward. "Arbitration and Constitutional Rights." *NCL Rev.* 71 (1992): 81.

Chauhan, Jai. "Transformation of Dispute Resolution: Technological Innovations in Dispute Resolution and Its Effect on International Law." Available at SSRN 4640977 (2023).

Desai, Meena. "Review of the Future of Arbitration: Innovations and Challenges." *Arbitration Business and Commercial Laws*: 67.

Don-Woods Company Limited v Kenya Airports Authority.

Fitrianingrum, Agustina, Rina Shahriyani Shahrullah, and Elza Syarief. "Legal approaches to online arbitration: Opportunities and challenges in Indonesia." *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 28, no. 2 (2016): 314-321.

Franck, Susan D. "Development and Outcomes of Investment Treaty Arbitration." *Harv. Int'l LJ* 50 (2009): 435.

Franck, Susan D., James Freda, Kellen Lavin, Tobias Lehmann, and Anne Van Aaken. "The Diversity Challenge: Exploring the Invisible College of International Arbitration." *Colum. J. Transnat'l L.* 53 (2014): 429.

Gaker, Jacob K. "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR." (2011).

Gonstead, Mariana Hernandez-Crespo. "Beyond Investor-State Disputes: Intercultural Capacity Building to Optimize Negotiation, Mediation, and Conflict Management." *U. St. Thomas LJ* 17 (2020): 251.

Gu, Weixia. "China's Belt and Road Development and a New International Commercial Arbitration Initiative in Asia." *Vand. J. Transnat'l L.* 51 (2018): 1305.

Hatami Alamdari, Bahar. "The Emerging Popularity of International Arbitration in Banking and Financial Sector–Is This a Fashionable Trend or a Viable Replacement?" PhD diss., University of London, 2016.

Hayford, Stephen L. "The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration." *Berkeley J. Emp. & Lab. L.* 21 (2000): 521.

Hobér, Kaj. "II. Does Investment Arbitration have a Future?" In *International Investment Law*, pp. 1873-1878. Nomos Verlagsgesellschaft mbH & Co. KG, 2015.

Karton, Joshua. "International Arbitration Culture and Global Governance." *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014).

Koh, Pearlie MC. "Enhancing Economic Co-operation: A Regional Arbitration Centre for ASEAN?" *International & Comparative Law Quarterly* 49, no. 2 (2000): 390-412.

Lasswell, Harold D., and Myres S. McDougal. "Legal Education and Public Policy: Professional Training in the Public Interest." *Yale Lj* 52 (1942): 203.

Łągiewska, Magdalena. "New Technologies in International Arbitration: A Game-Changer in Dispute Resolution?" *International Journal for the Semiotics of Law-Revue Internationale de Sémiotique Juridique* 37, no. 3 (2024): 851-864.

Ma, Yiyang. "The Legal Basis for the Expansion of the Effectiveness of Arbitration Agreements: Taking Principal and Guarantee Contracts as Examples." *International Theory and Practice in Humanities and Social Sciences* 2, no. 1 (2025): 315-325.

Menon, Sundaresh. "Arbitration and the Transnational System of Commercial Justice: Charting the Path Forward." *Asian International Arbitration Journal* 20, no. 2 (2024).

Muigua, K. "The Arbitration Acts: A Review of Arbitration Act, 1995 of Kenya Vis-a-Vis Arbitration Act 1996 of United Kingdom." Lecture delivered at the Chartered Institute of Arbitrators-Kenya Branch Entry Course, 2008 (Revised 2010).

Muigua, PhD. "Promoting International Commercial Arbitration in Africa." (2016).

Mutubwa, Wilfred. "The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013." *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 82, no. 2 (2016).

Muyala, Michael IW. "Strengthening the Legal and Institutional Framework of International Commercial Arbitration in Kenya: The Case of Nairobi Centre for International Arbitration." PhD diss., University of Nairobi, 2017.

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

Mwangi, C. "The Role of Kenyan Courts in Arbitration, Enabling or Constraining?" (2014).

Negi Advocate, Chitranjali. "Unlocking Potential: International Arbitration Trends in Central Asia and Caucasus." Available at SSRN 4926177 (2024).

Ng'etich, Raphael. "The Current Trend of Costs in Arbitration: Implications on Access to Justice and the Attractiveness of Arbitration." *Alternative Dispute Resolution* 5, no. 2 (2017).

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

Nyutu Agrovet Limited v Airtel Network Kenya Limited [2016] (eKLR).

Omwega, Annah N. "The Role of Arbitration in Promoting Access to Justice in Nairobi County, Kenya"." PhD diss., University of Nairobi, 2023.

Onsare, D.A. "Impact of Court Intervention on Arbitration in Kenya." PhD diss., University of Nairobi, 2023.

Reyes, Anselmo. "Judicial Capacity-Building and Sustainable Diversity under the Model Law." In *Diversity in International Arbitration,* pp. 150-166. Edward Elgar Publishing, 2022.

Solhchi, Mohammad Ali, and Faraz Baghbanno. "Artificial Intelligence and Its Role in the Development of the Future of Arbitration." *Int'l JL Changing World* 2 (2023): 56.

Stipanowich, Thomas. "Arbitration: The New Litigation." *U. Ill. L. Rev.* (2010): 1.

Stipanowich, Thomas. "Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals." *Columbia American Review of International Arbitration* 25 (2014).

Synergy Industrial Credit Ltd v Cape Holdings Ltd [2020] KECA 223 (KLR).

Zand Pazandi, Amir, Farrokh Forootan, Towhid Pourrostam, and Mehdi Ravanshadnia. "Arbitration of Disputes in the Construction Industry." *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 16, no. 4 (2024): 04524021.

From Efficiency to Delay: Reimagining Arbitration in Kenya to Uphold Finality and Minimise Judicial Interference

By: ***Youngreen Peter Mudeyi****

Abstract

Can arbitration, taking 17 years in one case and 10 years in another, fulfil its intended goal of efficiency and swift resolution? This highlights systemic failure in Kenya's arbitration framework, primarily caused by excessive court intervention. Arbitration was designed to limit judicial interference and ensure finality, yet Kenyan courts, including the Supreme Court, have breached this by creating appellate jurisdiction for the Court of Appeal on arbitration matters, one not grounded in any law. They acknowledged that Article 164 of the Constitution excludes appellate jurisdiction over High Court decisions on setting aside arbitral awards but unjustifiably claimed appeals to the Court of Appeal are allowed, without citing any legal basis. The justification of "palpable injustice" in cases of set-aside awards raises questions whether the High Court serves as a court of justice or injustice, and issues on judicial trust. Before the Nyutu and Synergy Supreme Court decisions, there were two schools of thought on the application of Article 35 of the Arbitration Act: one that permitted appeals beyond the High Court, and another that did not. The restrictive view offered no practical solutions for disputes when arbitral awards were set aside, creating legal uncertainty. This paper proposes a solution: when the High Court sets aside an arbitral award, the matter should be remitted to a new tribunal (this paper terms it as post-setting aside remission) with fresh arbitrators chosen by the parties, ensuring finality and efficiency by eliminating unnecessary appellate delays.

* *The author is a CB Madan Students Award recipient (2024), third-year law student at Kabarak University, and legal researcher at Allamano & Associates Advocates. Specialising in Constitutional and Public Law, ADR, Climate Change Litigation, and AI Governance, the author has presented at international conferences including the conference in Celebration of the Scholarship of Professor Charles Fombad, authored scholarly articles, and serves as a Student Editor for the EALS Journal.*

1.0. Introduction

Lawyers who encourage compromise over litigation have a unique opportunity to exemplify virtue, while ensuring they will always have enough work.[1] Few legal mechanisms inspire as much confidence yet spark as much controversy as arbitration.[2] Designed as a refuge from the complexities of traditional litigation, arbitration promises efficiency,[3] confidentiality,[4] and finality.[5] In a world where businesses demand swift and predictable resolution of disputes, arbitration has emerged as the preferred choice.[6] Yet, in Kenya, this promise is increasingly threatened.[7] Judicial overreach and a propensity for prolonged appellate processes have undermined arbitration's foundational principles, raising concerns about its viability as an alternative to court proceedings.[8] At its core, arbitration prioritises finality and minimises judicial interference, something that has been hailed as the hallmark of Kenya's 1995 Arbitration Act.[9] Section 35 of Kenya's Arbitration Act

---

[1] Abraham Lincoln, American President, 1861-1865, in J Pine (ed), Wit and Wisdom of American Presidents (Dover Publications Inc 2002) 27.

[2] Kevin Elbert Toa, 'Confidence in Confidentiality: An Open Defence to the Closed Nature of Arbitration' (Christopher Bathurst Prize Submission, 2017) 8.

[3] Katherine A Helm, 'The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?' (2006-2007) 61(4) *Dispute Resolution Journal* 2.

[4] Kariuki Muigua, Settling Disputes through Arbitration in Kenya (4th edn, Glenwood Publishers 2022) 3.

[5] Alvin Gachie, 'The Finality and Binding Nature of the Arbitral Award' (2017) 13(1) *Law Society of Kenya Journal* 86.

[6] Dipen Sabharwal, 'Resolving Disputes Without Going to Court' (Global Banking & Finance Review, 26 October 2015) https://www.globalbankingandfinance.com/resolving-disputes-without-going-to-court/ accessed 24 February 2025.

[7] The threat that this paper poses is narrowing the line between Arbitration and litigation by expanding the courts role in reviewing arbitration matter by allowing appeals beyond the High Court.

[8] Kariuki Muigua, 'Extent of Court Intervention in International Commercial Arbitration in Kenya' (The Lawyer Africa, 23 September 2023) 1, https://thelawyer.africa/2023/09/23/extent-of-court-intervention-in-arbitration-in-kenya/ accessed 25 February 2025.

[9] Professor Paul Musili Wambua, 'The Challenges of Implementing ADR as an Alternative Mode of Access to Justice in Kenya' (2013) 1(1) *Alternative Dispute Resolution Journal* 26.

encapsulates this ethos by allowing limited judicial oversight to set aside arbitral awards on specific grounds.[10] However, its application has been undermined by judicial practices that foster prolonged disputes and jeopardise the efficiency of arbitration.[11]

In recent years, Kenya has witnessed the erosion of arbitration's fundamental principles.[12] Cases spanning decades exemplify the systemic delays and judicial overreach that have plagued the process.[13] While arbitration awards are intended to be binding and conclusive,[14] excessive court interventions have transformed arbitration into a protracted and costly ordeal, undermining its raison d'être.[15] Decisions such as *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*[16] (Nyutu case) and *Synergy Industrial Credit Limited v Cape Holdings Limited*[17] (Synergy case) have introduced an unsettling precedent, allowing appeals beyond the High Court in cases of perceived "palpable injustice." These decisions, while ostensibly

[10] *Arbitration Act* (Laws of Kenya, Cap 49) (1995) s 35.
[11] International Bar Association, 'Challenges with Recognition and Enforcement of Arbitral Awards in Africa' (International Bar Association, 2023) https://www.ibanet.org/challenges-with-recognition-enforcement-arbitral-awards-Africa accessed 25 February 2025.
[12] Kituku, James K, *Facilitating International Arbitration in Kenya: A General Analysis of Arbitration in the Country and International Arbitration in Other Selected Countries* (LLM Thesis, University of Nairobi, in fulfilment of the requirements for the award of the Master of Laws, 2018) 36.
[13] See *Board of Governors Ng'iya Girls High School v Meshack Ochieng' t/a Mecko Enterprises* [2014] eKLR paras 35–36.
[14] Ibid, Section 32A.
[15] Kariuki Muigua, 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending, and After Arbitration in Kenya' (2010) https://new.kenyalaw.org/akn/ke/doc/journal/2010-03-01/role-of-the-court-under-arbitration-act-1995-court-intervention-before-pending-and-after-arbitration-in-kenya/eng%402010-03-01 accessed 25 February 2025.
[16] *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch* (Petition 12 of 2016) [2019] KESC 11 (KLR) (6 December 2019) (Judgment, with dissent by DK Maraga, CJ & P). (Nyutu Case)
[17] *Synergy Industrial Credit Limited v Cape Holdings Limited* (Petition 2 of 2017) [2019] KESC 12 (KLR) (6 December 2019) (Judgment). (Synergy Case).

grounded in justice, have created legal uncertainty, eroded finality, and burdened arbitration with characteristics it was meant to avoid.[18] The Supreme Court in the two decisions failed to note that the jurisdiction of a court can only be granted in specific terms by the Constitution or a statute.[19]

This paper critiques the judicial misapplication of Section 35 of the Arbitration Act, arguing that appeals beyond the High Court contravene legislative intent. Section 35 envisages narrow grounds for judicial review, yet conflicting interpretations have allowed the Court of Appeal to entertain appeals not expressly provided for. This judicial overreach contradicts the Arbitration Act's explicit directive that courts shall not intervene except as provided for by the Act.[20] This trend not only jeopardises arbitration's appeal but also diminishes Kenya's competitiveness as a preferred seat for arbitration in the region and beyond.[21] The absence of clarity on the finality of High Court decisions under Section 35 has led to inconsistent rulings and a lack of predictability in arbitration outcomes. To restore arbitration's integrity, this paper proposes for the post-setting aside remission.[22] When an arbitral award is set aside by the High Court, rather than opening the floodgates to appellate litigation, the dispute should be remitted to a new tribunal with arbitrators jointly selected by the parties. This mechanism ensures both judicial oversight and arbitral finality, bypassing the appellate delays that currently

---

[18] Kariuki Muigua, 'Arbitration Law and the Right of Appeal in Kenya' (2019) 18. https://kmco.co.ke/wp-content/uploads/2021/01/Arbitration-Law-and-the-Right-of-Appeal-in-Kenya-Kariuki-Muigua-9th-January-2021.pdf accessed 25 February 2025.

[19] Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling) para 50.

[20] *Arbitration Act* (Laws of Kenya, Cap 49) (1995) s 10.

[21] Synergy Case (CJ Maraga Dissenting opinion, Para 152) where he stated that '*Kenya's boasting as the arbitration centre in the East African region cannot hold if Kenyan courts do not reflect on the effect of their decisions in arbitral proceedings.*'

[22] This solution has been borrowed slightly from Helm, 'The Expanding Scope of Judicial Review of Arbitration Awards,' (n 3 above). Though it is important to note that Dr. Katherine Helm only speaks of remission as an alternative to setting aside, one similar to the provision of Section 35(4) of the Kenya's Arbitration Act but this paper handles remission, not as a substitute to but an additional reedy after the High Court has set aside an arbitral award.

plague the system.[23] By eliminating unnecessary appeals and fostering expeditious resolution, post-setting aside remission reaffirms arbitration as a credible alternative to litigation and not an equal full of the great disadvantages.[24] The paper also slightly addresses the need for a revision of the Arbitration Act in light of the Constitution of Kenya 2010. The scope of this paper is confined to Section 35 of the Arbitration Act and does not address Section 39, which permits appeals on questions of law in domestic arbitration under specific circumstances where the parties had agreed.[25] The analysis focuses on the legislative intent, divergent judicial interpretations, and practical implications of Section 35, culminating in a critique of the Nyutu and Synergy decisions. It seeks to provide actionable recommendations to enhance the efficiency, predictability, and autonomy of arbitration in Kenya while maintaining the need for judicial review in a narrow sense.

The paper begins by examining the objectives of arbitration and the legislative intent of Section 35 of Kenya's Arbitration Act, focusing on finality, efficiency and minimal judicial oversight. It then reviews judicial interpretations before the *Nyutu* and *Synergy* decisions, highlighting conflicting views and their impact on legal clarity. It critiques these decisions, addressing their implications for arbitration's efficiency and predictability. Finally, it proposes remitting disputes to a new tribunal with fresh arbitrators after an award is set aside, ensuring finality and reducing judicial interference.

[23] Hofmeyr, 'Arbitration Act: The Intersection between Remittal and Review' (Cliffe Dekker Hofmeyr, 4 May 2021) https://www.cliffedekkerhofmeyr.com/news/publications/2021/Dispute/dispute-resolution-alert-4-may-arbitration-act-the-intersection-between-remittal-and-review.html accessed 25 February 2025.
[24] Ibid.
[25] *Arbitration Act* (Laws of Kenya, Cap 49) (1995) s 39.

2.0. Arbitration's Core Purpose and the Legislative Intent of Section 35

The evolution of arbitration law in Kenya reflects a shift from court dominance to a more autonomous and efficient dispute resolution system.[26] The process began with the Arbitration Ordinance of 1914,[27] based on the English Arbitration Act of 1889, which gave courts significant control over arbitration.[28] In 1968, Kenya adopted its first Arbitration Act, modelled on the UK's 1950 Act, but this retained excessive court intervention, undermining arbitration's effectiveness. Inspired by the UNCITRAL Model Arbitration Law,[29] Kenya introduced the Arbitration Act of 1995,[30] replacing the 1968 Act to align with international standards and reduce court involvement.[31] Amendments in 2009 further insulated arbitration from court interference, enhancing its reliability and efficiency.[32] Today, the 1995 Act, as amended, provides a framework for both domestic and international arbitration, promoting finality and autonomy in the process. This section's arguments are divided into two: the rationale of arbitration, and the legislative intent behind section 35 as read with other sections of the arbitration act.

---

[26] Kariuki Muigua, 'Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises' (2018) 8. https://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf accessed 25 February 2025.

[27] Ibid, 8.

[28] John Miles and Nyanje Wa Nyanje, 'Swimming against the Current: The Emerging Jurisprudence as Regards Right to Appeals of Arbitration Awards in Kenya' *Dispute Resolution Update, Lagos Chambers of Commerce International Arbitration Centre* 7.

[29] Muigua, '*Emerging Jurisprudence in the Law of Arbitration in Kenya…' (n 26 above).*

[30] This is Kenya's current Arbitration Act.

[31] The Arbitration Agreement, Kenya Law Resource, available at http://kenyalawresourcecenter.blogspot.com/2011/07/arbitration-agreement.html [accessed 2 January 2025].

[32] The 2009 Amendment introduced section 32A into the Arbitration Act unless the parties agree otherwise, the arbitral award binds them and is final, with recourse allowed only as outlined in the Arbitration Act.

2.1. The Essence and Rationale of Arbitration

The core purpose of arbitration is to offer an efficient and timely resolution to disputes.[33] Expanding judicial review of arbitration undermines this goal.[34] To avoid any misunderstanding, it is important to emphasise that arbitration is a voluntary process of resolving disputes, chosen by the parties as a final mechanism despite its inherent flaws and risks.[35] The options for appealing or challenging an arbitration award are narrowly limited.[36] By parties choosing arbitration, they choose to forego the appellate advantage of litigation and they sacrifice it for the efficiency, timely determination and finality of arbitration.[37] Arbitration is a voluntary process, distinct from litigation.[38] Arbitration's design is to settle disputes conclusively, and attempts to introduce broad appeals undermine this principle.[39] Comparing arbitration to litigation is like comparing apples to oranges.[40] Despite some scholars suggesting their similarities, I argue the key difference that makes them greatly distinct is that arbitration is voluntary, unlike litigation. Muigua highlights the adversarial nature of arbitration,[41] which

---

[33] Dr. Andreas Respondek, 'What Is the Purpose of Arbitration? A Comprehensive Guide - Blog - Publications - International SIAC Arbitrator - Singapore' (Rf-arbitration.com, 2017) https://www.rf-arbitration.com/publications/blog/what-is-the-purpose-of-arbitration-a-comprehensive-guide#:~:text=In%20essence%2C%20the%20purpose%20of,confidentiality%2C%20autonomy%2C%20and%20finality. Accessed 30 December 2024.

[34] Katherine A. Helm, 'The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?' (2006) 61(4) Dispute Resolution Journal 6.

[35] CNG v. G., [2024] Hong Kong High Court, HKCFI 575.

[36] Oraro's Chacha Odera, Eva Mukami and Radhika Arora, 'Sponsored briefing: Court intervention with respect to arbitral awards in Kenya' (Legal Business, 30 April 2021) https://www.legalbusiness.co.uk/disputes-yearbook-2021/sponsored-briefing-court-intervention-with-respect-to-arbitral-awards-in-kenya/ accessed 25 February 2025.

[37] Ibid.

[38] Ibid.

[39] Ibid.

[40] Levin MJ, 'Professor Sovern: You're Mixing Apples and Oranges' (Consumer Finance Monitor, 11 April 2023) https://www.consumerfinancemonitor.com/2023/04/11/professor-sovern-youre-mixing-apples-and-oranges/ accessed 31 December 2024.

[41] Muigua, *Emerging Jurisprudence in the Law of Arbitration in Kenya…' (n 26 above)* 3.

resembles litigation,[42] but I maintain that the voluntary nature of arbitration makes it fundamentally distinct. The Kenyan Arbitration Act of 1995 stresses arbitration's finality, aligning with the principle of efficiency and finality that limits court intervention. Judicial interference should only occur in the rare cases outlined expressly in the Act.

2.2. Legislative Intent Behind Section 35 of Kenya's Arbitration Act

The silence of a statutory provision occurs when a rule that could have clarified a legal point or addressed a specific issue is omitted.[43] Section 35 of Kenya's Arbitration Act reflects the Legislature's intent to limit court involvement in arbitration.[44] It states that a party can apply to the High Court to set aside an arbitral award on specific grounds. These include the invalidity of the arbitration agreement, the award addressing a dispute not covered by the agreement, or serious procedural irregularities.[45] It also allows for an award to be challenged if it conflicts with Kenyan public policy, or if the arbitrator was biased or exceeded their authority. This section aims to balance the need for fairness in the arbitration process with the recognition of the finality of awards. The historical context of the Act clarifies that its primary aim was to promote arbitration as a swift and cost-effective alternative to the courts. As articulated in the 1995 Parliamentary Hansard report, the law sought to insulate arbitration from unnecessary court interference.[46] The then Attorney General emphasised that if courts were to

---

[42] Kariuki Muigua, Alternative Dispute Resolution and Access to Justice in Kenya, Glenwood Publishers Limited (2015).

[43] Camp B, 'Interpreting Statutory Silence' (2010) Texas Tech School of Law Legal Studies Research Paper 507.

[44] Kariuki Muigua, *Constitutional Supremacy over Arbitration in Kenya*, available at https://kmco.co.ke/wp-content/uploads/2018/08/Constitutional-Supremacy-over-Arbitration-in-Kenya.pdf (accessed 2 January 2025) 12.

[45] For the full analysis of this grounds, see Kariuki Muigua, *Arbitration Law and the Right of Appeal in Kenya*, paper first presented at the Law Society of Kenya Continuing Professional Development Webinar on Arbitration, (13 November 2020) 12-17.

[46] **Parliamentary National Assembly Official Report, Thursday, 20th July, 1995, 1645,** available at http://217.21.116.49/xmlui/handle/123456789/4622?show=full accessed 2 January 2025: where it was stated,

intervene at any stage of the arbitration process, it would defeat the purpose of arbitration,[47] which is to provide a quicker resolution to disputes. The amendment in 2009 strengthened this intention, aiming to shield arbitration from excessive court interference. Section 10 of the Arbitration Act echoes the UNCITRAL Model Law, stating that no court shall intervene in matters governed by the Act unless specified by the law.[48] The explanatory notes highlight the necessity of protecting the arbitral process from disruptive court intervention, particularly in commercial disputes involving foreign parties.[49] Section 35 allows for limited grounds of court intervention, such as incapacity or fraud, but this is a narrow exception, reinforcing the Act's commitment to arbitration's finality. This approach is essential to uphold arbitration's purpose of providing a swift, efficient, and final resolution to disputes, as opposed to the drawn-out and often cumbersome litigation process. This is will inform the argument in this paper. The next section handles the two schools of thought touching on the extent to which one can appeal an arbitration matter.

3.0. Divergent Judicial Interpretations Before Nyutu and Synergy Cases

Before the Supreme Court's decisions in *Nyutu* and *Synergy,* there was significant uncertainty regarding the right to appeal High Court decisions under Section 35 of the Arbitration Act.[50] This section will examine the two prevailing interpretations of this provision.

3.1. The Argument for Appeals Beyond the High Court Under Section 35

The argument for allowing appeals beyond the High Court under Section 35 of the Arbitration Act, has been seen in cases like *Kenya Shell Limited v. Kobil Petroleum*

"In fact, the purpose of this Bill is to reduce and minimise what I may, inverted commas, call 'Interferences by the local judiciary in international commercial arbitrations.'"

[47] Miles and Nyanje, 'Swimming against the Current' (n 28) 10.

[48] *Arbitration Act* (Laws of Kenya, Cap 49) (1995) s 10.

[49] Miles and Nyanje, 'Swimming against the Current' (n 28) 10.

[50] See Kenya Shell Limited -vs- Kobil Petroleum Limited, Civil Application No. 57 of 2006 (Unreported) and DHL Excel Supply Chain Kenya Limited -vs- Tilton Investments Limited, Civil Application No. NAI. 302 of 2015; [2017] eKLR

Limited and DHL Excel Supply Chain Kenya Limited v. Tilton Investments Limited. In both cases, the courts held that the silence of Section 35 regarding appeals does not preclude the right to appeal to the Court of Appeal. In *Kenya Shell Limited*, the court emphasised that Parliament could have explicitly barred appeals, but it chose not to, thus preserving the right to seek leave for an appeal.[51] Similarly, in *DHL Excel Supply Chain Kenya Limited*, the Court of Appeal ruled that decisions made under Section 35 remain appealable to the Court of Appeal by virtue of the Constitution, as it provides the framework for jurisdiction and rights of appeal.[52] This view is flawed. The law, as written in Section 35, does not specifically grant the right to appeal beyond the High Court. The argument that if the legislature had the intention to limit the appeal they could have done so expressly is misplaced due to the failure by the same courts to rebut the counter argument that if they intended an appeal, they would have expressly placed it in the section.[53] The courts have, in effect, created a jurisdiction that is not established in the Constitution or any statute. This judicial creation of appeal rights undermines the principle that judicial powers should be derived from clear legal authority, not from interpretations that extend beyond the written law.[54] As such, while courts may have ruled to allow appeals, this is not supported by the explicit

[51] Kenya Shell Case (n 50).
[52] DHL Excel Supply Chain Kenya Limited -vs- Tilton Investments Limited, (n 50) para 24.
[53] Also note that in the case of *Khelef Khalifa & 2 others v Independent Electoral and Boundaries Commission & another,2017 eKLR,* the court observed that in determining whether the parliament has directly addressed a particular issue, the courts cannot draw their own construction of the law from the outset. There is a school of thought that suggests the legislature's silence in a provision is intended to grant courts discretionary powers to adjudicate on the matter, particularly when the drafters lack specialized expertise. However, this view raises concerns about judicial overreach and the potential for inconsistent interpretations. As Howarth observes, (Howarth D, 'On Parliamentary Silence' (UK Constitutional Law Blog, 13 December 2016) https://ukconstitutionallaw.org/2016/12/13/david-howarth-on-parliamentary-silence/ accessed 2 January 2025) relying on the court to identify parliamentary intent can lead to ambiguity, as the court is not always in a position to accurately determine the precise legislative purpose. This approach may undermine legal certainty and empower the judiciary to make decisions that go beyond the original scope of the law.
[54] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

wording of Section 35 or any other legislative provision, leaving the issue open to legal challenges based on a lack of statutory support.

3.2. The Argument Against Appeals Beyond the High Court

The argument against appeals beyond the High Court under Section 35 of the Arbitration Act has firm judicial backing. In *Anne Mumbi Hinga v. Victoria Njoki Gathara*, the Court of Appeal held that Section 35 does not allow appeals and that appeals can only occur under the conditions set out in Section 39.[55] The court stated that courts have no right to intervene in arbitral processes or awards except where the Act expressly permits or where the parties have agreed in advance. Similarly, in *Micro-House Technologies Limited v. Co-Operative College of Kenya*, the Court of Appeal ruled that no appeal lies from a High Court decision under Section 35.[56]
These rulings correctly interpret the law but fail to offer practical solutions for parties facing unfair outcomes under Section 35. The courts simply assert that the section bars appeals and stops there. They do not address what parties can do if procedural or substantive errors occur in High Court decisions. This leaves a gap in the arbitration process, where affected parties lack guidance or recourse. By limiting their analysis to restating the law, these decisions weaken arbitration's role as a reliable dispute resolution mechanism.[57] The courts could offer interpretative guidance that balances adherence to the law with practical considerations, strengthening arbitration while respecting its statutory framework.[58] After this two schools of thought, the Supreme Court finally clarified the matter, but the clarification was to the detriment of Arbitration. That is what is analysed in the next section.

---

[55] Anne Mumbi Hinga -vs- Victoria Njoki Gathara, Civil Appeal No. 8 of 2009; [2009] eKLR.
[56] Micro-House Technologies Limited -vs- Co-Operative College of Kenya, Civil Appeal No. 228 of 2014, (2017) eKLR.
[57] Kariuki Muigua, 'Arbitration Law and the Right of Appeal in Kenya' (2021) 12 https://kmco.co.ke/wp-content/uploads/2021/01/Arbitration-Law-and-the-Right-of-Appeal-in-Kenya-Kariuki-Muigua-9th-January-2021.pdf accessed 25 February 2025.
[58] Ibid, 20.

4.0. A Critique of the Supreme Court's Position in Nyutu and Synergy

In *Nyutu case* and *Synergy case*, the Supreme Court established that the Court of Appeal could hear appeals in arbitration cases even without an express right of appeal under Section 35 of the Arbitration Act.[59] The Court justified this, stating that, in certain exceptional cases, such as where there is palpable injustice, the Court of Appeal could intervene.[60] The Court argued that these appeals should be narrowly defined, applying only when there is misconduct or procedural unfairness.[61] In *Synergy*, the Court stated that the Court of Appeal could step in when necessary to correct injustices in the arbitral process.[62] This Court's reasoning raises a lot of concerns. Section 35 clearly sets out the grounds for setting aside an arbitral award but does not mention a right of appeal. The Court's conclusion that the Court of Appeal could intervene despite the lack of statutory support introduces a right of appeal that the law does not explicitly provide for. The Court has effectively created a new legal route for appealing arbitral awards, without a legal foundation for such an action conflicting the argument that the jurisdiction of a court can only arise from the constitution or statutes in specific terms.

The question that needs to be fully interrogated is where in law the Supreme Court derived its power to hold that, in the absence of an express right of appeal under Section 35 of the Arbitration Act, the Court of Appeal nonetheless has 'narrow and circumscribed powers'[63] to act in cases of 'palpable injustice' or where an appellant has been 'shut out completely' from seeking justice. First, this power cannot be traced to any law. No provision in the Arbitration Act or elsewhere explicitly allows the Supreme Court to establish the new test it articulated in *Synergy* and *Nyutu*. Second, the Supreme Court effectively amended Section 35 of the Arbitration Act by creating a new right of appeal. Through these decisions, the Court enacted a substantive legal provision rather than interpreting the existing

[59] See Nyutu case (n 16) paras 69-80 and Synergy case (n 17) paras 86-87.
[60] Nyutu case (n 16) para 82.
[61] Ibid, para 77.
[62] Synergy case (n 17) paras 52, 90 and 91.
[63] Nyutu case (n 16) para 77. See also Synergy case (n 17) paras 69, 85 and 138.

law. Lastly, the Supreme Court's deliberate language suggests it developed a test whereby the Court of Appeal should grant leave to appeal in cases where bribery or corruption played a decisive role during the arbitral process.[64] Although the courts have largely avoided framing the issue in these terms, it is evident that the Supreme Court has mandated the reading of a right to appeal into Section 35 of the Arbitration Act in instances of bribery or corruption, notwithstanding the absence of express statutory authority. (See footnote 44 which offers a critique on the argument "silence implies intent" that hailers of the two decision might use to critique this).[65] This innovation could undermine the predictability of arbitration, as parties may now expect the possibility of appeals in cases where no such right is explicitly granted. Furthermore, the Court's focus on exceptional cases, such as allegations of misconduct or corruption,[66] risks opening the door to a wide range of appeals, which could delay the arbitration process and lead to inconsistencies in how arbitration law is applied. The Court's decision to allow appeals in the absence of legislative backing raises serious concerns. While the intention may be to ensure fairness and justice,[67] such a decision risks undermining the stability of arbitration law. It would have been more appropriate for the legislature to amend the Arbitration Act to explicitly define the grounds for appeal, rather than allowing the judiciary to create these grounds. This approach would have provided clearer guidance for all parties involved and avoided introducing

[64] Ibid, para 75.

[65] There is a school of thought that hails the two Supreme Court decisions and the supporters may be tempted to rely on Overholt's argument that legislative silence implies intent, necessitating judicial interpretation to eliminate ambiguities. (See Overholt E, 'Statutes: Construction: The Legislative Silence Doctrine', 43 California Law Review 5, 1955, 907 and Bowman F, 'A Judicial Dilemma: Real or Imagined?', 83 Virginia Law Review 29, 1981, 29.) While this argument holds merit, it is crucial to weigh the pros and cons of such an approach. Granting courts broad interpretative leeway risks undermining arbitration's efficiency, finality, and timeliness. Any judicial intervention must carefully balance these considerations to avoid eroding the very principles arbitration seeks to uphold.

[66] If the argument is that corruption in the High Court is the problem, then the judiciary ought to deal with the corruption as the court ought to be the epitome of integrity.

[67] Synergy case (n 17) paras 52, 90 and 91.

uncertainty into the arbitration process. After this analysis, the next section of this paper now offers a solution that can aid in balancing the need to prevent injustice while maintaining the key purpose of arbitration.

5.0. Policy Imperatives: Replacing Appeals with Post-Setting Aside Remission

The principle of finality in arbitration is central to the effectiveness of dispute resolution mechanisms, ensuring that matters are resolved swiftly and decisively.[68] However, the protracted litigation witnessed in cases such as *Nyutu Case* and *Synergy Case* reveals a significant flaw in the current system. These cases highlight the adverse consequences of multiple appeals and delays, which ultimately undermine the purpose of arbitration. A practical solution is necessary to balance judicial oversight with the need for efficiency, and the implementation of post-setting aside remission offers a viable remedy. This proposal focuses on referring disputes to a new arbitral bench after an award is set aside by the court, thus avoiding the complications of endless appeals while preserving the benefits of arbitration.

Post-setting aside remittal entails the referral of a matter to a new arbitral bench after an initial award has been nullified by the court.[69] This avoids the cycle of appeals, ensuring that the dispute is reconsidered promptly and conclusively.[70] Rather than prolonging litigation, the matter is returned to arbitration under a fresh panel, comprising three members with the necessary expertise. This solution adheres to the core principles of arbitration: efficiency, expertise, and neutrality.[71]

---

[68] Melissa Ng'ania, 'Review of the Principle of Finality in Arbitral Proceedings under Section 39(3) (b) of the Arbitration Act, 1995' (2018) 2(2) *Journal of CMSD* 47.
[69] Hofmeyr, 'Arbitration Act: The Intersection between Remittal and Review' (n 23).
[70] Raghav Kohli, 'Taking a Second Bite of the Cherry: When is it Appropriate to Remit an Award Instead of Setting it Aside in Singapore?' (Kluwer Arbitration Blog, 17 March 2019) https://arbitrationblog.kluwerarbitration.com/2019/03/17/taking-a-second-bite-of-the-cherry-when-is-it-appropriate-to-remit-an-award-instead-of-setting-it-aside-in-singapore/ accessed 25 February 2025.
[71] Brian Haderspock, 'Guiding Principles of Commercial Arbitration and Its Advantages Compared to Traditional Litigation' (26 June 2024) https://www.americanbar.org/groups/dispute_resolution/resources/just-

The remittal process offers the opportunity for a new panel to reexamine the case without the distortions of previous decisions, thus promoting fairer outcomes.[72] The new arbitral panel should consist of three members,[73] a decision grounded in international best practices. A panel of three arbitrators strikes a balance between adequate representation and manageable complexity. Each party may appoint one arbitrator, and the third, typically the chairperson, would be selected jointly or by an independent institution.[74] This ensures that the bench is independent, impartial, and equipped with diverse perspectives.[75] Moreover, this structure minimises the risk of arbitral errors that could arise from a single arbitrator's decision.

One of the key objectives of post-setting aside remittal is to ensure that disputes do not remain unresolved for prolonged periods.[76] To address this, the remitted arbitration should follow strict timelines for the conclusion of proceedings.[77] For example, the new arbitral bench could be mandated to deliver its award within a specified time frame from the date of remittal.[78] This provides an effective deterrent against unnecessary delays, ensuring that the matter is resolved within

---

resolutions/2024-june/guiding-principles-commercial-arbitration-advantages-compared-to-traditional-litigation/#:~:text=Arbitration%20is%20often%20preferred%20over,manner%20compared%20to%20court%20proceedings accessed 2 January 2025.

[72] Hofmeyr, 'Arbitration Act: The Intersection between Remittal and Review' (n 23).

[73] The idea of three arbitrators have been borrowed from the UNCITRAL, *Arbitration Rules* (2021), *Expedited Arbitration Rules*, *Rules on Transparency in Treaty-based Investor-State Arbitration, (Arbitration Rules) Article 9.* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf accessed 2 January 2025.

[74] Ibid.

[75] Nairobi Centre for International Arbitration, 'Arbitration Rules' (2015) rule 8(1) https://ncia.or.ke/wp-content/uploads/2021/02/Final-NCIA-Revised-Rules-2019_2.pdf accessed 25 February 2025.

[76] Kariuki Muigua, 'Settling Disputes Through Arbitration in Kenya' (3rd edn, Glenwood Publishers Limited 2017) 3–6.

[77] Ibid.

[78] Ibid.

a reasonable period.[79] This approach helps maintain the expeditious nature of arbitration, preventing the prolonged litigation seen in cases such as *Nyutu* and *Synergy.*

The issue of endless litigation arising from appeals must be resolved to enhance the finality of arbitral decisions.[80] The post-setting aside remittal framework eliminates the need for extended legal battles over the same substantive issues.[81] Once an award has been set aside, the case is returned to arbitration, and no further appeals should be allowed on the same matter.[82] This "one short appeal" principle reinforces the notion of finality in arbitration, ensuring that disputes do not drag on indefinitely.[83] By limiting further recourse to appeals, the legal process becomes more predictable and reliable, benefiting all parties involved.

However, for post-setting aside remittal to be effective, certain practical measures must be taken. The Arbitration Act may need to be amended to provide for post-setting aside remittal explicitly, setting out the procedures for the appointment of a new arbitral bench and establishing timelines for the resolution of remitted disputes.[84] These provisions would offer clarity and consistency, ensuring that remittals are handled efficiently and in line with established standards.[85] Arbitration institutions would also need to develop their own guidelines for administering remittals, including creating a roster of qualified arbitrators and putting in place clear processes for selecting the new panel.[86] Judicial training is

---

[79] Ibid.
[80] Ibid.
[81] Arbitration Act, 1995 (Kenya), Section 32A.
[82] Ibid, see the binding nature of the arbitral awards.
[83] A Rigozzi, 'Challenging Awards of the Court of Arbitration for Sport' (2010) 1 J Intl Disp Settlement 218.
[84] See Kassam Irfan Jafarali, *Interpreting the Silence of Section 35 of the Arbitration Act 1995: A Judicial Dilemma for the Kenyan Courts* (LLB dissertation, Strathmore University 2020) 35–36.
[85] Hofmeyr, 'Arbitration Act: The Intersection between Remittal and Review'(n 23).
[86] Makinde, Okadazim Niella, A Review of the Enforcement of Arbitration Awards: A Comparative Study of Nigeria and South Africa (LLM Thesis, University of Pretoria, 2022).

essential to the successful implementation of this policy.[87] Judges must understand the importance of limiting their role to the oversight of arbitration and not interfere unnecessarily in the remittal process.[88] Training programs should focus on reinforcing the need for judicial restraint, ensuring that judges support the timely and efficient remittal of matters without exacerbating delays through excessive intervention.[89]

Stakeholder engagement is another vital aspect of making post-setting aside remittal work since more lawyers are getting into it and it is becoming a precursor to litigation.[90] Legal practitioners and arbitrators must understand this approach to streamline arbitration. Post-setting aside remittal offers a solution to delays, ensuring efficiency and fairness with a three-person panel, strict timelines, and judicial oversight.[91] This policy enhances arbitration by resolving disputes promptly while upholding justice.[92]

6.0. Conclusion

Arbitration was designed to cure the malady and tedium of long, expensive, and inefficient litigation.[93] Parties present their grievances before arbitrators, whose

---

[87] See Kenya Judiciary Academy, 'Training' (Kenya Judiciary Academy) https://www.kja.go.ke/?page_id=2349 accessed 25 February 2025 and Chartered Institute of Arbitrators Kenya Branch, 'Training' (CIArb Kenya) https://ciarbkenya.org/training/ accessed 25 February 2025.

[88] *Anne Mumbi Hinga v Victoria Njoki Gathara* (Civil Appeal 8 of 2009) [2009] KECA 466 (KLR) (13 November 2009) (Judgment).

[89] Hon Justice Sir Robin Knowles, 'Judicial Education and Training' (2020) 9 Intl Org for Judicial Training Journal 7.

[90] Muigua, *Emerging Jurisprudence in the Law of Arbitration in Kenya…' (n 26)* 3.

[91] Joshua Juma Wangila, "Arbitration Efficiency Unpacked: Weighing, Cost, Time and Quality" Nairobi Centre for International Arbitration, 29th August 2024. https://ncia.or.ke/wp-content/uploads/2025/01/Arbitration-Efficiency-Unpacked-Weighing-Cost-Time-and-Quality.pdf acessed on 23rd February 2025.

[92] Ibid.

[93] Nyutu Agrovet Limited v Airtel Networks Kenya Ltd (Civil Appeal (Application) 61 of 2012) [2024] KECA 523 (KLR) (9 May 2024) (Judgment) paras 1–3.

decisions are to be final and binding.[94] However, in Kenya, arbitration has become a costly and prolonged process, and this can be attributed to the beyond High Court appeal of arbitration matter established by the Supreme Court in the *Nyutu* and *Synergy cases*. This has led to frustration and disillusionment.[95] To remedy this, post-setting aside remittal could be a solution.[96] This process allows courts to send cases back to arbitration after errors are found, restoring efficiency and reducing delays, making arbitration a more effective and accessible method of dispute resolution.[97]

[94] Russell A Smith and Dallas L Jones, 'Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties' (1966) 52 Va L Rev 831.
[95] Ibid.
[96] Arbitration Act, No. 4 of 1995, Laws of Kenya, s. 35.
[97] Ibid, s. 10.

Bibliography

Books

Kariuki Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya* (Glenwood Publishers Limited 2015).

Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (4th edn, Glenwood Publishers 2022).

J Pine (ed), *Wit and Wisdom of American Presidents* (Dover Publications Inc 2002).

Cases

Anne Mumbi Hinga v Victoria Njoki Gathara, Civil Appeal No. 8 of 2009; [2009] eKLR.

Board of Governors Ng'iya Girls High School v Meshack Ochieng' t/a Mecko Enterprises [2014] eKLR.

CNG v G., [2024] Hong Kong High Court, HKCFI 575.

DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited, Civil Application No. NAI. 302 of 2015; [2017] eKLR.

Kenya Shell Limited v Kobil Petroleum Limited, Civil Application No. 57 of 2006 (Unreported).

Khelef Khalifa & 2 others v Independent Electoral and Boundaries Commission & another, [2017] eKLR.

Macharia & another v Kenya Commercial Bank Limited & 2 others, Application 2 of 2011 [2012] KESC 8 (KLR) (23 October 2012) (Ruling).

Marbury v Madison, 5 U.S. (1 Cranch) 137 (1803).

Micro-House Technologies Limited v Co-Operative College of Kenya, Civil Appeal No. 228 of 2014, [2017] eKLR.

Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Petition 12 of 2016) [2019] KESC 11 (KLR) (6 December 2019) (Judgment, with dissent by DK Maraga, CJ & P).

Synergy Industrial Credit Limited v Cape Holdings Limited (Petition 2 of 2017) [2019] KESC 12 (KLR) (6 December 2019) (Judgment).

Legislation

Arbitration Act (Laws of Kenya, Cap 49) (1995).

Nairobi Centre for International Arbitration, 'Arbitration Rules' (2015) rule 8(1) https://ncia.or.ke/wp-content/uploads/2021/02/Final-NCIA-Revised-Rules-2019_2.pdf accessed 25 February 2025.

UNCITRAL, *Arbitration Rules* (2021), *Expedited Arbitration Rules*, *Rules on Transparency in Treaty-based Investor-State Arbitration, (Arbitration Rules) Article 9.* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf

Journal Articles and Theses

Alvin Gachie, 'The Finality and Binding Nature of the Arbitral Award' (2017) 13(1) *Law Society of Kenya Journal* 86.

A Rigozzi, 'Challenging Awards of the Court of Arbitration for Sport' (2010) 1 J Intl Disp Settlement 218.

Camp B, 'Interpreting Statutory Silence' (2010) *Texas Tech School of Law Legal Studies Research Paper* 507.

International Bar Association, 'Challenges with Recognition and Enforcement of Arbitral Awards in Africa' (International Bar Association, 2023) https://www.ibanet.org/challenges-with-recognition-enforcement-arbitral-awards-Africa accessed 25 February 2025.

John Miles and Nyanje Wa Nyanje, 'Swimming against the Current: The Emerging Jurisprudence as Regards Right to Appeals of Arbitration Awards in Kenya'

Dispute Resolution Update, Lagos Chambers of Commerce International Arbitration Centre 7.

Kariuki Muigua, 'Arbitration Law and the Right of Appeal in Kenya' (2019) https://kmco.co.ke/wp-content/uploads/2021/01/Arbitration-Law-and-the-Right-of-Appeal-in-Kenya-Kariuki-Muigua-9th-January-2021.pdf accessed 25 February 2025.

Kariuki Muigua, 'Constitutional Supremacy over Arbitration in Kenya' (2018) https://kmco.co.ke/wp-content/uploads/2018/08/Constitutional-Supremacy-over-Arbitration-in-Kenya.pdf accessed 2 January 2025.

Kariuki Muigua, 'Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises' (2018) https://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf accessed 25 February 2025.

Kariuki Muigua, 'Extent of Court Intervention in International Commercial Arbitration in Kenya' (The Lawyer Africa, 23 September 2023) https://thelawyer.africa/2023/09/23/extent-of-court-intervention-in-arbitration-in-kenya/ accessed 25 February 2025.

Kariuki Muigua, 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending, and After Arbitration in Kenya' (2010) https://new.kenyalaw.org/akn/ke/doc/journal/2010-03-01/role-of-the-court-under-arbitration-act-1995-court-intervention-before-pending-and-after-arbitration-in-kenya/eng%402010-03-01 accessed 25 February 2025.

Kassam Irfan Jafarali, Interpreting the Silence of Section 35 of the Arbitration Act 1995: A Judicial Dilemma for the Kenyan Courts (LLB dissertation, Strathmore University 2020) 35–36.

Katherine A Helm, 'The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?' (2006-2007) 61(4) *Dispute Resolution Journal* 2.

Kevin Elbert Toa, 'Confidence in Confidentiality: An Open Defence to the Closed Nature of Arbitration' (Christopher Bathurst Prize Submission, 2017) 8.

Kituku JK, *Facilitating International Arbitration in Kenya: A General Analysis of Arbitration in the Country and International Arbitration in Other Selected Countries* (LLM Thesis, University of Nairobi, 2018).

Levin MJ, 'Professor Sovern: You're Mixing Apples and Oranges' (Consumer Finance Monitor, 11 April 2023) https://www.consumerfinancemonitor.com/2023/04/11/professor-sovern-youre-mixing-apples-and-oranges/ accessed 31 December 2024.

Makinde, Okadazim Niella, A Review of the Enforcement of Arbitration Awards: A Comparative Study of Nigeria and South Africa (LLM Thesis, University of Pretoria, 2022).

Melissa Ng'ania, 'Review of the Principle of Finality in Arbitral Proceedings under Section 39(3) (b) of the Arbitration Act, 1995' (2018) 2(2) Journal of CMSD.

Overholt E, 'Statutes: Construction: The Legislative Silence Doctrine', 43 California Law Review 5, 1955, 907.

Bowman F, 'A Judicial Dilemma: Real or Imagined?', 83 Virginia Law Review 29, 1981, 29.

Professor Paul Musili Wambua, 'The Challenges of Implementing ADR as an Alternative Mode of Access to Justice in Kenya' (2013) 1(1) *Alternative Dispute Resolution Journal* 26.

Online Articles and Reports

Brian Haderspock, 'Guiding Principles of Commercial Arbitration and Its Advantages Compared to Traditional Litigation' (26 June 2024) https://www.americanbar.org/groups/dispute_resolution/resources/just-resolutions/2024-june/guiding-principles-commercial-arbitration-advantages-compared-to-traditional-litigation/#:~:text=Arbitration%20is%20often%20preferred%20over,manner%20compared%20to%20court%20proceedings

Cliffe Dekker Hofmeyr, 'Arbitration Act: The Intersection between Remittal and Review' (Cliffe Dekker Hofmeyr, 4 May 2021) https://www.cliffedekkerhofmeyr.com/news/publications/2021/Dispute/dispute-resolution-alert-4-may-arbitration-act-the-intersection-between-remittal-and-review.html accessed 25 February 2025.

Dipen Sabharwal, 'Resolving Disputes Without Going to Court' (Global Banking & Finance Review, 26 October 2015) https://www.globalbankingandfinance.com/resolving-disputes-without-going-to-court/ accessed 24 February 2025.

Dr. Andreas Respondek, 'What Is the Purpose of Arbitration? A Comprehensive Guide - Blog - Publications - International SIAC Arbitrator - Singapore' (Rf-arbitration.com, 2017) https://www.rf-arbitration.com/publications/blog/what-is-the-purpose-of-arbitration-a-comprehensive-guide#:~:text=In%20essence%2C%20the%20purpose%20of,confidentiality%2C%20autonomy%2C%20and%20finality. accessed 30 December 2024.

Howarth D, 'On Parliamentary Silence' (UK Constitutional Law Blog, 13 December 2016) https://ukconstitutionallaw.org/2016/12/13/david-howarth-on-parliamentary-silence/ accessed 2 January 2025.

Joshua Juma Wangila, "Arbitration Efficiency Unpacked: Weighing, Cost, Time and Quality" Nairobi Centre for International Arbitration, 29th August 2024. https://ncia.or.ke/wp-content/uploads/2025/01/Arbitration-Efficiency-Unpacked-Weighing-Cost-Time-and-Quality.pdf acessed on 23rd February 2025.

Oraro's Chacha Odera, Eva Mukami and Radhika Arora, 'Sponsored briefing: Court intervention with respect to arbitral awards in Kenya' (Legal Business, 30 April 2021) https://www.legalbusiness.co.uk/disputes-yearbook-2021/sponsored-briefing-court-intervention-with-respect-to-arbitral-awards-in-kenya/ accessed 25 February 2025.

The Arbitration Agreement, Kenya Law Resource http://kenyalawresourcecenter.blogspot.com/2011/07/arbitration-agreement.html accessed 2 January 2025.

Parliamentary National Assembly Official Report, Thursday, 20th July, 1995, 1645 http://217.21.116.49/xmlui/handle/123456789/4622?show=full accessed 2 January 2025.

Raghav Kohli, 'Taking a Second Bite of the Cherry: When is it Appropriate to Remit an Award Instead of Setting it Aside in Singapore?' (Kluwer Arbitration Blog, 17 March 2019) https://arbitrationblog.kluwerarbitration.com/2019/03/17/taking-a-second-bite-of-the-cherry-when-is-it-appropriate-to-remit-an-award-instead-of-setting-it-aside-in-singapore/ accessed 25 February 2025.

AI and Blockchain in Arbitration; Trends in Digital Dispute Resolution in Kenya

By: ***Ontweka Yvonne*** [*] ***Christopher Kinyua*** [**] ***& Aromo Marion*** [***]

Abstract

In a fast evolving digital world technological innovations are being invented daily. Mechanisms used to resolve dispute especially in the digital era should be fully incorporated due to the inevitability of disputes in societies so as to build a cornerstone of a just society. This paper navigates the potential of AI and Blockchain to revolutionize the legal framework and the regulatory framework in Kenya and internationally under the digital dispute resolution. The article demonstrates how AI and Blockchain has enhanced the efficacy of resolving disputes in the digital space. Additionally, this article discusses how artificial intelligence and Blockchain are changing arbitration in Kenya especially through the digital contracts and the use of online courts. While recognizing the limitations of arbitration in certain aspects of Artificial Intelligence and Block chain, the authors underscore its potential as a catalyst for positive change. Ultimately, this paper issues a compelling call to action for widespread adoption of arbitration in Artificial Intelligence as a means of championing and fostering societal harmony. The integration of

[*] *Yvonne Ontweka-LL.B 4th UOEm, undergraduate legal researcher, current Vice president of the UOEm Legal Aid Clinic, Country Rep of Legal Torch International(current), Commentaries Editor University of Embu Law Review, passionate in commercial law, Alternative Dispute Resolution, climate and Environmental justice.She can be reached at yvonneontweka@gmail.com*

[**] *Christopher Kinyua is a finalist law student and an LLB candidate at the University of Embu. He is the Editor-In-Chief of the University of Embu Law Review and a certified professional mediator with a strong passion for arbitration. A dedicated climate change champion, currently working with SMACHS Foundation. He is a firm believer in the rule of law and the strict observance of human rights. His research interests include constitutional law, climate governance, dispute resolution, politics and human rights. Christopher can be reached at christopherkinyuamwai@gmail.com*

[***] *Aromo Marion-LL.B 4th Year at the University of Embu.,She is an enthusiastic legal researcher passionate in Alternative Dispute Resolution, Human rights, Environmental law and Criminal Justice. She is currently serving as the Campus Director Legal Torch Initiative.In addition,she is also serving as a Senior Editor in the University of Embu Law Review.*
She can be reached at aromomarion12@gmail.com

arbitration within the realm of Artificial Intelligence and Blockchain is a crucial yet an under-explored subject. The authors will sum up by giving the recommendations highlighting how the innovations in the Digital Dispute Resolution are enhancing access to justice in a more accessible manner.

1. Introduction

The Kenyan Alternative Dispute Resolution sector has made tremendous progress by incorporating digital and advanced technology when dealing with disputes.[1] The introduction and reemergence of both AI and Blockchain stands to change the ADR sector in the country significantly both positively and negatively.[2] These advancements in the AI and Blockchain not only stands to change arbitration in the country but also hands the sector a new set of disputes to handle with its own complexities and requirements that the sector must change to adapt to.[3]

Disputes relating to AI and Blockchain are largely handled through online arbitration or the Online Dispute Resolution (ODR). The ODR system also stands to significantly change as a result of resurgence of AI and Blockchain. [4]Online Dispute Resolution (ODR) is the use of technology to resolve disputes outside of traditional court settings.[5]

Artificial Intelligence is a branch of computer science that focuses on developing systems and algorithms capable of performing tasks that in normal circumstances

---

[1] https://thelawyer.africa/2023/09/09/the-path-to-kenyas-preparedness-in-embracing-digital-dispute-resolution/?noamp=mobile Accessed on 9/2/2025
[2] https://www.mdpi.com/2078-2489/15/5/268 [Accessed on 9/2/2025]
[3] https://www.mondaq.com/india/arbitration-dispute-resolution/1376104/the-future-of-technology-in-arbitration-ai-and-blockchain [Accessed on 9/2/2025]
[4] https://hal.science/hal-04194478/document [Accessed on 9/2/2025]
[5] https://www.tandfonline.com/doi/full/10.1080/13600834.2022.2088060 [Accessed on 9/2/2025]

they would require human intelligence.[6] AI can recognize patterns, solve problems, and present information.[7] In relation to ADR AI has the capability of helping in dispute resolution by improving efficiency in the processes involved, increase the speed of procedures, reduce costs, and optimize the time spent by all the personnel involved in the processes.[8] The reliability of AI especially keeping confidential information of clients without fear of exposing it to a third party makes it an important tool in the digital dispute resolution.[9]

A block chain is a distributed database or ledger shared across a computer network's nodes.[10] They are best known for their crucial role in cryptocurrency systems, maintaining a secure and decentralized record of transactions, but they are not limited to cryptocurrency uses.[11] Block chain technology has provided a new set of disputes arising out of block chain and smart contract transactions or for traditional disputes that are not related to block chain transactions.[12]

Not all AI and Block chain disputes can be undertaken by the Online dispute resolution mechanisms with some presenting as criminal cases and are not supposed to be dealt with on such a platform.[13]

---

[6] https://www.coursera.org/articles/what-is-artificial-intelligence [Accessed on 9/2/2025]
[7] https://builtin.com/artificial-intelligence [Accessed on 9/2/2025
[8] https://cms.law/en/ken/publication/cms-international-disputes-digest-2024-summer-edition/artificial-intelligence-in-arbitration-use-challenges-and-limitations [Accessed on 13/11/2024]
[9] https://www.ibanet.org/balancing-efficiency-and-privacy-AI-impact-on-legal-confidentiality-and-privilege [Accessed on 9/2/2025]
[10] https://medium.com/@moeed1678/what-is-a-blockchain-4c0e3e732353 [Accessed on 9/2/2025]
[11] A. Hayes,*'Block chain Facts; What is it, how it works and How it can be used.'*2024
[12] Navigating the Digital Dispute Resolution Landscape: The Opportunities – The Lawyer Africa[Accessed on 13/11/2024]

[13] https://kmco.co.ke/wp-content/uploads/2023/08/Navigating-the-Digital-Dispute-Resolution-Landscape-Challenges-and-Opportunities.pdf [Accessed on 9/2/2025]

This paper expounds more on the legal frameworks and regulations that guide the use of AI and Block chain. Further, it explains the progress that the digital courts have made so far and also outline the challenges faced. It gives a limelight and the future prospective of ODR and recommendations on the same.

The Legal and Regulatory Framework In Ai And Blockchain.

In addressing issues to do with digital dispute resolution, a strong legal framework should be put in place to ensure no loopholes. A stable and in-depth exploratory of the legal framework is thus very important.[14] Now that it's about the digital dispute resolution, the existing laws should be reviewed in order to ensure consistency. Equally, laws and policies should be formulated in alignment with the digital dispute resolution.

The Constitution of Kenya 2010.

In article 159(2), the constitution recognizes the use of arbitration in solving of disputes. It further provides that justice shall be administered without undue regard to procedural technicalities[15]. The Digital Dispute Resolution has greatly solved the technicalities that has been faced by ADR hence providing an advanced solution to the Arbitration courts in their pursuit to achieving justice.[16]

Further, Article 48 provides for the access to justice for all persons. With the ODR mechanism, justice has been served to many at the comfort of their homes and residential places without necessarily needing them to appear to the proceedings in person.[17]

[14] https://ncia.or.ke/wp-content/uploads/2024/12/NCIA_ADR_Journal_Vol_4_2024.pdf [Accessed on 9/2/2025]
[15] Constitution 2010
[16] https://thelawyer.africa/2023/09/27/navigating-the-digital-dispute-resolution/?amp=1 [Accessed on 9/2/2025]
[17] https://ncia.or.ke/wp-content/uploads/2024/12/NCIA_ADR_Journal_Vol_4_2024.pdf

Arbitration Act.

The arbitration Act is the cornerstone in solving all the arbitration matters.[18] The DDR mechanism has greatly influenced the Act by providing advanced ways of dealing with matters. AI has been used in helping the arbitrators in analyzing data and identifying suitable arbitrators basing with the level of expertise.[19] Generative AI has also helped the arbitrators in predicting the probable awards suitable for the parties. Further, the DDR helps in coming up with the costs and expenses that both parties incur from the proceedings.

European Union Artificial Intelligence Act [2024]

Kenya's regulatory and legal regime relating to AI and Blockchain remain scarce and hence the need to analysis legal framework for AI and Blockchain beyond the boundaries of Kenya. [20]

The Act regulates and improves the functioning of the internal market and promotes the uptake of human-centric and trustworthy artificial intelligence (AI). Article 50 provides for Transparency Obligations for Providers and Deployers of Certain AI Systems. These are the guidelines that regulate the use of AI explaining how far it can be used. The Act considers the saying 'Too much of something is poison 'thus providing the risks that AI imposes on the DDR system if too much of it is used.[21]

Exploring How AI and Blockchain are Changing Arbitration

Like physical courts, arbitration is not immune to change, such as human and societal change. Over the last decade Artificial Intelligence (AI) and Blockchain

[18] https://cornerstonebarristers.com/wp-content/uploads/old/cornerstone-arbitration.pdf [Accessed 9/2/2025]
[19] https://cms.law/en/ken/publication/cms-international-disputes-digest-2024-summer-edition/artificial-intelligence-in-arbitration-use-challenges-and-limitations [Accessed 9/2/2025]
[20] https://icj-kenya.org/news/artificial-intelligencekenyas-regulatory-model-must-consider-global-trends-human-rights/ [Accessed on 9/2/2025]
[21] European Union Artificial Intelligence Act. [2024]

have seen advancements which have made them a reliable tool to everyday person today.[22] But like all human interactions disputes are inevitable and AI and Blockchain are not immune from disputes.[23] These disputes arising in the context of AI and Blockchain are arbitratable in nature, but they are unique set of disputes which forces arbitration to change and adapt to better arbitrate the disputes arising in AI and Blockchain world. [24]

To start with, lets delve into the AI related disputes and how they same are shaping Arbitration. For starters AI disputes cut across a vast areas of expertise including; AI-generated content ownership, collaboration contracts, copyright, data privacy and security, IP infringement, IP licensing, know-how, licensing agreements, life sciences, patents, service agreements, R&D and technology transfer, trade secrets, and trade marks.[25] As the nature of disputes in AI are different so are parties to the AI disputes. These parties include academies, AI service providers, collective management organizations, consumers, data providers, developers and innovators, end users, government agencies, interpreters, media organizations, content sharing providers, publishers, researchers, software developers, start-up companies, among others.[26]
A key trait of arbitration is ability to offer experts arbitrators in the field of the dispute [27]and in this case in the field of Intellectual Property (IP) and AI, allowing parties to arbitration to select professionals with the requisite technical knowledge

---

[22] https://academic.oup.com/arbitration/article/40/3/277/7716003 [Accessed on 9/2/2025]
[23] https://stanford-jblp.pubpub.org/pub/resolving-nft-blockchain-disputes/release/4 Accessed on 9/2/2025
[24] https://www.researchgate.net/publication/376742095_Arbitration_in_Smart_Contracts_Disputes_-_A_Look_into_the_Future Accessed on 9/2/2025
[25] 'WIPO ADR for Artificial Intelligence (AI) Disputes' (World Intellectual Property Organization (WIPO), 2024) https://www.wipo.int/amc/en/center/specific-sectors/artificial-intelligence/
[26] Ibid
[27] https://law.pepperdine.edu/blog/posts/demystifying-the-arbitration-process.htm Accessed on 9/2/2025

to form the arbitral tribunal deciding their case. What this means is that arbitration in Kenya needs to change from a lawyer oriented practice to a professional oriented practice. There is need for training and encouraging more experts in IP and AI to take arbitration to bridge the professional gap that exists and to prepare the practice in the country to handle AI disputes locally and professionally.

By now its an accepted arbitration norm that the nature of dispute significantly influences how arbitration is conducted including the approach and structure taken in the arbitration proceedings.[28] AI disputes also happen and will significantly change the arbitration process due the nature of the dispute. AI being a complex and majorly specialized disputes will often require specialized rules.[29] In this area World Intellectual Property Organization (WIPO) rules would be best suited since they offer and are designed to provide confidentiality and technical evidence.[30] However, these rules needs to be domesticated to cater for domestic disputes in the realm of AI. [31]

The diverse parties involved in AI disputes also change arbitration significantly. Parties to an arbitration proceeding heavily influence the arbitration since it's the parties that select and appoint arbitrators, decide on the rules and procedure of the arbitration, as well as decide on the seat of the arbitration, which are all at the heart of arbitration.[32] To accommodate the vast list of parties to AI disputes arbitration in Kenya has to change and is changing to try accommodate them.
Online Dispute Resolution (ODR) has in the recent years been intertwined largely with AI transforming how disputes are managed and resolved in the digital

[28] https://iccwbo.org/wp-content/uploads/sites/3/2017/05/866-3-ENG-Effective-Management-of-Arbitration.pdf Accessed on 9/2/2025
[29] https://journalofcmsd.net/wp-content/uploads/2020/03/Artificial-Intelligence-and-Its-Future-in-Arbitration.pdf Accessed on 9/2/2025
[30] Ibid
[31] Ibid
[32] Stewarts, 'Arbitration Process - What is Arbitration?' (Stewarts, 2023) https://www.stewartslaw.com/expertise/international-arbitration/arbitration-process/

space.[33] One particular area of ODR arbitration that has been changed as a result of AI is evidence analysis.[34] Modern times have seen creation of AI systems and tools with capabilities to analyze large datasets including documents, electronic contracts.[35] The use of these tools changes arbitration by emphasizing on the need for arbitrators to be up to date with technological advancements. [36]

AI as a tool has been responsible for industrial transformation and the arbitration industry also has changed as a result of AI. [37]Adoption of AI by arbitrators and arbitration training stations and centers as well as practice centers, with AI being used as a case management tool, predictive analysis tool in some cases, assist in Online Dispute Resolution (ODR) among others.[38] AI as a tool positively changes arbitration and helps aide the arbitration process. [39]

Let's turn to Block chain and how the same changes and influences arbitration. A Block chain network is exposed to many types of disputes over its lifetime.[40] Disputes arising from the trading of crypto-currencies, smart contracts and the deluge of disputes resulting from the collapse of any crypto-currency or token are inevitable teething issues in the maturation of the Block chain.[41] The nature of

---

[33] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4640977 Accessed on 9/2/2025
[34] 'What is ODR?' (SmartODR, 2024) https://help.smartodr.In/docs/investor-basics/odr-definitions accessed 14 November, 2024
[35] https://www.sciencedirect.com/science/article/pii/S0378720621000082 Accessed on 9/2/2025
[36] Ibid
[37] https://www.nortonrosefulbright.com/en/knowledge/publications/3cb82b55/new-frontiers-regulating-artificial-intelligence-in-international-arbitration Accessed on 9/2/2025
[38] Ibid
[39] Ibid
[40] https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/MqLawJl/2019/5.html Accessed on 9/2/2025
[41] Bautista FG, 'ADR in the Blockchain Ecosystem: A Primer' (Kluwer Arbitration Blog, 14 December 2023) https://arbitrationblog.kluwerarbitration.com/2023/12/14/adr-in-the-blockchain-ecosystem-a-primer

Block chain transactions indicate that ADR methods are well-disposed to play a leading role in the resolution of block chain disputes.[42]

Block chain is a peculiar sector, by the nature of transactions in the block chain are intended to be pseudonymous, facilitated by a public cryptography code which allows nothing more than verification of transactions to and from the holder of that code.[43] This pseudonymity inevitably results in serious issues when disputes arise, particularly when identifying the correct counter-party to a dispute, since often such counter-parties are hidden behind their public code.[44]

Blockchain solutions are often designed with the goal of minimizing disputes by ensuring that one party's performance is contingent in the other-party's performance (often referred to as "delivery versus payment" or "pay-for-performance" transactions). [45]Many protocols use self-executing contracts written in code, called smart contracts to automate the delivery of these payments based on system data. In this way, it is theoretically possible to eliminate participant discretion that might otherwise lead to a violation of contract terms. Nonetheless, failures still arise.[46] Disputes arising out of blockchain include: non-transactional disputes, off-chain governance disputes and on-chain disputes.[47] So how does all this change arbitration? One, arbitration will require to change to be able to offer the tailor-made dispute resolution that is tailored to meet the level of sophistication associated with blockchain ecosystems and blockchain

[42] Ibid
[43]https://hal.sorbonne-universite.fr/hal-01870617v4/file/vademecum_blockchain_technologies_CAMERA_READY.pdf Accessed on 9/2/2025
[44] Ibid
[45]https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/06/blockchains-unchained_fcbd568f/3c32c429-en.pdf Accessed on 9/2/2025
[46] 'Bridging the Governance Gap: Dispute Resolution for Blockchain based transactions' (World Economic Forum White Paper, December 2020)
[47] Ibid

transactions.[48] Two, arbitration has to change to provide the high level of privacy needed in the blockchain world, with it being a sector that highly thrives on anonymity.[49] Three, for arbitration to be relevant in the blockchain dispute resolution, arbitration has to offer the technical expertise that is almost similar to the one employed in the sector. Arbitrators arbitrating these disputes have to be knowledgeable on the workings of the blockchain transactions and ecosystems.[50]

Four, arbitration must be expeditious enough to be relevant. Among the great promise of the blockchain network, alongside and as a consequence of its decoupling from central authority, is the increased speed with which transactions can be entered into, executed and enforced.[51]

All this shows and underscores the immense power AI and Blockchain wield in arbitration practice. For arbitration to be relevant it must at change to accommodate these two sectors.

Arbitration in Digital Dispute Settlement

Arbitration remains attractive for digital dispute settlement due to the benefits arbitration offers.[52] With tech revolution which has been underway over the last century, the progress of technology has allowed technology to creep in the domain of alternative dispute resolution.[53]

---

[48] Bautista FG, 'ADR in the Blockchain Ecosystem: A Primer' (Kluwer Arbitration Blog, 14 December 2023) https://arbitrationblog.kluwerarbitration.com/2023/12/14/adr-in-the-blockchain-ecosystem-a-primer

[49] Ibid

[50] Ibid

[51] Ibid

[52] https://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/ Accessed on 9/2/2025

[53] Yeoh D., 'Is Online Dispute Resolution the Future of Alternative Dispute Resolution?' (Kluwer Arbitation Blog, 29 March 2018) https://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternatice-dispute-resolution accessed 14 November, 2024

Notably today the world has experienced new business trends through electronic transactions, e-banking, e-commerce, crypto currency, artificial intelligence, financial technology, and arguably, dispute resolution has also grown beyond physical meetings to Online Dispute Resolution, a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties through online-arbitration.[54] Online arbitration can be defined as an arbitration in which all aspects of the proceedings are conducted online, with hearing being conducted via videoconferencing.[55]

With the rise of self-executing agreements on blockchain platforms, arbitration works in two ways, on-chain and off-chain processes.[56] On-chain arbitration incorporates dispute settlement with the blockchain itself, ensuring enforcement through smart contracts, while off-chain arbitration uses traditional tribunals with digital enhancements like automated award enforcement.[57] Digital arbitration framework, such as the digital dispute settlement focus on efficiency and adaptability to new technologies.[58]

Online Dispute Resolution

Digital dispute resolution has brought a lot of progress in the courts in the pursuit to attaining justice as is required by Article 48 of the Constitution.[59] AI has

[54] Muigua K, 'Disruption of Arbitration by Online Dispute Resolution (ODR)' (The Lawyer Africa, 28 September 2023) https://thelawyer.africa/2023/09/28/arbitration-and-online-dispute-resolution-odr/ accessed 14 November 2024

[55] Ibid

[56] https://newtech.law/en/articles/on-chain-and-off-chain-arbitration-using-smart-contracts-to-amicably-resolve-disputes Accessed on 9/2/2025

[57] Indulia B, 'Smart Contracts and Blockchain Arbitration: Smart Solutions Paving the Way for a Better Dispute Resolution Mechanism' (SCC Blog, 25 April 2022) https://www.scconline.com/blog/post/2022/04/25/smart-contracts-and-blockchain-arbitration-smart-solutions-paving-the-way-for-a-better-dispute-resolution-mechanism/ accessed 14 November 2024

[58] https://thelawyer.africa/2023/09/09/approaches-to-digital-disputes-resolution/ Accessed on 9/2/2025

[59] Constitution of Kenya, 2010.

increasingly been intergrated in courts to enhance efficiency in the court proceedings. [60]It has done so through the following ways;

I. Improving legal research and writing.

In Arbitration matters where researchers are expected to cite previous precedence from previous cases, AI has made it easier for the research work since its able to generate the and any other needed information automatically.[61] It analyzes vast legal data quickly and informs the legal personnel in a short time than the analog way of research and writing.[62] Users must be trained on and understand the drawbacks of AI, including potential biases in training data, and why they must always review any output from an AI system.[63]

II. Translating of foreign language.

AI is used for translation of court proceedings, into the favorable language of the persons involved. Thus making it easier for non-native speakers to participate.[64]With this, it becomes easier for the parties to understand each other despite of the language difference barrier. Even in doing so, the courts must establish robust mechanisms of human oversight that can account for the limitations of AI.[65]

---

[60] https://iacajournal.org/articles/10.36745/ijca.343 Accessed on 9/2/2025
[61] https://www.austlii.edu.au/au/journals/UNSWLawJlStuS/2024/33.pdf Accessed on 9/2/2025
[62] Ibid
[63] How to navigate ethics for common AI use cases in courts - Thomson Reuters Institute accessed 15 November 2024
[64] Artificial intelligence and online courts accessed 15 November 2024
[65] How to navigate ethics for common AI use cases in courts - Thomson Reuters Institute accessed 15 November 2024

III. **Automated Case Management**:

AI helps in managing case backlogs in Arbitration cases by automating routine tasks like scheduling and management of documents needed for the process.[66] Unlike the analog way which encompassed lots of documents which would sometimes lead to confusion of the same because of their bulkiness in a courtroom during the proceedings.[67] It's also easier to trace documents unlike the analog way where losing a document meant that that the case could not continue because the document needed was absent.[68] With this digital mode, all documents are served and uploaded on the digital system.[69]

IV. Online Dispute Resolution (ODR) Platforms

AI is very helpful to the Online Dispute Resolution (ODR) platforms, where technology facilitates the resolution of disputes without requiring parties to be physically present. AI helps with the processes by analyzing the claims and suggesting awards based on similar cases or prior outcomes.[70] Many ODR platforms integrate AI to assess settlement offers, mediate between parties, and even suggest compromises, potentially reducing the need for human intervention in the dispute resolution.[71] The courts have embraced the use of AI thus making the processes easier for justice to be served to the citizens.[72]

---

[66] https://www.lexology.com/library/detail.aspx?g=7717902d-90ff-455f-8fc5-7e273a0262e9 Accessed on 9/2/2025
[67] Ibid
[68] Ibid
[69] R. Susskind,*'Online Courts and the future of justice.'*
[70] https://www.pon.harvard.edu/daily/mediation/ai-mediation-using-ai-to-help-mediate-disputes/ Accessed on 9/2/2025
[71] Ibid
[72] https://www.unh.edu/inquiryjournal/blog/2024/03/place-artificial-intelligence-sentencing-decisions Accessed on 9/2/2025

Limitations in The Implementation of Digital Dispute Resolution

We cannot overlook the fact that despite the potential of AI and Block chain there are several challenges faced in the implementation.[73] Some of the challenges are discussed below.

1. The legal and regulatory problems.

The legal and regulatory framework is a big challenge in that the laws and policies may be put in place but the problem will be the implementation of those laws.[74] The traditional frameworks for instance may fail to align with the nature of the smart contracts and block chain making dispute resolution process difficult. In this instance, the enforcement of the arbitral award becomes dubious and questionable.[75]

2. Costs.

It is undeniable that arbitration is costly. When talking about expenses, arbitration is not that much different from litigation.[76] The parties to arbitration pay the legal fees just as they would do in a normal court setup. The implementation of technology can equally be expensive and this can discourage many from wanting to explore the digital dispute of AI and Block chain avenue.[77]

---

[73] https://www.researchgate.net/publication/363107713_Challenges_and_Solution_Approaches_for_Blockchain_Technology Accessed on 9/2/2025

[74] Risk as an Approach to Regulatory Governance: An Evidence Synthesis and Research Agenda - Jeroen van der Heijden, 2021

[75] Blockchain-Based Dispute Resolution: Insights and Challenges

[76] Hodgson M., & Jae H, 'The Problem of Costs in Arbitration' (Cambridge University Press Ebooks, 11 October 2021, pp. 438-467) https://www.cambridge.org/core/books/abs/cambridge-companion-to-international-arbitation/problem-of-costs-in-arbitration accessed November 15,2024

[77] LLC, Aceris Law. "The Costs of Arbitration • Aceris Law." *ACERIS LAW*, 17 Aug. 2022, www.acerislaw.com/the-costs-of-arbitration/.

3. Illiteracy.

Accessibility may be problematic to those who are not technologically savvy.[78] For instance, when using online courts to solve arbitration disputes, not everyone may have the technological know-how to log in. Lack of smartphones may equally hinder be it the parties or the witnesses from accessing online dispute resolution.[79]

4. Technological complexities

Arbitration in the digital space of AI and Block chain requires a very high level of expertise.[80] When dealing with issues through virtual hearings for instance, a lot of expertise is required.[81] Minimal expertise affects the arbitration process.[82] Artificial Intelligence can refine arbitration process through ways such as easing the drafting of preliminary decisions thus it can be of great importance if the technology complexities are regulated to fit.[83]

5. Security challenges and data privacy.

Confidentiality is threatened when using the digital dispute resolution mechanisms. The management of personal information can be very difficult.[84] Notably, when logging in online, one may use a device that does not belong to them and this may lead to wrong record keeping. [85] If the sensitive information kept in a block chain is not carefully managed to protect the parties in arbitration,

---

[78] https://sopa.tulane.edu/blog/why-accessible-technology-important Accessed 9/2/2025

[79] Alessa, Hibah. "The Role of Artificial Intelligence in Online Dispute Resolution: A Brief and Critical Overview." *Information & Communications Technology Law*, vol. 31, no. 3, 16 June 2022, pp. 1–24, https://doi.org/10.1080/13600834.2022.2088060.

[80] Chevalier, Maxime. "From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading towards the Blockchain Arbitral Order." *Journal of International Dispute Settlement*, 31 Oct. 2021, https://doi.org/10.1093/jnlids/idab025. Accessed 15 Nov. 2024.

[81] Ibid

[82] Ibid

[83] Ibid

[84] https://academic.oup.com/arbitration/article/40/3/277/7716003 Accessed on 9/2/2025

[85] Ibid

then confidentiality is compromised. Despite there being the data protection act safeguarding all this implementation of it has remained a challenge.[86]

To sum up with, despite the discussed challenges, the potential of AI and Block chain remains of great significance in the digital dispute resolution.[87] The transformative role of AI and Block chain in the digital space should never go unrecognized. As the world keep evolving, so does it require people to be well equipped especially to be educated on how well to understand the digital dispute resolution arena.[88]

Recommendations.

The laws established must acknowledge the ongoing and dynamic changes in the field of digital dispute resolution.[89] It is evident that technologies like AI and Blockchain have contributed more positively than negatively.[90] The constitution, along with other related legislations, should create clear laws and regulations that govern the use of these technologies.[91] It is essential to define the limits of there applications to ensure that they do not surpass the role of human involvement in dispute resolution mechanisms.[92]

---

[86] Ibid

[87] Ibid

[88] https://www.researchgate.net/publication/377073122_On_the_Integration_of_Artificial_Intelligence_and_Blockchain_Technology_a_Perspective_about_Security Accessed on 9/2/2025

[89] Julien Chaisse, Professor at City University of Hong Kong, and Research Fellow at the Chinese University of Hong Kong Jamieson Kirkwood. "Smart Courts, Smart Contracts, and the Future of Online Dispute Resolution." *Stanford Journal of Blockchain Law & Policy*, 5 Jan. 2022, stanford-jblp.pubpub.org/pub/future-of-odr/release/1.

[90] https://www3.weforum.org/docs/39655_CREATIVE-DISRUPTION.pdf Accessed on 9/2/2025

[91] National Archives. "The Constitution: What Does It Say?" *National Archives*, 12 Oct. 2016, www.archives.gov/founding-docs/constitution/what-does-it-say

[92] Griffiths, Thomas L. "Understanding Human Intelligence through Human Limitations." *Trends in Cognitive Sciences*, vol. 24, no. 11, 1 Nov. 2020, pp. 873–883, www.sciencedirect.com/science/article/pii/S1364661320302151, https://doi.org/10.1016/j.tics.2020.09.001

In addressing the issue to do with illiteracy within the context of arbitration in the digital dispute resolution, organizing educational trainings to sensitize people will be of great significance.[93] It will be of essence to enable people understand the basics of AI and Blockchain in arbitration. Many individuals are unaware on how to utilize online dispute resolution effectively. The judiciary should thus develop a platform to advocate for and raise awareness about digital dispute resolution among the public.[94]

Investing in expertise is equally of importance since the expertise will be able to professionally address any technical challenges to ensure there is reliability and consistency.[95]

Therefore, legal recognition of the digital dispute resolution (AI and blockchain) will tremendously be a turning point in ensuring a fair and impartial arbitration process through transparency and efficiency.[96]

Conclusion

In the dynamic world, the integration of AI and Block-chain is not just a mere trend but a game changer.[97] These cutting age innovations are transforming arbitration in Kenya and making it more efficient. As we step into these new era, the digital

[93] Łągiewska, Magdalena. "New Technologies in International Arbitration: A Game-Changer in Dispute Resolution?" *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique*, 13 Dec. 2023, https://doi.org/10.1007/s11196-023-10070-7

[94] *Oup.com*, 2024, https://academic.oup.com/jids/article/15/2/273/7616652 Accessed 15 Nov. 2024.

[95] Grenier, Robin S, and Marie-Line Germain. "An Introduction to Expertise at Work: Current and Emerging Trends." *Springer EBooks*, 1 Jan. 2021, pp. 1–13, https://doi.org/10.1007/978-3-030-64371-3_1 Accessed 15 Nov. 2024

[96] Ibid

[97] https://appinventiv.com/blog/ai-in-blockchain/ Accessed on 9/2/2025

era, the potential for streamlined processes in the arbitration system is immense.[98] As we embrace these emerging trends, it is evident that digital disputes resolution is revolutionizing the arbitration process, offering unprecedented opportunities.[99] The ability of AI to analyze vast amount of data has helped reshape how arbitrators approach complex disputes.[100] Additionally, AI enhances decision making and propagates quicker arrival at resolutions.[101] This not only does it expedites the arbitration process but also ensures that decisions given are well informed based on a comprehensive data analysis.[102] Block-chain with its immutable ledger brings security to the arbitration process, for instance smart contracts that are powered by block-chain automate the enforcement of agreements. [103]

The synergy between AI and Block-chain is a big deal! As it marks a significant milestone in the evolution of dispute resolution in Kenya.[104] These emerging trends are not only transforming the arbitration process but also paving way for a more accessible and efficient legal system.[105] The future of arbitration is digital and through embracing these advancements we can ensure an effective way of dispute resolution for the generations to come.[106]

[9898]https://kmco.co.ke/wp-content/uploads/2022/04/The-Evolving-Alternative-Dispute-Resolution-Practice-Investing-in-Digital-Dispute-Resolution-in-Kenya-Kariuki-Muigua.pdf Accessed on 9/2/2025

[99]https://thelawyer.africa/2023/09/09/approaches-to-digital-disputes-resolution/ Accessed on 9/2/2025

[100]https://www.webberwentzel.com/News/Pages/how-artificial-intelligence-is-re-shaping-international-arbitration-practice.aspx Accessed 9/2/2025

[101] Ibid

[102] Ibid

[103]http://www.csq.ro/wp-content/uploads/5-S.-PACHAHARA-C.-MAHESHWARI.pdf Accessed on 9/2/2025

[104] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4644253 Accessed on 9/2/2025

[105] https://www.law.nyu.edu/sites/default/files/Center%20on%20Civil%20Justice%20-%20Recent%20Developments%20in%20Arbitration.pdf Accessed on 9/2/2025

[106]https://www.cambridge.org/core/books/abs/arbitration-in-the-digital-age/introduction/B7A7AC45C7B45A1FA24DD0C663D8DFA0 Accessed on 9/2/2025

Bibliography

Legislation

Constitution of Kenya 2010.
European Union Artificial Intelligence Act 2024.
Arbitration Act (Kenya).

Books

Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2024).

M Hodgson and H Jae, 'The Problem of Costs in Arbitration' in *Cambridge Companion to International Arbitration* (Cambridge University Press 2021).

Journal Articles

Hibah Alessa, 'The Role of Artificial Intelligence in Online Dispute Resolution: A Brief and Critical Overview' (2022) 31(3) *Information & Communications Technology Law* https://doi.org/10.1080/13600834.2022.2088060.

Maxime Chevalier, 'From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading towards the Blockchain Arbitral Order' (2021) *Journal of International Dispute Settlement* https://doi.org/10.1093/jnlids/idab025.

Magdalena Łągiewska, 'New Technologies in International Arbitration: A Game-Changer in Dispute Resolution?' (2023) *International Journal for the Semiotics of Law* https://doi.org/10.1007/s11196-023-10070-7.

Reports and White Papers

World Economic Forum, 'Bridging the Governance Gap: Dispute Resolution for Blockchain-Based Transactions' (December 2020).

Jeroen van der Heijden, 'Risk as an Approach to Regulatory Governance: An Evidence Synthesis and Research Agenda' (2021).

Websites and Online Articles

World Economic Forum, 'Creative Disruption' (2025) https://www3.weforum.org/docs/39655_CREATIVE-DISRUPTION.pdf.

HAL, 'AI and Dispute Resolution' (2025) https://hal.science/hal-04194478/document.

Taylor & Francis, 'Technology and Arbitration' (2022) https://www.tandfonline.com/doi/full/10.1080/13600834.2022.2088060.

Coursera, 'What is Artificial Intelligence?' https://www.coursera.org/articles/what-is-artificial-intelligence.

Builtin, 'Artificial Intelligence Overview' https://builtin.com/artificial-intelligence.

CMS Law, 'Artificial Intelligence in Arbitration: Use, Challenges, and Limitations' (2024) https://cms.law/en/ken/publication/cms-international-disputes-digest-2024-summer-edition/artificial-intelligence-in-arbitration-use-challenges-and-limitations.

Aceris Law, 'The Costs of Arbitration' (2022) https://www.acerislaw.com/the-costs-of-arbitration/.

Oxford University Press, 'International Dispute Resolution' (2024) https://academic.oup.com/jids/article/15/2/273/7616652.

Thomson Reuters, 'How to Navigate Ethics for Common AI Use Cases in Courts' (2024).

A Hayes, 'Blockchain Facts: What is it, How it Works and How it Can be Used' (2024).

The Lawyer Africa, 'Navigating the Digital Dispute Resolution Landscape: The Opportunities' (2024).

WIPO, 'WIPO ADR for Artificial Intelligence (AI) Disputes' (2024) https://www.wipo.int/amc/en/center/specific-sectors/artificial-intelligence/.

Stewarts, 'Arbitration Process - What is Arbitration?' (2023) https://www.stewartslaw.com/expertise/international-arbitration/arbitration-process/.

SmartODR, 'What is ODR?' (2024) https://help.smartodr.In/docs/investor-basics/odr-definitions accessed 14 November 2024.

FG Bautista, 'ADR in the Blockchain Ecosystem: A Primer' (Kluwer Arbitration Blog, 14 December 2023) https://arbitrationblog.kluwerarbitration.com/2023/12/14/adr-in-the-blockchain-ecosystem-a-primer.

World Economic Forum White Paper, 'Bridging the Governance Gap: Dispute Resolution for Blockchain-Based Transactions' (December 2020).

D Yeoh, 'Is Online Dispute Resolution the Future of Alternative Dispute Resolution?' (Kluwer Arbitration Blog, 29 March 2018) https://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternatice-dispute-resolution accessed 14 November 2024.

K Muigua, 'Disruption of Arbitration by Online Dispute Resolution (ODR)' (The Lawyer Africa, 28 September 2023) https://thelawyer.africa/2023/09/28/arbitration-and-online-dispute-resolution-odr/ accessed 14 November 2024.

B Indulia, 'Smart Contracts and Blockchain Arbitration: Smart Solutions Paving the Way for a Better Dispute Resolution Mechanism' (SCC Blog, 25 April 2022) https://www.scconline.com/blog/post/2022/04/25/smart-contracts-and-blockchain-arbitration-smart-solutions-paving-the-way-for-a-better-dispute-resolution-mechanism/ accessed 14 November 2024.
Blockchain-Based Dispute Resolution: Insights and Challenges'.

Thomas L Griffiths, 'Understanding Human Intelligence through Human Limitations' (2020) *Trends in Cognitive Sciences* https://doi.org/10.1016/j.tics.2020.09.001.

Robin S Grenier and Marie-Line Germain, 'An Introduction to Expertise at Work: Current and Emerging Trends' (2021) *Springer EBooks* https://doi.org/10.1007/978-3-030-64371-3_1 accessed 15 November 2024.

Investor-State Dispute Settlement (ISDS) In Kenya: ISDS Arbitration and The Kenyan Experience

By: ***Christopher Kinyua Mwai****

Abstract

Investor-State Dispute Settlement (ISDS) provides a critical and important framework for resolving disputes between foreign investors and contracting states through arbitration. This paper examines the evolution of ISDS to understand the need for ISDS and the role ISDS plays in upholding investor confidence, attracting foreign investment as well protecting a country's sovereignty. The paper further assesses the legal framework and the practical experience of ISDS in Kenya.

The paper evaluates Kenya's alignment with international ISDS mechanisms including bilateral investment treaties (BITs), multilateral agreements, and domestic laws such as the Constitution of Kenya, 2010 and the Arbitration Act of 1995. Through an analysis of landmark cases, including Cortec Mining v Kenya and World Duty Free v Kenya, the paper highlights Kenya's experience with ISDS arbitration and also highlights the principles of legal compliance in Investor-State relations.

The paper takes a look at the much-needed transparency in ISDS Arbitration, considering the degree of public interest that couples the process and the proceedings. The paper delves into the current international regulatory and legal regime requiring transparency in ISDS Arbitration proceedings. The paper also looks at third persons involvement in ISDS Arbitration proceedings.

The paper further takes a look at criticisms of ISDS, such as the impact on state sovereignty and regulatory autonomy, and explores global reform trends, including increased

* *Christopher Kinyua is a finalist law student and an LLB candidate at the University of Embu. He is the Editor-In-Chief of the University of Embu Law Review and a certified professional mediator with a strong passion for arbitration. A dedicated climate change champion, currently working with SMACHS Foundation. He is a firm believer in the rule of law and the strict observance of human rights. His research interests include constitutional law, climate governance, dispute resolution, politics and human rights. Christopher can be reached at christopherkinyuamwai@gmail.com.*

transparency and a shift towards balanced agreements. The paper emphasizes the need for the country to adapt international reforms while safeguarding national interests and fostering investor confidence to attract foreign investment much needed.

1.0 Introduction

Investor-State Dispute Settlement (ISDS) can be defined as a procedural mechanism that allows an investor from one country to bring arbitral proceedings against the country in which it has invested.[1] ISDS involve one party alleging violation of International Investment Treaties (IIT), which are bilateral or multilateral treaties that commit state parties to afford specific standards of treatment to foreign investors from other state-parties.[2] IIT grant foreign investors certain protections and benefits, including recourse to ISDS with host states.[3] IIT's also allow foreign investors to allege treaty violations by suing states through arbitration.[4] ISDS can also be termed as a mechanism that enables foreign investors to resolve disputes with the government of the country where their investment was made (host state) in a neutral forum through binding arbitration.[5]

ISDS provisions are contained in many international agreements including free trade agreements, bilateral investment treaties, multilateral investment agreements, national investment laws, and investment contracts.[6] Many ISDS are found in bilateral investment treaties (BIT), free trade agreements (FTA) and some

---

[1] 'Investor-State Dispute Settlement (ISDS)' (*Thomson Reuters, Practical Law, 2024*) https://uk.practicallaw.thomsonreuters.com/0-624-6147?transitionType=Default accessed November 01,2024

[2] 'Primer on International Investment Treaties and Investor-State Dispute Settlement' (*Columbia Centre on Sustainable Investment, January 2022)* https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement accessed November 01, 2024

[3] Ibid

[4] Ibid

[5] Valasek M. & FitzGerald A., 'Frequently Asked Questions About Investor-State Dispute Settlement' in International Arbitration Report Issue 8 (*Norton Rose Fulbright, June 2017*)

[6] 'Investor-State Dispute Settlement (ISDS)' (*Thomson Reuters, Practical Law, 2024*) https://uk.practicallaw.thomsonreuters.com/0-624-6147?transitionType=Default accessed November 01,2024

in specific treaties.[7] Historically, foreign investors had no choice but to resolve disputes with host states before the state's own local courts, where many investors were unable to obtain full or indeed any recovery from the local courts.[8] ISDS generally offers certain protections and rights to investors including the right not to have property expropriated without prompt, adequate and effective compensation.[9]

In many times foreign investment comes in form of Foreign Direct Investment (FDI). ISDS comes up as a response to the need to protect FDI, with historically ISDS being used as a tool for attracting FDI. Kenya is one of the largest recipients of FDI in Africa,[10] with the country relying heavily on foreign investment for infrastructure, energy and industry growth.

2.0 How Does ISDS Work?

On who can bring an ISDS claim, the ISDS agreement will set out who has standing to bring a claim, with most defining who is an "investor" and what is a qualifying "investment".[11] Claimants typically must satisfy nationality criteria by demonstrating that they are a national of a state that is a party to the treaty containing the ISDS agreement and that they have an investment in the territory of another state that is a party to the treaty.[12]

The specifics of ISDS agreements will vary, with most tending to follow a specific pattern. First there will be a notice provision requiring a claimant to notify the host

---

[7] Valasek M. & FitzGerald A., 'Frequently Asked Questions About Investor-State Dispute Settlement' in International Arbitration Report Issue 8 (*Norton Rose Fulbright, June 2017*)
[8] Ibid
[9] 'Investor-State Dispute Settlement (ISDS)' (*Thomson Reuters, Practical Law, 2024*) https://uk.practicallaw.thomsonreuters.com/0-624-6147?transitionType=Default accessed November 01,2024
[10] 'Foreign Direct Investment (FDI) in Kenya' (*Lloyds Bank Trade, May 2024*) https://www.lloydsbanktrade.com/en/market-potential/kenya/investment accessed November 01, 2024
[11] Valasek M. & FitzGerald A., 'Frequently Asked Questions About Investor-State Dispute Settlement' in International Arbitration Report Issue 8 (*Norton Rose Fulbright, June 2017*)
[12] Ibid

state in writing of a dispute.[13] Some of the agreements will impose a "cooling off" period in which the claimant and host state must attempt to resolve the dispute amicably, and the claimant may also be required during this period to exhaust local remedies and once this period has expired and assuming no other pre-conditions apply the claimant may commence arbitration.[14]

Each party to the dispute (the accusing investor and the host state) appoints an arbitrator, with both of them agreeing on a third one.[15] The three arbitrators then move to meet in an international arbitration tribunal to conduct hearings. The ISDS agreement will typically stipulate the rules that will apply to the proceedings or permit the claimant to elect between certain rules which the host states have consented to in advance.[16] the most common rules include the ICSID Arbitration Rules[17], ICSID Additional Facility Rules[18], UNICTRAL Arbitration Rules[19] and ICC Rules of Arbitration.[20]

Once the tribunal is constituted, it will set the procedure and timetable.[21] Usually, there is a written phase (legal briefs with supporting evidence) and an oral phase (hearing for cross-examination of witnesses and legal argument), with the arbitration taking a number of years, from commencement through to final

---

[13] Ibid

[14] Ibid

[15] 'Frequently Asked Questions About ISDS' (*ISDS Platform, 2024*) https://isds.bilaterals.org/the-basics accessed November 01, 2024

[16] Valasek M. & FitzGerald A., 'Frequently Asked Questions About Investor-State Dispute Settlement' in International Arbitration Report Issue 8 (*Norton Rose Fulbright, June 2017*)

[17] International Center of Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules* (April 2006)

[18] International Center for Settlement of Investment Disputes, *ICSID Additional Facility Rules (July 2022)*

[19] United Nations Commission on International Trade Law, *UNICTRAL Arbitration Rules (2013)*

[20] International Chamber of Commerce, *ICC Rules of Arbitration (2021)*

[21] 'First Session – ICSID Convention (2006 Rules)' (*International Center for Settlement of Investment Disputes – ICSID)* https://icsid.worldbank.org/procedures/arbitration/convention/process/first-session/2006 accessed February 07, 2025

award.[22] The seat of the arbitration may be defined in the ISDS agreement, if it is not, it may be determined by the tribunal, once constituted in accordance with the applicable laws.[23]

3.0 Legal Framework and International Instrument for ISDS

3.1 National Legal Framework

The Country has enacted several pieces of legislation providing for ISDS mechanisms to protect and attract foreign investment. These include:

3.1.1 Constitution of Kenya, 2010

Article 2 (5) and (6) of the Constitution, on the supremacy of the Constitution provides that the general rules of international law forms part of the laws of Kenya, and that any treaty or convention ratified by Kenya forms part of the law Kenya under the same Constitution.[24] It is a general rule now that largest chunk of ISDS agreement originate by way of international agreements either bilateral or multilateral.[25] The Constitution provides for the recognition of these agreements and allow their enforcement.

Article 159 (2)(c) of the 2010 Constitution provides for the constitutional basis of the recognition, enforcement, and promotion of alternatives forms of dispute resolution (ADR) including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[26] Arbitration is the main and primary mode of

[22] Valasek M. & FitzGerald A., 'Frequently Asked Questions About Investor-State Dispute Settlement' in International Arbitration Report Issue 8 (*Norton Rose Fulbright, June 2017*)
[23] Ibid
[24] Constitution of Kenya 2010, art 2 (5) & (6)
[25] Joachim P., Kekeletso M. & Alexis N., 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' (*OECD Working Papers on International Investment 2012/02, 2012)* https://dx.doi.org/10.1787/5k8xb71nff628-en accessed February 7, 2025
[26] Ibid, art 159 2(c)

settling claims under ISDS.[27] The recognition of the form of dispute resolution allows for the state to be subjected to it as well easy enforcement of any awards as a result of ISDS process.

3.1.2 The Investment Promotion Act, Chapter 485B

The Act of Parliament is established to promote and facilitate investment by assisting investors in obtaining the licenses necessary to invest and by providing other assistance and incentives to the investors.[28] The Act seeks to safeguard and offer investment protection by licensing investors.[29] The licensing of foreign investors protects the investors and their investments as is the goal of ISDS.[30] The Act provides a framework nationally for the protection of foreign investors.[31]

The Act provides and creates a conducive investment environment that attracts foreign investments and creates a legal basis for the creation of ISDS agreements through treaties, conventions, and bilateral and multilateral agreements.[32]

3.1.3 Foreign Investment Protection Act, Chapter 518

The Act is established to give protection to certain approved foreign investment.[33] In relation to ISDS the Act provides for compulsory acquisition of foreign investment.[34] One of the major investor state disputes is the compulsory

---

[27] Chaisse J., Choukroune L.& Jusoh S., 'Investor-State Dispute Settlement (ISDS): An Introduction in: Chaisse J., Choukroune L.& Jusoh S., (eds) Handbook of International Investment Law and Policy' (*Spring Nature, 2021)* https://doi.org/10.1007/978-981-13-5744-2_60-1 accessed February 7, 2025
[28] The Investment Promotion Act
[29] Ibid
[30] Ibid, Section 3
[31] 'Practical Cross-Border Insights into FDI Screening Regimes: Foreign Direct Investment Regimes' (*International Comparative Legal Guides, Third Edition, 2022)* https://iclg.com accessed February 7, 2025
[32] The Investment Promotion Act
[33] Foreign Investment Protection Act
[34] Ibid, Section 8

acquisition of investors investments and or assets by the host states.[35] The Act makes provision on compulsory acquisition to provide protection to investors and also as a base of ISDS agreement if and when the states acquire an investors investment or assets improperly.[36]

The Act provides that 'no approved enterprise or any property belonging thereto shall be compulsorily taken possession of, and no interest in or right over such enterprise or property shall be compulsorily acquired, except in accordance with the provisions concerning compulsory taking of possession and acquisition and the payment of full and prompt payment of compensation contained in section 75 (1) & (2) of the Constitution.'[37]

This provision (section 8) of the Act forms part of ISDS agreement in relation to protection accorded to foreign investors over the arbitrary take of their investments, assets and interests thereon.

3.1.4 The Public Private Partnerships Act, 2021

The Act was established for the purposes of providing for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects through public private partnership.[38]

The Act governs public-private partnership agreements and includes dispute resolution mechanisms, allowing for international arbitration.[39] The Act provides that project agreements signed between the state and investors are subject to

---

[35] Joachim P., Kekeletso M. & Alexis N., 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' (*OECD Working Papers on International Investment 2012/02, 2012)* https://dx.doi.org/10.1787/5k8xb71nff628-en accessed February 7, 2025

[36] Foreign Investment Protection Act, section 8 (schedule)

[37] Ibid, section 8

[38] Public Private Partnerships Act, No. 14 of 2021

[39] Ibid, section 71(2) & third schedule

provisions of Kenyan law and provisions of a project agreement.[40] The Act provides that parties to a project management may agree to resolve any disputes arising under the project agreement through arbitration or any other non-judicial means of dispute resolution as may be provided by the project agreement.[41]

The Third Schedule of the Act provides for the minimum contractual obligations required to be specified in a project agreement, including mechanism for dispute resolution including resolution of disputes by way of arbitration or any other amicable dispute resolution mechanism.[42] These sections provide and allows international arbitration in project agreements between the state and foreign investors.[43]

The Act defines a project agreement as a contract concluded between a contracting authority and a private party and includes any ancillary agreement entered into by the parties in relation to an agreement.[44] Other acts of parliament that are influential in helping and providing for international arbitration and ISDS include Arbitration Act of 1995[45] and the Nairobi International Financial Centre Act, Chapter 495.[46]

3.2 International Instruments

The following international instruments provide a framework that collectively helps to resolve investment disputes through ISDS while fostering investor confidence.

[40] Public Private Partnerships Act, section 70
[41] Ibid, section 70 (2)
[42] Ibid, third schedule, section 18
[43] Ibid, third schedule
[44] Ibid, Section 2
[45] Arbitration Act of 1995, Cap. 49 Laws of Kenya
[46] Nairobi International Financial Act, Cap. 495 Laws of Kenya

3.2.1 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)

The Convention establishes under Article 1 the International Centre for Settlement of Investment Disputes (ICSID) to provide facilities for arbitration of investment disputes between contracting states and nationals of other contracting states.[47] The Convention empowers the administrative council established under the convention with the power to make and adopt the rules of procedure for the institution of arbitration proceedings, as well as adopt the rules of procedure for arbitration proceedings (the council has adopted the Arbitration Rules).[48]

The ICSID Convention provides in detail provisions relating to panels for arbitrators for purposes of proceedings. The Convention requires members of the panel to have the highest qualification including but not limited to being persons of high moral character, and recognized competence in the fields of law, commerce, industry or finance.[49]

The jurisdiction of the ICSID (*center*) extends to any legal dispute arising directly out of an investment, between a contracting state and a national of another contracting state, which the parties to the dispute consent in writing to submit to the ICSID.[50] The convention recognizes the power of a contracting state to require exhaustion of local remedy before a dispute between the state and persons from other states is submitted to the ICSID for determination.[51]

The Convention requires the party seeking to institute arbitration proceedings to write and address a request for arbitration letter to the secretary general of the center who then refers the same to the other party in the arbitration proceeding.[52] It stipulates that the constitution of the arbitral tribunal shall be based on mutual

---

[47] Concention on the Settlement of Investment Disputes Between States and Nationals of Others States (*The ICSID Convention)*, Article 1
[48] Ibid, Article 6
[49] Ibid, article 14
[50] Ibid, artice 25
[51] Ibid, article 26
[52] Ibid, article 36

agreements by the parties, either such agreement agreed upon institution of the dispute or contained in the agreement with the lack of such agreement the convention remedying the same by requiring the tribunal to comprise of three arbitrators.[53]

The Convention provides that the award made by the arbitral tribunal shall be binding on the parties and shall not be subject to appeal or to any other remedy, with the convention requiring both parties to abide with the terms of the award.[54] It places an obligation to contracting states to recognize an award rendered under the auspices of the convention and enforce the pecuniary obligations imposed by that award within its territories as if it was a final judgment of a local court. The convention further provides for the enforcement of such award by national courts where there exists a procedure for such enforcement by a state domestic court.[55]

Under the powers of the Convention there have also been established the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (*Institutional Rules*)[56] as well as the Rules of procedure for Arbitration Proceedings (*Arbitration Rules*)[57] which supplement the provisions of the convention and guide the conduct of arbitral proceedings.

It is important to note that Kenya is a signatory to the ICSID Convention and hence the obligations highlighted above bind Kenya as a signatory state to the present convention.

---

[53] Ibid, Article 37
[54] Ibid, article 53
[55] Ibid, article 54
[56] ICSID Institutional Rules, (*International Centre for Settlement of Investment Disputes – ICSID, 2022)*
[57] ICSID Arbitration Rules, (*International Centre for Settlement of Investment Disputes – ICSID, 2022)*

3.2.2 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration

This Convention was adopted by the United Nations General Assembly (UNGA) after recognizing the need for provisions on transparency in the settlement of treaty-based investor-state disputes to take account of the public interest involved in such arbitration.[58] The Convention applies to arbitration between an investor and a state or a regional economic integration organization conducted on the basis of investment treaty.[59] The term investment treaty in the context of the convention refers to any bilateral or multilateral treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement , trade and investment framework or cooperation agreement, or bilateral investment treaty, which contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against contracting parties to that investment treaty.[60] The convention also provides the extent to which the UNCITRAL Rules on Transparency apply.

3.2.3 UNICTRAL Rules

The UNICTRAL Arbitration Rules[61], Expedited Arbitration Rules and Transparency in Treaty-based Investor-State Arbitration are applicable to ISDS.[62]

3.2.3.1 UNICTRAL Arbitration Rules

The UNICTRAL Arbitration rules were adopted by the UN General Assembly in 2021, to apply to parties who have agreed that the disputes between them in respect of a defined legal relationship, whether contractual or not shall be referred to Arbitration under the UNICTRAL Arbitration Rules.[63] The Arbitration Rules specify that for investor-state arbitration initiated pursuant to a treaty providing for the protection of investments or investors, the arbitration rules apply together

---

[58] United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, preamble
[59] Ibid, article 1
[60] Ibid
[61] UNICTRAL Arbitration Rules (2021)
[62] UNICTRAL Rules on Transparency in Treaty-based Investor-State Arbitration
[63] UNICTRAL Arbitration Rules (2021), article 1(1)

with the UNICTRAL Rules on Transparency in Treaty-based Investor-state Arbitration.[64]

The rules require the party initiating the arbitration proceedings to communicate to the other party of such intentions through a notice of arbitration, with arbitration proceedings being presumed to commence upon receipt of the arbitration notice by the respondent.[65] The respondent is accorded a 30-day period to respond to the notice. An award as a result of proceedings conducted in accordance with the rules is considered final and binding on the parties, and parties are required to carry out the awards without any undue delays.[66] To facilitate expeditious resolution of arbitration under the rules, the UNGA adopted the UNICTRAL Expedited Arbitration Rules which require parties to an arbitration proceeding to act in an expeditious manner throughout the proceedings, with the tribunal under the obligation to conduct the proceedings in an expedited time frame as agreed by the parties to the proceedings.[67]

The UNICTRAL Arbitration Rules offer an alternative for ICSID for investors and parties pursuing ISDS, and allow them to pursue ISDS Arbitration through the procedure and manner prescribed by the rules. The Expedited Rules offer a quicker resolution of ISDS than the ICSID.[68]

3.2.3.2 UNICTRAL Rules on Transparency in Treaty-based Investor-State Arbitration

The rules commonly referred to as *Rules on Transparency* apply to investor-state arbitration initiated under the UNICTRAL Arbitration Rules and pursuant to a treaty providing for the protection of investment or investors.[69]

---

[64] Ibid, article 1(4)
[65] Ibid, article 3
[66] Ibid, article 34
[67] UNICTRAL Expediated Arbitration Rules, article 1, 3
[68] 'Expediated Arbitration – ICSID Convention Arbitration (2022 Rules)' (*ICSID)* https://icsid.worldbank.org/procedures/arbitration/convention/expediated-arbitration/2022 accessed February 7, 2025
[69] UNICTRAL Rules on Transparency in Treaty-based Investor-State Arbitration, article 1

A key achievement of the Rules of Transparency is controlling and regulating the discretion and authority to an arbitral tribunal, to require the authority and discretion to be exercised after taking into account the public interest in transparency in treaty-based investor-state arbitration and in the particular arbitral proceedings.[70] This a derogation from the arbitration norms which only require an arbitral tribunal to take into account the wishes of the parties and the agreement conferring the tribunal such authority or discretion.[71]

Under Article 2 of the rules, once the notice of arbitration has been received by the respondent, each party to the proceedings is required to transmit a copy of the notice to the repository established under article 8 of the rules, with the repository required to make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.[72] Since ISDS carries with them a certain degree of public interest, the publication of any information regarding such proceedings satisfies the public interest requirement of transparency and accountability in public matters.[73]

The rules also require the publication of the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defense and any further written statements or written submissions by any party to the proceedings, with expert reports and witness statement available upon request by third parties.[74]

---

[70] Ibid, article 1 (4)(a)

[71] Lise J. & Nathalie B., 'New UNICTRAL Rules on Transparency: Application, Content and Next Steps' (*Investment Treaty News – ITN, September 18, 2013)* https://www.iisd.org/itn/2013/09/18/new-unictral-arbitration-rules-on-transparency-application-content-and-next-steps-2/ accessed February 7, 2025

[72] Ibid, article 2

[73] 'Frequently asked questions about investor-state dispute settlement' (*Norton Rose Fulbright, June 2017)* https://www.nortonrosefulbright.com/en/knowledge/publication/8014c6b7/ accessed February 7, 2025

[74] Ibid, article 3

A major milestone achieved by the rules is the provision relating to submissions by third parties under Article 4 of the rules. This provision moves away from the traits of arbitration of only limiting the arbitration proceedings to parties therein. The provision allows a person not a party to the proceedings (*third person(s)*) to file written submission with the arbitral tribunal regarding a matter within the scope of the dispute.[75] The rules also empower the tribunal with the consultation of the parties to invite submission by non-disputing party relating to the interpretation of the treaty offering protection to the investor or investment. [76]

Under the rules any information relating to confidential business information, information that is protected against being made available to the public under the treaty, information that is protected against being made available to the public, in the case of the information of the respondent state, under the law of the respondent state and information the disclosure of which would impede law enforcement is considered confidential and protected information and is not availed to the public.[77]

3.2.4 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*New York Convention of 1958*)

With the growing importance of international arbitration as a means of settling international commercial disputes, the New York Convention seeks to provide a common legislative standard for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards, such as ISDS awards.[78]

ISDS arbitration is designed to operate and happen outside the territory of the contracting state as a means avoiding prejudicing the investor in the arbitration

[75] Ibid, article 4
[76] Ibid, article 5
[77] Ibid, article 7
[78] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*The New York Convention)* entered into force on 7 June 1959

proceedings.[79] A resulting award under ISDS arbitration is considered a foreign award and the New York convention ensures its enforcement like it was a domestic award.[80] The convention applies to recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought.[81]

Kenya being a party to the Convention is under an obligation to recognize arbitral awards as binding and enforce them in accordance with the rules of procedure in Kenya.[82] In Kenya arbitration is regulated and provided for under the Arbitration Act of 1995, which recognizes international arbitration awards as binding and enforced in accordance with the provisions of the New York Convention.[83] For a foreign award to be enforced the party relying on an arbitral award is required to apply for enforcement and recognition of the arbitral award in the Kenyan High Court and furnish the court with the original award or duly certified copies of the same, and an original arbitration agreement or duly certified copies of the same.[84] The provisions of the Arbitration Act of 1995 list grounds upon which the High Court may reject an application for recognition and enforcement of a foreign arbitral award.[85] These are that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya, or the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.[86] This is also the position of the New York Convention in Article V (2).

---

[79] 'Frequently asked questions about investor-state dispute settlement' (*Norton Rose Fulbright, June 2017)* https://www.nortonrosefulbright.com/en/knowledge/publication/8014c6b7/ accessed February 7, 2025

[80] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*The New York Convention)*, article 1

[81] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*The New York Convention)*, article 1

[82] Ibid, article 3

[83] Arbitration Act of 1995, section 36 (2)

[84] Ibid, section 36 (3)

[85] Ibid, section 37

[86] Ibid, section 37 (1)(b)

Under the New York Convention recognition and enforcement of the award maybe refused by a court , at the request of the party against whom it is invoked, if that party furnishes proof that they were under some incapacity, or the said agreement is not valid under Kenyan law, or fails any indication under Kenyan law, or the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, or the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was unable to present his case, or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or the award has not yet become binding on the parties, or has been set aside by a competent authority.[87] The Arbitration Act in Section 37 (1)(a) also takes the same position as the convention. Other rules that apply to ISDS include the UNICTRAL Code of Conduct for Judges in International Investment Dispute Resolution,[88] UNICTRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution,[89] Statute of the Advisory Center on International Investment Dispute Resolution,[90] and international chamber of Commerce (ICC) Arbitration Rules.[91]

4.0 Select Notable Cases on Kenya's ISDS

4.1 Cortec Mining Kenya Ltd. Cortec (Pty) Ltd. v Kenya (ICSID Case No. ARB/15/29)

The dispute arose from Kenya's revocation of mining licenses for rare earth metal project. The tribunal while ruling in Kenya's favor determined that the special licenses forming the subject matter of the arbitration (*Special Mining License 351*

[87] New York Convention, article V

[88] UNICTRAL Code of Conduct for Judges in International Investment Dispute Resolution (*United Nations Commission on International Trade Law – UNICTRAL, 2023)*

[89] UNICTRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (*United Nations Commission on International Trade Law – UNICTRAL, 2023)*

[90] Statute of the Advisory Centre on International Investment Dispute Resolution, (*United Nations Commission on International Trade Law, 2023)*

[91] ICC Rules of Arbitration (*International Chamber of Commerce, 2021)*

(SML 351)) was issued in violation of Kenyan Law, deeming the license void ab initio.[92] The tribunal went ahead and defined what constituted an investment by applying the ICSID Convention and the UK-Kenya Bilateral Investment Treaty (BIT), it held that for an investment to qualify for protection, it must be lawful under the host state's laws.[93]

In its decision the tribunal reinforced the principle that international arbitration does not protect investments acquired through illegality, and that protection cannot be accorded to an investor or his investment if that investment is unlawful under the contracting state domestic laws.

4.2 Word Duty Free v Kenya (ICSID Case No. ARB/00/7)

The case did not involve any BIT but was based on contract-based investment arbitration, with the claimant alleging possible violations of contractual obligations and international law by taking and destroying claimant's property.[94] Based on the assessment of the facts and relevant principles of domestic and international law, the Tribunal held the claimant had in fact procured the 1989 Agreement through a bribe to the former Kenyan president and that, consequently the claimant had no right to pursue to recover under any of its pleaded claims, all of which arose from that 1989 agreement.[95]

The case is important in that is an example of how a tribunal can refer to and rely upon general principles on international law, and private parties' obligations thereunder, in order to inform its evaluation of claims.[96] it also supports the principle that investors have obligations to comply with domestic and international law in the host states in which they invest, and shows how investor

[92] Cortec Mining Kenya Limited & Others v. Republic of Kenya (ICSID Case No. ARB/15/29)
[93] Ibid
[94] World Duty Free Company Limited v Republic of Kenya (ICSID Case No. ARB/007)
[95] Ibid
[96] Ibid

misconduct in certain circumstances can affect an investor's legal rights vis-a-vis host states.[97]

The fact that World Duty Free was based on a contract between the claimant and Kenya as opposed to a bilateral investment treaty or other international investment agreement (IIA) may, however, limit these principles' applicability in other investors-state disputes.[98] Other key cases on Kenya ISDS include WalAm Energy v Republic of Kenya (ICSID Case No. ARB/15/7) and Universal Petroleum Services Corporation v Republic of Kenya.

5.0 Trends, Developments and Reforms in ISDS

Over the years, ISDS has spurred a lot of controversies on its legitimacy and integrity. The criticisms mainly stem from the obscuring effect of ISDS on legitimate government regulation and the adventurist manner in which arbitral tribunals interpret substantive rights favoring foreign investors.[99] this, in turn, has resulted in a backlash by states which is illustrated through various forms ranging from withdrawal from traditional BIT's, the development of new era BIT's, to extremities of eliminating ISDS altogether.[100]

Several notable developments continue towards the reform of International Investment Agreements (IIA) regime at the bilateral, regional and multilateral levels, including new types of investment-related agreements, the termination of bilateral investment treaties (BITs) and continued multilateral discussions on the reform of ISDS.[101]

---

[97] Lise Johnson, 'World Duty Free v Kenya' (Investment Treaty News, October 18, 2018) https://www.iisd.org/itn/en/2018/10/18/world-duty-free-v-kenya/ accessed November 10, 2024

[98] Ibid

[99] Ali B. 'Backlash Against ISDS: A Case for a Sustainable Development Approach to Investment Arbitration for Developing Countries'

[100] Ibid

[101] 'Trends in the Investment Treaty Regime and a Reform Toolbox for the Energy Transition' (United Nations Conference of Trade and Development - UNCTAD, 2023)

In 2022, countries concluded at least 15 new IIAs consisting of 10 BITs and 5 treaties with investor provisions (TIPs).[102] The number of terminations in 2022 exceeded the number of newly concluded IIAs with at least 58 IIAs being effectively terminated, of which 54 were by mutual consent, 1 was unilateral and 3 were replacements.[103] Most of these terminations by mutual consent were based on the agreement to terminate intra-EU BITs, which became effective in 2022 among all 23 EU Member states that had signed it.[104] This made at end of 2022, the total number of effective terminations reached at least 569, with about 70 percent of IIAs terminated in the last decade.

With the evolution of Kenya's regime on ISDS largely being driven by international changes and international reforms, it is important to take a look at reforms happening internationally. Important is the recent EU reforms of ISDS by the European Commission (EC) has come up with draft policies for establishment of a "new and transparent system for resolving disputes between investors and states", citing the need to reform existing investor-state dispute settlement mechanisms (ISDS).[105] The EC claimed ISDS "suffers from a fundamental lack of trust".[106]

Conclusion

Over the years Kenya has gotten into various BIT agreements that have formed the basis for ISDS agreements and jurisdiction of ISDS Arbitration. The Kenya's BIT regime includes Kenya-United Kingdom BIT (1999), Kenya-China BIT (2001),

---

https://investmentpolicy.unctad.org/pages/1072/trends-in-the-investment-treaty-regime-and-a-reform-toolboc-for-the-energy-transition accessed November 10, 2024

[102] Ibid

[103] Ibid

[104] Ibid

[105] Stothard P., McDougall K. & Long C. 'The EU's Proposed Reform of ISDS' In International Arbitration Report 2017 - Issue 8 (Norton Rose Fulbright, June 2017)

[106] 'Frequently asked questions about investor-state dispute settlement' (*Norton Rose Fulbright, June 2017)* https://www.nortonrosefulbright.com/en/knowledge/publication/8014c6b7/ accessed February 7, 2025

Kenya-Netherlands BIT (1970), Kenya-Germany BIT (1996), Kenya-France BIT (2001), Kenya-South Korea BIT (2014) among others.

Kenya's interplay and engagement with ISDS Arbitration reveals the dynamic interplay between upholding investor confidence and attracting foreign investments as well as promoting national interests and sovereignty. Notable cases such as Cortec Mining Kenya Limited v Republic of Kenya and World Duty Free Company Limited v Republic of Kenya have underscored the importance of adhering to lawful conduct, compliance with already established Kenya investment-investor regulatory and legal regime, and international set standards on investment and protection of investment and investors.

However, the experience with ISDS highlights the importance of crucial reforms to ISDS both in the country and internationally to not only protect investors and the host state but balance the intricate balance needed for ISDS to work. There is need for the international community to take in the criticism on ISDS as a motivation aimed at reforming the ISDS to serve its purpose in the 21st Century.

Bibliography

'First Session – ICSID Convention (2006 Rules)' (International Center for Settlement of Investment Disputes – ICSID) https://icsid.worldbank.org/procedures/arbitration/convention/process/first-session/2006

'Foreign Direct Investment (FDI) in Kenya' (Lloyds Bank Trade, May 2024) https://www.lloydsbanktrade.com/en/market-potential/kenya/investment accessed November 01, 2024

'Frequently Asked Questions About ISDS' (ISDS Platform, 2024) https://isds.bilaterals.org/the-basics accessed November 01, 2024

'Investor-State Dispute Settlement (ISDS)' (Thomson Reuters, Practical Law, 2024) https://uk.practicallaw.thomsonreuters.com/0-624-6147?transitionType=Default accessed November 01,2024

'Practical Cross-Border Insights into FDI Screening Regimes: Foreign Direct Investment Regimes' (International Comparative Legal Guides, Third Edition, 2022) https://iclg.com

'Primer on International Investment Treaties and Investor-State Dispute Settlement' (Columbia Centre on Sustainable Investment, January 2022) https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement accessed November 01, 2024

'Trends in the Investment Treaty Regime and a Reform Toolbox for the Energy Transition' (United Nations Conference of Trade and Development - UNCTAD, 2023) https://investmentpolicy.unctad.org/pages/1072/trends-in-the-investment-treaty-regime-and-a-reform-toolboc-for-the-energy-transition accessed November 10, 2024

Ali B. 'Backlash Against ISDS: A Case for a Sustainable Development Approach to Investment Arbitration for Developing Countries'

Arbitration Act of 1995, Cap. 49 Laws of Kenya

Chaisse J., Choukroune L.& Jusoh S., 'Investor-State Dispute Settlement (ISDS): An Introduction in: Chaisse J., Choukroune L.& Jusoh S., (eds) Handbook of International Investment Law and Policy' (Spring Nature, 2021) https://doi.org/10.1007/978-981-13-5744-2_60-1 accessed February 7, 2025

Constitution of Kenya 2010

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), article 1

Convention on the Settlement of Investment Disputes Between States and Nationals of Others States (The ICSID Convention), Article 1

Cortec Mining Kenya Limited & Others v. Republic of Kenya (ICSID Case No. ARB/15/29)

Foreign Investment Protection Act

ICC Rules of Arbitration (International Chamber of Commerce, 2021)

ICSID Institutional Rules, (International Centre for Settlement of Investment Disputes – ICSID, 2022)

International Center for Settlement of Investment Disputes, ICSID Additional Facility Rules (July 2022)

International Center of Settlement of Investment Disputes, ICSID Convention, Regulations and Rules (April 2006)

International Chamber of Commerce, ICC Rules of Arbitration (2021)

Joachim P., Kekeletso M. & Alexis N., 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' (OECD Working Papers on International Investment 2012/02, 2012) https://dx.doi.org/10.1787/5k8xb71nff628-en accessed February 7, 2025

Lise J. & Nathalie B., 'New UNICTRAL Rules on Transparency: Application, Content and Next Steps' (Investment Treaty News – ITN, September 18, 2013) https://www.iisd.org/itn/2013/09/18/new-unictral-arbitration-rules-on-transparency-application-content-and-next-steps-2/

Lise Johnson, 'World Duty Free v Kenya' (Investment Treaty News, October 18, 2018) https://www.iisd.org/itn/en/2018/10/18/world-duty-free-v-kenya/ accessed November 10, 2024

Nairobi International Financial Act, Cap. 495 Laws of Kenya

Public Private Partnerships Act, section 70

Statute of the Advisory Centre on International Investment Dispute Resolution, (United Nations Commission on International Trade Law, 2023)

Stothard P., McDougall K. & Long C. 'The EU's Proposed Reform of ISDS' In International Arbitration Report 2017 - Issue 8 (Norton Rose Fulbright, June 2017)
The Investment Promotion Act

UNICTRAL Arbitration Rules (2021)

UNICTRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (United Nations Commission on International Trade Law – UNICTRAL, 2023)

UNICTRAL Code of Conduct for Judges in International Investment Dispute Resolution (United Nations Commission on International Trade Law –

UNICTRAL, 2023)

UNICTRAL Expedited Arbitration Rules

UNICTRAL Rules on Transparency in Treaty-based Investor-State Arbitration
United Nations Commission on International Trade Law, UNICTRAL Arbitration Rules (2013)

United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration

Valasek M. & FitzGerald A., 'Frequently Asked Questions About Investor-State Dispute Settlement' in International Arbitration Report Issue 8 (Norton Rose Fulbright, June 2017)

World Duty Free Company Limited v Republic of Kenya (ICSID Case No. ARB/007)

Post-Pandemic Arbitration: Have We Fully Adapted to The New Normal?

By: ***Murithi Antony* and Sarafin Cherono****

Abstract

This paper examines the transformation of arbitration practices in the wake of the COVID-19 pandemic, analyzing its evolution from traditional physical hearings to virtual and hybrid methods. Initially constrained by a reliance on in-person proceedings and cultural norms, arbitration faced significant disruptions during the pandemic. The authors posit that rapid adaptation to technology, such as virtual hearings and digital submissions marked a turning point in the practice of arbitration, establishing cost-efficient and sustainable practices. The paper discusses the unforeseeable challenges that emerged in the post pandemic period, including technological disparities, cybersecurity risks, cultural resistance, and concerns over procedural equity, and gives recommendations on how such challenges can be overcome to ensure arbitration remains a credible and accessible dispute resolution mechanism.

1. Introduction

Arbitration as a form of Alternative Dispute Resolution Mechanisms (ADR) has always been praised for its flexibility, efficiency, and party-centric approaches.[1] Its private nature has made it increasingly popular, especially in international commerce where neutrality and enforceability are paramount.[2] Yet, despite its procedural adaptability, arbitration traditionally leans on in-person hearings,

* *LL.B (Hons), University of Embu; PG Dip in Law (Cnd), KSL; Email: amurithi326@gmail.com*

** *LL.B II, University of Nairobi; Email: sarafin@students.uonbi.ac.ke*

[1] Muigua, K. (2012). Settling disputes through arbitration in Kenya. Glenwood Publishers, Nairobi.

[2] 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.

physical submissions, and institutional rules shaped for a predominantly physical setting leaving it vulnerable to disruption in the face of unforeseen challenges.[3]
The COVID-19 pandemic, perhaps, is one of those most significant and unprecedented challenge that arbitration has ever faced.[4] It triggered widespread disruptions globally, marked by travel restrictions, health concerns, and lockdowns.[5] Ongoing arbitral proceedings were halted due to physical restrictions that had made it impossible to continue with traditional in-person hearings.[6] In response, the arbitration community quickly pivoted to technology-driven solutions, with virtual hearings emerging as the foremost adaptation, which allowed arbitration to continue despite the challenges posed by the pandemic.[7] The changes that emerged during the pandemic established a new normal that persists in the post-pandemic world.[8]

This paper examines the evolution of arbitration in the post-pandemic era, focusing on the pre-pandemic period, the impact of the pandemic, and subsequent innovations. It also explores the challenges of this transition and offers recommendations for establishing a robust framework for arbitration in the future.

2. Pre-Pandemic Arbitration: Trends and Norms

The practice of Arbitration before the pandemic was characterized by both traditional practices and gradual innovations.[9] While it had long been celebrated for its flexibility and efficiency compared to litigation, arbitration remained

[3] 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.
[4] Wilske, Stephan. "The impact of COVID-19 on international arbitration-hiccup or turning point?" *Contemp. Asia Arb. J.* 13 (2020): 7.
[5] *Ibid.*
[6] *Ibid.*
[7] Rooney, Kim M. "The global impact of the Covid-19 pandemic on commercial dispute resolution in the first seven months." *Disp. Resol. Int'l* 14 (2020): 83.
[8] Ngo, Steve. "Appraising Remote Arbitrations Arising from the Pandemic: Reality Check and Thoughts on Keeping Arbitration Going." *Ind. Arb. L. Rev.* 4 (2022): 109.
[9] Schmitz, Amy J. "Arbitration in the Age of COVID: Examining Arbitration's Move Online." *Cardozo J. Conflict Resol.* 22 (2020): 245.

shackled by established norms, with a strong preference for physical proceedings, extensive documentation, and procedural rigor.[10]

Essentially, physical proceedings in arbitration were prioritized to maintain the integrity and fairness of the process.[11] Both parties and arbitrators valued in-person hearings for the perceived benefits of direct interaction, such as assessing witness demeanour and credibility.[12] Advocates also emphasized that face-to-face interactions between legal teams, arbitrators, and witnesses enhanced procedural transparency and fostered confidence in the process.[13] In many jurisdictions, including Kenya, the preference for physical hearings was influenced by cultural expectations and traditional approaches to dispute resolution, which often involved all affected parties present physically during the dispute resolution processes.[14]

The reliance on physical hearings, however, was accompanied by a lot of challenges especially with globalization.[15] Organizing physical hearings in international or cross-border disputes involved serious logistical complexities such as travel and accommodation expenses, given that Arbitrators, counsel and witnesses had to be brought together for hearing, which made arbitration too costly for smaller enterprises and individuals, rendering it less inclusive.[16] Cases

---

[10] *Ibid.*
[11] Makarenkov, Oleksii, and Lurdes Varregoso Mesquita. "Challenges of Legal Guarantees for the Enforcement of Arbitral Awards in International Commercial Cases." *Access to Just. E. Eur.* (2024): 107.
[12] *Ibid.*
[13] Alkon, Cynthia, and Amy Schmitz. "Opening the Virtual Window: How on-Line Processes Could Increase Access to Justice in the Criminal Legal System." *Cardozo J. Conflict Resol.* 25 (2023): 177.
[14] Mwalula, Michael. "Effectiveness of the traditional court system in conflict resolution in chief Chitimukulu chiefdom and Munkonge chiefdom of Zambia's northern province." PhD diss., The University of Zambia, 2022.
[15] Al-Aydah, Shayma'A. Ahmad Abu. "The Occupational Interests and Its Relation to Psychological Stability among 10th Grade Students with Physical and Hearing Disabilities in Syrian Refugee Camps Schools in Jordan." *JL Pol'y & Globalization* 114 (2021): 53.
[16] *Ibid.*

such as *Republic of Ecuador v. Chevron Corporation* provide a vivid example of how difficult cross-border arbitrations are to organize, with many stakeholders on different continents needing extensive coordination.[17]

Further, while arbitration was traditionally reliant on physical processes, the pre-pandemic period saw early efforts to incorporate technology.[18] This was, however, limited to procedural aspects such as e-mail communications for scheduling and case management. In some instances, video conferencing was used for procedural hearings or taking witness testimony, but it was by no means widely adopted.[19] This can be explained by the fact that technological innovations in arbitration were often driven by individual arbitrators or parties, rather than institutional mandates, owing to the principal of party autonomy and procedural flexibility.[20] For instance, some progressive arbitrators in international arbitrations occasionally relied on electronic document management systems to streamline submissions.[21] However, these practices were the exception rather than the norm, and their implementation varied widely across jurisdictions and cases.[22]

3. Arbitration in the Wake of COVID-19: Disruptions, Innovations, and Post-Pandemic Norms

The onset of the pandemic brought an abrupt and unprecedented disruption to arbitration practices.[23] With physical meetings prohibited and social distancing measures enforced, hearings were postponed, deadlines extended, and parties

---

[17] *Republic of Ecuador v. Chevron Corporation [2009]*
[18] Salton, David. "Recent Trends in International Arbitration and 2021 International Rule Changes." *Const. LJ* 17 (2021): 81.
[19] *Ibid.*
[20] Özraşit, Ticen Azize. "Assessment of the Balance of Autonomy and Justice in English Arbitration Proceedings in the Light of the Assistance of State Courts and Injunctions." *Hacettepe Hukuk Fakültesi Dergisi* 14, no. 1 (2024): 175-208.
[21] Anderson, Alan, and Herman Verbist, eds. *Expedited International Arbitration: Policies, Rules and Procedures*. Kluwer Law International BV, 2024.
[22] *Ibid. See also,* Anderson, Alan, and Herman Verbist, eds. *Expedited International Arbitration: Policies, Rules and Procedures*. Kluwer Law International BV, 2024.
[23] Roberts, Elizabeth. "Impact of covid-19 on Arbitration Centers." In *The Impact of Covid on International Disputes*, pp. 230-243. Brill Nijhoff, 2022.

were forced to find innovative solutions to continue proceedings while adhering to public health guidelines.[24] Arbitration had to quickly evolve and adapt to the new realities of the pandemic.[25] This shift resulted in the widespread adoption of hybrid hearings, the increased reliance on digital platforms, and the emergence of sustainability concerns within the arbitration process.[26] As described in the LCIA 2020 Report, the COVID-19 Pandemic resulted in a "new normal", with which arbitration users and service providers have had to keep pace.[27] These changes, as discussed below, have significantly redefined arbitration norms, even in post-pandemic period.

3.1. Hybrid Hearings

The most significant adaptation is represented by the complete transformation of inter-personal communication, which has shifted, with exponential acclivity,[28] to the digital space.[29] In the several post-pandemic years, arbitral institutions have either updated their institutional rules to now specifically envisage the possibility of virtual hearings, or prepared guidance notes and checklists to encourage and assist disputing parties and arbitral tribunals to conduct hearings virtually so as to avoid inordinate delays at the behest of the pandemic.[30] Further, a plethora of service providers have gained prominence recently as specialists in organizing virtual hearings, with services ranging IT assistance for preparing the hearing

---

[24] Shankar, Vidya, and Shreya Chauhan. "Impact of COVID-19 on International Commercial Contract." *Indian JL & Legal Rsch.* 2 (2021): 1.
[25] *Ibid.*
[26] Gómez-Moreno, Juan Pablo. "Advocacy for Online Proceedings: Features of the Digital World and Their Role in How Communication is Shaped in Remote International Arbitration." *International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique* 37, no. 3 (2024): 865-885.
[27] "LCIA Annual Casework Report 2020 and changes to the LCIA Court and European User's Council," LCIA, May 17,2021,6, https://www.lcia.org/News/lcia-news-annual-casework-report-2020-and-changes-to-the-lcia-c.aspx
[28] Maarten de Vet., "Impacts of the COVID-19 pandemic on Eu industries," European Parliament (march 2021), 32-33
[29] Pilita Clark, "Year in a word: Zoom," Financial Times, December 21,2020 https://www.ft.com/content/170649do-4cdf-454b-a4ec-e28d130974cd
[30] Article 26(1) of the ICC Rules 2021

participants before and during the virtual hearing, remote display of documentary evidence available for the duration of the virtual hearing, and tailored video conferencing platforms for virtual hearings in arbitration proceedings.[31] Correspondingly, court reporters and interpreters have also adjusted their services to now include the provision of transcription and interpretation services virtually.[32]

Therefore while the phenomenon of virtual hearings had already entered the discourse prior to the pandemic, its scope and range have extensively been explored and put in practice after the pandemic.[33] Indeed, the international community has made rapid advancements to facilitate arbitrations during these dire times.[34] In light of the above, it is unsurprising that the COVID-19 pandemic has been referenced as having triggered a "revolution" of arbitration practices.[35]

3.2. Greener Arbitrations: Digitalization of the Arbitration Process

The international arbitration community has experienced a rise in initiatives that promote environmentally sustainable arbitration proceedings referred to as "green arbitrations".[36] One of the primary effects of the COVID-19 pandemic on international arbitration procedure has been the adoption of electronic-only submissions.[37] While electronic submissions and electronic case management systems have been used by many arbitral institutions for years, the pandemic has accelerated the move away from hard-copy submissions.[38]

---

[31] Pratyushi Panjwani, "The Impact of the COVID-19 Pandemic on International Arbitration Practices," (Oxford University Press, 2022) 28
[32] *Ibid*
[33] Shaheeza Lalani and Steven G. Shapiro, The Impact of Covid on International Disputes (Oxford University Press, 2022)
[34] Ibid
[35] Ibid
[36] Pratyush Panjwani, "The Impact of the COVID-19 Pandemic on International Arbitration Practices," (Oxford University Press, 2022) 28
[37] Kevin Ongenae and Maud Piers, "Procedural Formalities in Arbitration: Towards a Technologically Neutral Legal Framework," Journal of International Arbitration 38, (2021) 27
[38] *Ibid.*

With respect to the request for arbitration, before the COVID-19 pandemic, most arbitration rules required that the request for arbitration be sent in hard copy to the respondent and to the relevant arbitral institution.[39] In *Gami Investments v Mexico,* the tribunal ruled that the parties must provide hard copies for each fact exhibit.[40] In the same spirit, the tribunal in *Mobil v Canada* ordered that the parties file hard copies of pleadings, witness statements, expert reports, and other documents.[41]

However, with the advent of the COVID-19 pandemic, arbitral institutions quickly recognized the impact of quarantine and lockdown orders on hard-copy filing requirements.[42] The transition to electronic-only submissions brings substantial efficiencies to the arbitral process, reducing time and expense previously required to prepare and ship hard copies to the relevant parties.[43] Furthermore, smaller arbitral institutions have been able to rely on the investments that larger organizations have made with respect to electronic-filing software, further reducing overall costs.[44]

Eliminating hardcopy submissions also reduces the volume of paper in an arbitration, resulting in a more environmentally sustainable practice.[45] This transition aligns with the increased interest in paperless arbitration, as well as the

---

[39] *Ibid.*
[40] Gami Investments Inc v The Government of the United Mexican State, Procedural Order No. 1 https://www.italaw.com/sites/default/files/case-documents/italaw11253_1.pdf
[41] Mobil Investments Canada Inc v Canada (ICSID Case No. ARB/15/6), Procedural Order No. 1 https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4205/DC7592_En.pdf
[42] Bjorn Arp and Edwin Nemesio, "The Practice of Virtual Hearings during COVID-19 Investment Arbitration Proceedings," (Oxford University Press, 2022) 157
[43] Patricia Shaughnessy, "Initiating and Administering Arbitration Remotely," *International Arbitration and the COVID-19 Revolution* (Wolters Kluwer, 2020), 39
[44] *Ibid.*
[45] Mohit Mahla and Kabir A.N. Duggal, "When the Answer is Becoming the Question: Impact of Arbitrations on the Environment," https://arbitrationblog.kluwerarbitration.com/2020/11/29/when-the-answer-is-becoming-the-question-impact-of-arbitrations-on-the-environment/

Campaign for Greener Arbitration Pledge, which encourages the elimination of hard copies in favor of electronic submissions.[46]

3.3. Sustainability and Cost Efficiency

Notwithstanding its historical reputation as a more efficient and economical alternative to national court litigation, international arbitration has recently been criticized as slow and costly.[47] The arbitral community's widespread adoption of remote hearings has had the potential to significantly increase efficiency and reduce costs in an enduring fashion, which has helped address this criticism.[48] It has been estimated that travel and subsistence alone account for approximately one quarter of the costs to hold an in-person hearing.[49]

Remote hearings has significantly reduced these costs.[50] In a survey of nineteen arbitral institutions, Patricia Shaughnessy noted that the institutions have found the procedures for facilitating remote arbitration have worked well and met the needs of clients for fair, efficient, and cost-effective arbitration.[51] The prevalence and familiarity of remote hearing platforms sparked by the pandemic has led many arbitral users to experience significant efficiency gains without compromising the quality of the arbitral process.[52]

---

[46] *Ibid.*
[47] White & Case LLP, "2018 International Arbitration Survey: The Evolution of International Arbitration," Queen Mary University of London, May 9 2018, 32 https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF
[48] Jennifer Kirby, "Efficiency in Arbitration: Whose Duty Is It?," *Journal of International Arbitration* 32, 6(2015) 689-695
[49] Berkeley Research Group, "The Psychological Impact of Remote Hearings," August 18 2021,10 https://media.thinkbrg.com/wp-content/uploads/2021/08/05105717/BRG-Remote-Hearing-Impact-2021-Final.pdf
[50] Karthik Nagarajan and James J. East Jr, "Salient Considerations for Remote International Arbitration Hearings," (Oxford University Press, 2022) 100
[51] White & Case LLP, "2021 International Arbitration Survey: Adapting arbitration to a changing world," Queen Mary University of London, May 7, 2021.
[52] Karthik Nagarajan and James J. East Jr, "Salient Considerations for Remote International Arbitration Hearings," (Oxford University Press, 2022) 100

4. Challenges in Adapting to Post-COVID Arbitration

The transition to post-COVID arbitration, while transformative, has not been without hurdles. Key challenges persist, including technological disparities, data security risks, cultural resistance, and procedural fairness concerns. This section critically examines these issues, drawing on case studies, institutional reports, and academic literature to provide a comprehensive analysis.

4.1. Technological Barriers and Infrastructure Limitations

The greatest challenge in post-COVID arbitration lies in the significant digital divide between developed and developing regions.[53] In many African countries, including Kenya, inadequate technological infrastructure hampers effective participation in virtual or hybrid hearings.[54] Unreliable internet connectivity, particularly in rural areas, frequently causes delays and disruptions, undermining the efficiency of online arbitration.[55]

Data from the ITU shows that in 2021, only 28% of households in the Sub-Saharan region had access to the internet compared to 87% in Europe.[56] The inequalities arising give way to structural unfairness in an arbitration where parties hailing from more technologically developed regions are better placed in dealing with digital proceedings.[57]

---

[53] Garg, Nandini, and Vasu Manchanda. "Covid–19 crisis and digitisation: towards revamping the justice delivery system." *Bennett Journal of Legal Studies* 2, no. 1 (2021): 37-68.

[54] Goh, Allison. "Digital Readiness Index for Arbitration Institutions: Challenges and Implications for Dispute Resolution Under the Belt and Road Initiative." *Journal of International Arbitration* 38, no. 2 (2021).

[55] *Ibid.*

[56] Abdul-Wakeel Karakara, Alhassan, and Evans S. Osabuohien. "Threshold effects of ICT access and usage in Burkinabe and Ghanaian households." *Information Technology for Development* 28, no. 3 (2022): 511-531.

[57] Mateko, Freeman Munisi. "Nexus between ICT diffusion and poverty level In Sub-Saharan African (SSA) countries." PhD diss., North-West University (South Africa), 2022.

4.2. Cybersecurity and Confidentiality Risks

As arbitration increasingly relies on digital platforms, concerns about cybersecurity and confidentiality have intensified.[58] Arbitration's appeal lies in its private nature, yet the transition to online hearings and document-sharing platforms has exposed proceedings to potential breaches. [59] Further, the conduct of virtual arbitration proceedings require external assistance to operate technologies during the conduct of arbitration, including reporters and translators create confidentiality concerns.[60] Since virtual arbitration proceedings are normally followed by email communications in the form of witness statements, written submissions and arbitral awards, there's a potential risk of hacking.[61] In case of hearings conducted by video conferencing, the log-in details may be accessed by third parties who can gain unauthorized access to the proceedings thus raising security concerns.[62] Further, where the tribunal renders an electronic award submitted to the parties via internet , it may be accessed by third parties against the principle of privacy that is central to arbitration.[63]

Arbitration institutions have reported rise in attempted cyber-attacks since the pandemic.[64] ICC, for instance, disclosed that in 2021 alone, it experienced multiple attempts to breach its digital case management system.[65] These incidents highlight the risks posed by inadequate cybersecurity measures, which can compromise

---

[58] Karthik Nagarajan and James J. East Jr, "Salient Considerations for Remote International Arbitration Hearings," (Oxford University Press, 2022) 100

[59]Kariuki Muigua, 'Virtual Arbitration Amidst COVID-19: Efficacy and Checklist for Best Practices' (Discussion Paper, May 2020)

[60] *Ibid*

[61] *Ibid*

[62] Muigua. K., Settling Disputes Through Arbitration in Kenya, Glenwood Publishers, 3rd Edition,2017; *See also,* Shaheeza L. and Steven G., The Impact of COVID on International Disputes, 27 January 2023

[63] *Ibid*

[64] Quilling, Chelsea. "The Future of Digital Evidence Authentication at the International Criminal Court." *Journal of Public & International Affairs* (2022).

[65] George, A. Shaji. "Bridging the Digital Divide: Understanding the Human Impacts of Digital Transformation." (2024).

sensitive commercial information and damage the credibility of the arbitration process.[66]

4.3. Cultural Resistance to Virtual Arbitration

Resistance to virtual arbitration remains a notable barrier to its widespread acceptance, influenced by deeply rooted cultural traditions and generational perspectives.[67] Arbitration has long been grounded in face-to-face interactions, which are considered critical for building trust, fostering mutual respect, and promoting transparency.[68] These values are particularly cherished in African countries, where personal interaction is a cultural essential.[69] For many, the shift to virtual hearings feels impersonal and incompatible with these established norms, making adaptation a slow process.[70]

This resistance extends beyond the disputing parties to include arbitrators and legal practitioners, particularly those from older generations. Some senior arbitration practitioners have raised concerns that the transition to virtual platforms daunting.[71] Their unfamiliarity with digital tools often leads to concerns about their ability to manage proceedings effectively, creating anxiety over potential mistakes or mismanagement during virtual hearings.[72]

---

[66] Quilling, Chelsea. "The Future of Digital Evidence Authentication at the International Criminal Court." *Journal of Public & International Affairs* (2022).
[67] Beretta, Rachele. "Procedural justice in online dispute resolution: an empirical enquiry." PhD diss., University of Antwerp, 2024.
[68] Brown, Julian Christopher Patric. "The protection of confidentiality in arbitration: balancing the tensions between commerce and public policy." PhD diss., London Metropolitan University, 2021.
[69] Taylor, Henry. "Is Justice by Zoom Justice Denied?: Judicial Stakeholder and Legal Advocate Experiences of Video-Mediated Trial Courts in Washtenaw County." *Judicial Stakeholder and Legal Advocate Experiences of Video-Mediated Trial Courts in Washtenaw County (March 25, 2022)* (2022).
[70] *Ibid.*
[71] George, A. Shaji. "Bridging the Digital Divide: Understanding the Human Impacts of Digital Transformation." (2024).
[72] *Ibid.*

4.4. Procedural Inequities and Due Process Concerns

Procedural fairness is a cornerstone of arbitration, ensuring that all parties have an equal opportunity to present their cases.[73] However, the shift to virtual hearings has raised important questions about whether this principle is being upheld in practice.[74] Virtual arbitration has introduced several challenges that can disadvantage certain parties, such as differences in time zones, varying levels of technological proficiency, and unequal access to reliable digital tools.[75] These disparities can create an uneven playing field, particularly in complex or high-stakes disputes.

The International Bar Association (IBA) has emphasized that equal access to resources is critical to maintaining procedural integrity in arbitration.[76] Yet, achieving this balance has proven difficult, especially in cross-border disputes where economic and technological inequalities are stark. For example, a party from a country with advanced digital infrastructure may find it easier to participate in virtual proceedings than one from a region with limited internet connectivity or outdated technology.[77]

---

[73] Gorthy, Keerthi. "Deciphering Arbitration Awards-A Comprehensive Guide to Enforcement in India." *Available at SSRN 4637429* (2023).
[74] *Ibid.*
[75] Alkon, Cynthia, and Amy Schmitz. "Opening the Virtual Window: How on-Line Processes Could Increase Access to Justice in the Criminal Legal System." *Cardozo J. Conflict Resol.* 25 (2023): 177.
[76] Nottage, Luke, Nobumichi Teramura, and James Tanna. "Lawyers and non-lawyers in international arbitration: discovering diminishing diversity." *Loy. LA Int'l & Comp. L. Rev.* 47 (2024): 139.
[77] Pantić, Marijana, Juaneé Cilliers, Guido Cimadomo, Fernando Montaño, Olusola Olufemi, Sally Torres Mallma, and Johan Van den Berg. "Challenges and opportunities for public participation in urban and regional planning during the COVID-19 pandemic—lessons learned for the future." *Land* 10, no. 12 (2021): 1379.

4.5. Legitimacy and Credibility of Virtual Processes

Virtual arbitration can raise credibility concerns especially when it comes to examination of witnesses.[78] There's a concern that the loss of in-person observation will impair the tribunal's ability to assess the credibility and strength of the evidence especially in cross-examination.[79] In an in-person hearing, the tribunal is able to discern the credibility of witnesses by observing his or her body language, facial expressions and tone.[80] This element may be defeated in virtual arbitration proceedings.[81] Further, there could be a possibility that the witness is being coached off-camera or even reading from a script not within the view of the tribunal.[82]

According to the ICC's 2021 survey of arbitration practitioners, 42% of respondents believed that virtual hearings compromised the quality of the proceedings, particularly in cases involving extensive witness testimony.[83] That perception is threatening the legitimacy of virtual arbitration even as a practical alternative to a physical hearing gains traction.[84]

4.6. Ethical Challenges and Arbitrator Impartiality

The rapid adoption of virtual arbitration has also raised ethical challenges, particularly regarding arbitrator impartiality.[85] Arbitrators are now faced with difficult questions about ensuring equal access for all parties, dealing with claims

---

[78] Muigua. K., Settling Disputes Through Arbitration in Kenya, Glenwood Publishers, 3rd Edition, 2017
[79] *Ibid.*
[80] Walker. J., Virtual Hearings: An Arbitrator's Perspective, https://int-arbitrators.com/wp-content/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf Accessed 25 December 2024
[81] *Ibid.*
[82] *Ibid.*
[83] Salton, David. "Recent Trends in International Arbitration and 2021 International Rule Changes." *Const. LJ* 17 (2021): 81.
[84] Al Mahdouri, Abir. "Ambiguity and Uncertainty Surrounding Public Policy and Confidentiality in the Context of Arbitration Intellectual Property Disputes." PhD diss., The University of Manchester (United Kingdom), 2024.
[85] Köksal, Bahadir. "A Trade-Off in Smart Contract Arbitration: Sacrificing Arbitrators' Anonymity for Transparency?" *Available at SSRN 4815591* (2024).

of procedural bias, and handling conflicts of interest in an online environment.[86] In the absence of standardized guidelines for virtual arbitration, there is considerable room for subjective interpretation, which only compounds these challenges.[87] The transition towards digital and hybrid arbitration frameworks has yielded numerous benefits; still, these challenges show that there is a need for continued discussion and reform to ensure that the arbitration process remains inclusive, fair, and reliable.[88] Addressing these issues shall be very important in sustaining the position of arbitration as one of the preferred dispute resolution methods in the post-pandemic period.[89]

5. Towards a Stronger Post-COVID Arbitration Framework: Recommendations for Effective Adaptation to the New Normal.

Adapting arbitration to the post-COVID era requires deliberate reforms that address the challenges identified in virtual and hybrid models. A stronger framework should be premised on pragmatic, inclusive, and equitable solutions, ensuring that arbitration remains effective, accessible, and credible. This part considers solutions that are actionable, with proven data, institutional guidelines, and case law lessons.

5.1. Standardizing Virtual Arbitration Protocols

One of the foremost requirements for strengthening post-COVID arbitration is the creation of standardized virtual arbitration protocols.[90] Virtual hearing practices relating are so inconsistently applied leading to inconsistencies in handling and resolving disputes, thereby undermining procedural fairness.[91] Global organizations like the International Chamber of Commerce (ICC) and the London

[86] *Ibid.*
[87] *Ibid.*
[88] Valchuk, Nazarii. "Potential and challenges of online dispute resolution for courts." PhD diss., Vilniaus universitetas., 2024.
[89] *Ibid.*
[90] Schmitz, Amy J. "Arbitration in the Age of COVID: Examining Arbitration's Move Online." *Cardozo J. Conflict Resol.* 22 (2020): 245.
[91] *Ibid.*

Court of International Arbitration (LCIA) have taken initial steps to develop such protocols, but broader implementation is still required.[92]

For instance, in 2020, the ICC issued the *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic* which encouraged counsel, parties and arbitrators to manage arbitrations in a fair, expeditious and cost-effective manner, in spite of the pandemic.[93] Similarly, in Kenya, the Nairobi Centre for International Arbitration (NCIA) introduced virtual arbitration guidelines tailored to respond to the unique challenges posed by the pandemic.[94] These rules include critical elements from exchange of documents online, to the virtual hearings.[95] While these efforts are undeniably noticeable, much remains to be done. Arbitral institutions can either amend their existing rules to adapt to the new normal or develop new rules addressing virtual hearings, evidence presentation, and related issues such as data handling.

5.2. Investment in Technological Resources

To bridge the digital divide and guarantee equitable access to virtual and hybrid hearings, a strong arbitration framework must invest in proper technology.[96] Governments, institutions, and players in the private sector can all contribute to the improvement of digital infrastructure. In Kenya, initiatives like the government's Digital Literacy Programme, aimed at increasing access to the internet and digital skills, provide a framework in which technology can be

---

[92] Panjwani, Pratyush. "The Impact of the COVID-19 Pandemic on International Arbitration Practices: Greener Arbitrations with Reduced Due Process Paranoia?" In *The Impact of Covid on International Disputes*, pp. 28-61. Brill Nijhoff, 2022.

[93] Visconte, Debora. "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic and CIArb Guidance Note on Remote Dispute Resolution Proceedings." *Rev. Bras. Arb.* 17 (2020): 198.

[94] The Nairobi Centre for International Arbitration (Virtual Hearing) Guidelines, 2020, available at < https://ncia.or.ke/wp-content/uploads/2021/05/NCIA-Virtual-Hearing-Guidelines..pdf>

[95] *Ibid.*

[96] Giupponi, Belen Olmos. "“Virtual” Dispute Resolution in International Arbitration: Mapping Its Advantages and Main Caveats in the Face of COVID-19." In *The Impact of Covid on International Disputes*, pp. 62-83. Brill Nijhoff, 2022.

incorporated within the arbitration framework.[97] Arbitral institutions could leverage such initiatives by offering subsidized access to digital resources for parties and regions that may not have sufficient resources.[98]

Equally, new technologies have a lot of promise to enhance the arbitration process. For example, blockchain can improve data security and integrity by storing evidence and proceedings records in a tamper-proof manner.[99] Singapore has been pioneering the use of blockchain in the arbitration process through platforms such as the Singapore International Arbitration Centre's e-hearing which ensures safe storage and exchange of documents.[100]

Artificial intelligence (AI) is another transformative tool. AI-driven analytics could assist arbitrators in managing large volumes of data, identifying relevant precedents, and streamlining case management.[101] For instance, AI tools are already being used in institutional arbitration to automate the more administrative tasks, freeing arbitrators to focus on substantive issues.[102]

5.3. Enhancing Institutional Roles

Arbitral institutions play a pivotal role in shaping the landscape of dispute resolution.[103] Beyond case management, they must embrace broader

---

[97] Kerkhoff, Shea N., and Timothy Makubuya. "Professional development on digital literacy and transformative teaching in a low-income country: A case study of rural Kenya." *Reading Research Quarterly* 57, no. 1 (2022): 287-305.
[98] *Ibid.*
[99] Shang, Hua, and Hui Qiang. "Electronic data preservation and storage of evidence by blockchain." *Journal of Forensic Science and Medicine* 6, no. 1 (2020): 27-36.
[100] Chen, Lei. "Will virtual hearings remain in Post-pandemic International Arbitration?." International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique 37, no. 3 (2024): 829-849.
[101] Solhchi, Mohammad Ali, and Faraz Baghbanno. "Artificial Intelligence and Its Role in the Development of the Future of Arbitration." *Int'l JL Changing World* 2 (2023): 56.
[102] *Ibid.*
[103] Morrill, Calvin. "Institutional change through interstitial emergence: The growth of alternative dispute resolution in US law, 1970-2000." *Braz. J. Empirical Legal Stud.* 4 (2017): 10.

responsibilities, such as capacity building, advocacy for systemic change, and research to address the evolving challenges in modern arbitration.[104] For instance, tailored educational programs for arbitrators, legal practitioners, and disputing parties can enhance their ability to navigate virtual and hybrid arbitration proceedings effectively.[105] Already, the Nairobi Centre for International Arbitration (NCIA) has taken a proactive approach by offering training on cybersecurity, virtual hearings, and the effective use of digital tools.[106] Similarly, leading institutions like the ICC and LCIA have pioneered innovative initiatives that can serve as benchmarks for others.[107]

But it's not just about skills and technology. Arbitration institutions also need to push for inclusivity and diversity.[108] Supporting underrepresented groups, like women and arbitrators from developing countries, is crucial to make arbitration fairer and more balanced.[109] Programs like the Equal Representation in Arbitration Pledge show how this can be done, by actively promoting gender diversity and giving marginalized groups a bigger platform.[110] By stepping up in these areas, arbitration institutions can make a real difference, showing that they value fairness, representation, and flexibility as the world continues to change.[111]

---

[104] *Ibid.*
[105] Beretta, Rachele. "Procedural justice in online dispute resolution: an empirical enquiry." PhD diss., University of Antwerp, 2024.
[106] Mwangi, Vicky Jackline, and Harrison Otieno. "Arbitration as a Dispute Resolution Method in the Cybersecurity Space in Kenya: Advancing Towards New Frontiers." *Available at SSRN 4958854* (2024).
[107] *Ibid.*
[108] Winkler, Matteo, and Mikael Schinazi. "No Longer "Pale, Male, and Stale"? Approaching Diversity and Inclusiveness in International Arbitration." *Approaching Diversity and Inclusiveness in International Arbitration (January 31, 2021). Forthcoming in Liber Amicorum Guillermo Aguillar Alvarez* (2021).
[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid.*

5.4. Building Capacity in Developing Regions

Capacity building for developing regions is essential to enhance inclusivity and equity in arbitration, particularly in developing regions, which require targeted initiatives to bridge the digital divide and empower stakeholders to participate effectively in arbitration processes.[112] To effectuate this, collaboration between arbitral institutions, governments, and international organizations can be fostered, which will ensure that these capacity-building schemes are rolled out.[113] For instance, initiatives like the Pan-African Digital Initiative by the African Union aim to improve internet access and digital skills, providing a foundation for greater participation in online arbitration.[114]

Arbitration institutions can take advantage of such initiatives and create regional hubs with reliable technology designed for virtual hearings.[115] The Kigali International Arbitration Centre (KIAC) is a prime example, providing modern facilities to assist stakeholders who lack access to essential technology.[116] Establishing similar centres in other regions can bridge gaps, especially between urban and rural areas, ensuring equitable access to arbitration and creating a level playing field for all participants.[117]

5.5. Data Security and Confidentiality

With the increased popularity of virtual proceedings and digital case management platforms in the post-COVID arbitration, it becomes necessary to ensure data security and confidentiality in the system.[118] Strong cybersecurity measures must

---

[112] George, A. Shaji. "Bridging the Digital Divide: Understanding the Human Impacts of Digital Transformation." (2024).
[113] African Union Commission. *Africa's Development dynamics 2021 digital transformation for quality jobs: Digital transformation for quality jobs*. oecd Publishing, 2021.
[114] African Union Commission. *Africa's Development dynamics 2021 digital transformation for quality jobs: Digital transformation for quality jobs*. oecd Publishing, 2021.
[115] *Ibid.*
[116] Osiri, Jean. "Effectiveness of Alternative Dispute Resolution Methods in the Rwandan Construction Industry." PhD diss., JKUAT-COETEC, 2021.
[117] *Ibid.*
[118] Huang, Jie. "Conflicts and tentative solutions to protecting personal data in investment arbitration." *European Journal of International Law* 32, no. 4 (2021): 1191-1220.

be put in place by arbitrators, counsel, and parties to safeguard private data from illegal access and data breaches.[119] This could entail using safe storage systems, encrypted communication routes, and adherence to national and international data protection requirements, such as the Data Protection Act of Kenya, and the General Data Protection Regulation (GDPR) at international level.[120] Additionally, parties can also enter into comprehensive confidentiality agreements that cover all online communications and virtual hearings and address all other aspects of cyber security.[121] Further, regular cybersecurity training for all stakeholders and appointment of data protection officers can further bolster efforts to maintain the integrity and confidentiality of arbitration processes in the digital age.[122]

5.6. Promoting Procedural Equity in Virtual Proceedings

Promoting procedural equity in arbitration is essential to ensure fairness and inclusivity.[123] Procedural equity requires that all parties are given equal opportunities to present their case, irrespective of their financial, geographical, or technological disparities.[124] This could involve tailoring procedures to meet the unique needs of each party, such as providing access to reliable virtual platforms, language translation services, and clear procedural rules.[125] Arbitrators must remain vigilant to avoid unconscious biases and make sure that judgments are

---

[119] Zamoff, Mitch. "Safeguarding confidential arbitration awards in uncontested confirmation actions." *American Business Law Journal* 59, no. 3 (2022): 505-557.
[120] Greenleaf, Graham, and Bertil Cottier. "International and regional commitments in African data privacy laws: A comparative analysis." *Computer Law & Security Review* 44 (2022): 105638.
[121] Egan, Mo, and Hong-Lin Yu. "Intersecting and Dissecting Confidentiality and Data Protection in Online Arbitration." *Journal of Business Law* 2022, no. 2 (2022): 135-163.
[122] Griffin, Letitia. "The Effectiveness of Cybersecurity Awareness Training in Reducing Employee Negligence Within Department of Defense (DoD) Affiliated Organizations-Qualitative Exploratory Case Study." PhD diss., Capella University, 2021.
[123] GAJOS, Maciej. "Procedural fairness in business and human rights arbitration." (2024).
[124] Allen, Nathalie, Leonor Díaz Córdova, and Natalie Hall. "'If Everyone Is Thinking Alike, Then No One Is Thinking': The Importance of Cognitive Diversity in Arbitral Tribunals to Enhance the Quality of Arbitral Decision Making." *Journal of International Arbitration* 38, no. 5 (2021).
[125] Aidid, Abdi. "Access to justice and civil-procedural bargaining." *University of Toronto Law Journal* 73, no. Supplement 1 (2023): 3-33.

based on impartial evaluations.[126] Transparent procedures, active participation from all parties, and a cooperative environment further help to ensure equality in arbitration, which cumulatively, not only upholds the core principles of arbitration but also builds trust in the process.[127]

6. Conclusion

The post-pandemic era has reshaped the practice arbitration, ushering in opportunities and challenges. With emergence of virtual and hybrid hearings, arbitration has become more efficient, cost-effective, and sustainable. However, challenges have also arisen particularly due to disparities in digital divide, mostly affecting underprivileged regions with limited technological infrastructure. This highlights the need for targeted investments, robust cybersecurity frameworks, and global collaboration to safeguard data integrity and uphold principles of privacy and trust. While noticeable steps have been taken to counter these challenges, there has been obstacles such as cultural resistance and procedural scepticisms which can be resolved through education, targeted capacity-building, and proactive institutional support to ensure inclusivity. By fostering global cooperation, embracing innovative technologies, and promoting procedural equity, arbitration can evolve into a more inclusive, efficient, and credible dispute resolution mechanism to meet the complexities brought about by globalization.

[126] Noussia, Kyriaki, Stanislava Nedeva, Arya Aakaansha, Chang Wang, and Maria Glynou. "Bias of arbitrators: a critical analysis on the law post-Halliburton v. Chubb and a comparative approach." *Journal of International Trade and Arbitration* 2, no. 1 (2022): 31-92.
[127] Leung, Samuel Yee Ching, and Alex Chun Hei Chan. "The duties of impartiality, disclosure, and confidentiality: lessons from a London-seated arbitration." *Arbitration International* 37, no. 3 (2021): 667-684.

List of References

Abdul-Wakeel Karakara, Alhassan, and Evans S. Osabuohien. "Threshold effects of ICT access and usage in Burkinabe and Ghanaian households." *Information Technology for Development* 28, no. 3 (2022): 511-531.

Al-Aydah, Shayma'A. Ahmad Abu. "The Occupational Interests and Its Relation to Psychological Stability among 10th Grade Students with Physical and Hearing Disabilities in Syrian Refugee Camps Schools in Jordan." *JL Pol'y & Globalization* 114 (2021): 53.

Alkon, Cynthia, and Amy Schmitz. "Opening the Virtual Window: How onLine Processes Could Increase Access to Justice in the Criminal Legal System." *Cardozo J. Conflict Resol.* 25 (2023): 177.

Anderson, Alan, and Herman Verbist, eds. *Expedited International Arbitration: Policies, Rules and Procedures*. Kluwer Law International BV, 2024.

Article 26(1) of the ICC Rules 2021.

Beretta, Rachele. "Procedural justice in online dispute resolution: an empirical enquiry." PhD diss., University of Antwerp, 2024.

Berkeley Research Group. "The Psychological Impact of Remote Hearings." August 18, 2021. https://media.thinkbrg.com/wp-content/uploads/2021/08/05105717/BRG-Remote-Hearing-Impact-2021-Final.pdf.

Bjorn Arp and Edwin Nemesio. "The Practice of Virtual Hearings during COVID-19 Investment Arbitration Proceedings." *Oxford University Press* (2022): 157.

Brown, Julian Christopher Patric. "The protection of confidentiality in arbitration: balancing the tensions between commerce and public policy." PhD diss., London Metropolitan University, 2021.

Garg, Nandini, and Vasu Manchanda. "Covid–19 crisis and digitisation: towards revamping the justice delivery system." *Bennett Journal of Legal Studies* 2, no. 1 (2021): 37-68.

George, A. Shaji. "Bridging the Digital Divide: Understanding the Human Impacts of Digital Transformation." (2024).

Gami Investments Inc. v. The Government of the United Mexican State. *Procedural Order No. 1.* https://www.italaw.com/sites/default/files/case-documents/italaw11253_1.pdf.

Gorthy, Keerthi. "Deciphering Arbitration Awards-A Comprehensive Guide to Enforcement in India." Available at SSRN 4637429 (2023).

Goh, Allison. "Digital Readiness Index for Arbitration Institutions: Challenges and Implications for Dispute Resolution Under the Belt and Road Initiative." *Journal of International Arbitration* 38, no. 2 (2021).

Gómez-Moreno, Juan Pablo. "Advocacy for Online Proceedings: Features of the Digital World and Their Role in How Communication is Shaped in Remote International Arbitration." *International Journal for the Semiotics of Law-Revue internationale de Sémiotique juridique* 37, no. 3 (2024): 865-885.

Kariuki Muigua. "Virtual Arbitration Amidst COVID-19: Efficacy and Checklist for Best Practices." (Discussion Paper, May 2020).

Kariuki Muigua. *Settling Disputes Through Arbitration in Kenya.* Glenwood Publishers, 3rd Edition, 2017.

Kevin Ongenae and Maud Piers. "Procedural Formalities in Arbitration: Towards a Technologically Neutral Legal Framework." *Journal of International Arbitration* 38 (2021): 27.

LCIA Annual Casework Report 2020 and changes to the LCIA Court and European User's Council. LCIA, May 17, 2021. https://www.lcia.org/News/lcia-news-annual-casework-report-2020-and-changes-to-the-lcia-c.aspx.

Maarten de Vet. "Impacts of the COVID-19 pandemic on EU industries." *European Parliament* (March 2021): 32-33.

Makarenkov, Oleksii, and Lurdes Varregoso Mesquita. "Challenges of Legal Guarantees for the Enforcement of Arbitral Awards in International Commercial Cases." *Access to Just. E. Eur.* (2024): 107.

Mobil Investments Canada Inc. v. Canada (ICSID Case No. ARB/15/6). *Procedural Order No. 1.* https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C4205/DC7592_En.pdf.

Mohit Mahla and Kabir A.N. Duggal. "When the Answer is Becoming the Question: Impact of Arbitrations on the Environment." https://arbitrationblog.kluwerarbitration.com/2020/11/29/when-the-answer-is-becoming-the-question-impact-of-arbitrations-on-the-environment/.

Muigua, Kariuki. *Settling Disputes Through Arbitration in Kenya.* Glenwood Publishers, Nairobi, 2012.

Mwalula, Michael. "Effectiveness of the traditional court system in conflict resolution in chief Chitimukulu chiefdom and Munkonge chiefdom of Zambia's northern province." PhD diss., The University of Zambia, 2022.

Ndolo, D. "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, 2020.

Ngo, Steve. "Appraising Remote Arbitrations Arising from the Pandemic: Reality Check and Thoughts on Keeping Arbitration Going." *Ind. Arb. L. Rev.* 4 (2022): 109.
Özraşit, Ticen Azize. "Assessment of the Balance of Autonomy and Justice in English Arbitration Proceedings in the Light of the Assistance of State Courts and Injunctions." *Hacettepe Hukuk Fakültesi Dergisi* 14, no. 1 (2024): 175-208.

Patricia Shaughnessy. "Initiating and Administering Arbitration Remotely." *International Arbitration and the COVID-19 Revolution.* Wolters Kluwer, 2020: 39.

Pilita Clark. "Year in a word: Zoom." *Financial Times,* December 21, 2020. https://www.ft.com/content/170649do-4cdf-454b-a4ec-e28d130974cd.

Pratyushi Panjwani. "The Impact of the COVID-19 Pandemic on International Arbitration Practices." *Oxford University Press,* 2022: 28.

Republic of Ecuador v. Chevron Corporation [2009].

Roberts, Elizabeth. "Impact of covid-19 on Arbitration Centers." In *The Impact of Covid on International Disputes,* pp. 230-243. Brill Nijhoff, 2022.

Rooney, Kim M. "The global impact of the Covid-19 pandemic on commercial dispute resolution in the first seven months." *Disp. Resol. Int'l* 14 (2020): 83.

Salton, David. "Recent Trends in International Arbitration and 2021 International Rule Changes." *Const. LJ* 17 (2021): 81.

Schmitz, Amy J. "Arbitration in the Age of COVID: Examining Arbitration's Move Online." *Cardozo J. Conflict Resol.* 22 (2020): 245.

Shaheeza Lalani and Steven G. Shapiro. *The Impact of Covid on International Disputes.* Oxford University Press, 2022.

Shankar, Vidya, and Shreya Chauhan. "Impact of COVID-19 on International Commercial Contract." *Indian JL & Legal Rsch.* 2 (2021): 1.

Stephan Wilske. "The impact of COVID-19 on international arbitration—hiccup or turning point?" *Contemp. Asia Arb. J.* 13 (2020): 7.

Taylor, Henry. "Is Justice by Zoom Justice Denied?: Judicial Stakeholder and Legal Advocate Experiences of Video-Mediated Trial Courts in Washtenaw County." *Judicial Stakeholder and Legal Advocate Experiences of Video-Mediated Trial Courts in Washtenaw County* (March 25, 2022).

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.

White & Case LLP. "2018 International Arbitration Survey: The Evolution of International Arbitration." Queen Mary University of London, May 9, 2018.

https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.
White & Case LLP. "2021 International Arbitration Survey: Adapting arbitration to a changing world." Queen Mary University of London, May 7, 2021.

A Brief Response to Criticism against Arbitrators

By: ***Paul Ngotho****

Abstract

An arbitrator is a private judge. However, an arbitrator has more powers than a judge mainly for three reasons. First, it is next to impossible to remove an arbitrator once appointed. Second, an arbitrator's award is final and binding and non-appealable. Third, court intervention in arbitral proceedings is severely restricted. Fourth, arbitration is characterized by confidentiality and immunity from prosecution. These factors make it possible for good arbitrators to excel but create room for unworthy practioners to hide and thrive.

For context, this article was initially written in response to Mr. Jaindi Kisero's article, titled *Arbitration is fast losing favour* in the Daily Nation of 10th December 2024. It was sent to Mr Kisero and to the editor of the Daily Nation on 20th and re-sent on 24th December 2024. The Nation has not published it to-date. The article has been tweaked slightly for this journal. Because of its origin, the article cannot address all the criticisms against arbitration.

Mr Kisero lists the textbook advantages of arbitration – speed, efficiency, economy and finality – and adds that they are, in Kenya, are honoured more in breach than in practice. The article inevitably delves into the elephant in the room: arbitrator integrity. Mr Kisero cites a case in which an arbitrator, for work done in a 23-day period, billed for 570 hours, which is mathematically impossible even if one worked 24/7. He gives another case between Kenya Breweries Ltd and a contractor. The claim apparently, grew from Ksh. 163 million in 2010 to Ksh. 2.5 billion in 2024, against a contract sum of Ksh. 1.5 billion.

On finality, the criticism is that a party which is successful in arbitration ends up in court for enforcement proceedings anyway. Apparently, a number of corporates are deleting arbitration clauses from their contracts in favour of litigation.

* *HSC, LL.M, Chartered Arbitrator*

The article has been forwarded and discussed in various fora, with every comment in support of Mr Kisero's views. Comments in social media are less circumvent. They talk of corrupt arbitrators and compromised appointing authorities. A Kenyan lawyer, who is Senior Counsel and an arbitrator, stated that "only fools and very bad lawyers go to arbitration in Kenya... the courts is more affordable, and at times, you can go before a decent court and judge…never go for arbitration before a Kenyan lawyer." He did not indicate why he has singled out lawyer arbitrators, since some arbitrators are non-lawyers. Let's give him the benefit of doubt.

The arbitration fraternity has, typically, been quiet. It cannot plead ignorance or lack of evidence. Court decisions against errant arbitrators are all over. In one reported case, a retired judge, no less, was removed from arbitration for grossly overcharging the parties. In another one, the arbitrator, a man, visited the female principal of a government institution, which had a case before him, for private deliberations. Hon. Lady Justice Kasango removed him on this ground alone. None of the three prominent professional bodies, which the arbitrator belonged to, carried out disciplinary proceedings.

The first level of censure is at a personal level. An arbitrator is required to decline an appointment if he or she is compromised in a matter for whatever reason – friendships, business relationships, etc. A party which believes that an arbitrator is biased should raise a complaint before that arbitrator and, if aggrieved by the arbitrator's decision, file an application in court.

This is the normal practice globally, especially in ad hoc arbitrations, where an arbitrator, once appointed, is left to his or her devices. Most arbitrations in Kenya are that type. Institutional arbitrations help by providing administrative support and oversight over the arbitrator. Some institutions have arrangements for the challenge to be heard by a different entity, not the affected arbitrator, in the first instance.

Whatever the case, it is notoriously difficult to remove an arbitrator from a matter or reverse an arbitrator's decision. Statutory protection shields arbitrators and

arbitration from flimsy challenges, which can be expected in an adversarial process. However, it also creates conducive environment for corruption. Power corrupts and absolute power corrupts completely. An arbitrator enjoys close to absolute power and little public scrutiny since the proceedings take place in private boardrooms away from the public and the press.

In the courts, magistrates and judges work in open court and their judgments are available to the public. People who appear regularly in court know the judicial officer's reputation. They can tell you the angels – thank God, we still have some - and the fair game, with details of bribery channels, sums required and the currency. Similarly, in arbitration the insiders know the rotten eggs, as well as the good ones, by name.

Complaints against arbitrators are found even at international level. Many judges in the so-called World Court, the International Court of Justice, have been undertaking arbitrations privately in violation of an express prohibition in the court's statute. They did it for decades and continued doing so after the detailed findings of an empirical research on the was published in 2017.

A society which breeds corrupt *kanju* askaris, police officers, teachers, doctors, imams, pastors, governors, lawyers and judges cannot but have corrupt arbitrators. Little wonder that one of the earliest cases in which corruption was cited in international arbitration involved Kenya - the latest involved Nigeria. In the Kenyan case, a foreign investor had filed a case against Kenya for the unlawful termination of a contract. Kenya filed the most astonishing defence: that the contract should not be enforced because a former Kenyan president, name withheld, had received a cash bribe of USD 2,000,000 to ensure that the investor was awarded the contract. The sum is about Ksh. 260,000,000/= at the current exchange rate. A professor of sociology from a Kenyan university, name also withheld, told the arbitrators, on oath, that a presidential visitor would be frowned upon if he appeared empty-handed.

One of the most powerful features in arbitration is party autonomy, which in this context means the right of the parties to decide who their arbitrator will be. The

parties are free to appoint an arbitrator whom both of them can trust 100%. A consensual appointment is, or should be, in the best interest of both parties. Furthermore, the parties can jointly dismiss an arbitrator at any stage without giving reasons.

Incidentally, arbitration, like marriage, is consensual. Both of them have suffered so much bad press that one would be excused to think there was no future for them. Just talk to family lawyers. Yet there are more marriages being registered today that ever before. The Registrar of marriages has even opened an executive wing for the couples which require an exclusive event.

It is said that some top Kenyan companies and their lawyers are striking out arbitration clauses from their contracts. At international level, a few states have quit bilateral international treaties and introduced legislation requiring foreign investors to litigate their disputes. Tension between arbitration and litigation is an endless pendulum which swings back and forth, never stopping. Answers to these and other monumental challenges which face domestic and arbitration have been elusive. Despite that, arbitration continues to grow locally and internationally according to unpublished data. At CIArb Kenya, actual appointments rose from 129 in 2020 to 213 in 2024, or about 16.5% yearly. The Nairobi Centre for International Arbitration has also registered impressive growth.

There can be no defence to corrupt arbitrators, who are remunerated quite well anyway. This author has argued elsewhere[1] that an arbitrator should be like Ceaser's wife – not just above reproach but above suspicion. Incidents of compromised arbitrators are discussed in hushed tones because the complainants do not have solid proof and are wary of the attendant legal liability and costs. One way of going round this is to limit discourse to the remarkably few incidents in which the courts have made findings regarding arbitrator incompetence, negligence, malpractice and abuse of power. This author is preparing for publication incisive case analyses, which involve otherwise respected lawyers, non-lawyers, former judges and chartered arbitrators. Stay tuned.

[1] https://youtu.be/P_GRLfOrpQI

Constitutional Questions in Alternative Justice Systems: Adopting a Normative Framework to Aid AJS bodies in handling matters involving Constitutional Questions

By: ***Youngreen Peter[*] and Miriam Rosasi[**]***

Abstract

Alternative Justice Systems (AJS) in Kenya, rooted in African customs, offer culturally resonant mechanisms for dispute resolution and align with local values while promoting decolonization by integrating traditional practices into the formal legal system. Despite their growing prominence, AJS frameworks have primarily addressed civil and criminal matters, neglecting constitutional issues that require unique interpretation. Recent referrals of constitutional questions, such as Governor Kawira Mwangaza's impeachment to the Njuri Ncheke Council, highlight the limitations of AJS bodies in handling such matters effectively. This paper advocates for a structured approach to ensure constitutional principles are upheld within AJS proceedings. It proposes that courts oversee cases involving constitutional questions, retaining jurisdiction over binding interpretations.

---

[*] *Lead Author, a third-year Kabarak law student, East African Journal on Human Rights editor, CB Madan Award winner (2024), and legal researcher at Ronald Allamano & Associates, specializes in comparative constitutional studies in Africa, AI governance and climate change, aspiring to become a leading Afrocentric legal scholar.* Youngreen is the lead author. Email: pyoungreen39@gmail.com

[**] *The author, a third-year Kabarak law student, Certified Mediator, and Millennium Fellow, excels in constitutional law, environmental justice, impactful African solutions, and research, including contributing to the ICJ Election Petitions Compendium and winning Best Researcher in Environmental Justice Moot Court (2024).*

[*] *This paper was selected for presentation at the African Network of Constitutional Lawyers Biennial Congress on Constitutionalism 2024, themed "Towards an Endogenous African Constitutionalism and Legitimate Government: Epistemological and Empirical Perspectives." However, we were unable to present due to financial constraints, as we could not raise sufficient funds for transport, coupled with the fact that the congress coincided with our end-of-semester examinations.* Great thanks to **Professor Justice Joel Ngugi** for his insights on the idea in the paper and **Joshua Fwamba** for his comments that aided in the restructuring of this paper.

Where constitutional issues arise during AJS processes, matters should revert to the courts for interpretation before returning to AJS for resolution. The paper suggests that to ensure this happens effectively, when a matter is referred to AJS by a court of law, the court should appoint a Constitutional Law expert whose role will be to solely watch brief in the proceedings and identify if the matter has an aspect that will require the courts intervention in the interpretation. It is important to note that this should only apply if a matter has been referred for AJS by a court of law. Where the matter was not brought to court before being referred for AJS, the paper warns against judicial interference unless the matter is appealed against by the dissatisfied party in which we argue that the six throng threshold of review suggested by the National AJS policy should apply. Courts must also establish timelines to avoid delays and maintain efficiency. Drawing insights from South Africa's experiences, the paper suggests adopting a framework that harmonises constitutional compliance with African customs. It warns against over legislation in relation to AJS matters so as to avoid the fate South Africa suffered in the attempt to enact the Traditional Courts Bill. It aims to enhance the legitimacy and public trust in AJS decisions, fostering a balanced integration of traditional and formal justice systems for resolving constitutional matters.

1.0 Introduction

Injustice takes many forms, and justice must evolve to address each unique wrong termed unjust.[1] Access to courts is merely one element of true justice, which demands vigilance, compassion, and diverse approaches. In Kenya,[2] and the International Human Rights System,[3] access to justice is a fundamental right,

[1] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010,' (2015) Strathmore Law Review 25.
[2] Constitution of Kenya (2010) art 48.
[3] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), Article 8; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 14(1); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

extending beyond court access[4] and access to legal representation[5] to include formal and informal mechanisms for grievance resolution in compliance with human rights standards.[6] Historically, equating justice solely with court access has excluded informal justice systems, a gap addressed by Kenya's 2010 Constitution.[7] The Constitution recognizes that judicial authority derives from the people and is vested in courts and tribunals, creating an impression of judicial monopoly.[8] While it incorporates Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (AJS), these mechanisms are framed as guiding principles for courts, reinforcing the court's primacy.[9] Kenyan courts have frowned upon this by acknowledging the significance of ADR and AJS in dispute resolution.[10] While ADR is well-developed with established normative frameworks,[11] AJS is still underdeveloped but it is currently gaining traction, which can mainly be attributed to the Annual Alternative Justice Systems Conferences[12] and the AJS Framework Policy.

---

[4] United Nations Development Programme (UNDP), 'Analysis of the National Studies on the Capacities of the Judicial Institutions to Address the Needs/Demands of Persons with Disabilities, Minorities and Women Strengthening Judicial Integrity through Enhanced Access to Justice' (2013) 5.

[5] UNDP, 'Access to Justice Practice Note' (2004).

[6] UNDP, *Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (Bangkok, UNDP, 2005).

[7] Constitution of Kenya (2010) art 159(2) (c).

[8] Kemboi LK, 'Courts as Monopolies: What Does It Mean for Access to Justice?' (IEA Kenya, 5 March 2024) https://ieakenya.or.ke/blog/courts-as-monopolies-what-does-it-mean-for-access-to-justice/ accessed 14 November 2024.

[9] Constitution of Kenya (2010) art 159(2).

[10] *Council of Governors v Senate & another* (2014) eKLR; *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) (Constitutional Court of South Africa) [51]; *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) (Constitutional Court of South Africa) [41]; *MM v MN* 2013 (4) SA 415 (CC) (Constitutional Court of South Africa) [23].

[11] See Arbitration and Mediation in Kenya.

[12]See < https://www.youtube.com/results?search_query=ANNUAL+AJS+CONFERENCE > accessed 29 December 2024.

The AJS Policy outlines six approaches[13] to courts' interaction with AJS:[14] Avoidance, where courts ignore previous AJS proceedings and awards, contrary to Article 159 of the Constitution; Convergence, where courts defer to AJS only when both parties agree to the process; Deference, where courts review procedural fairness and proportionality, which denotes a review of merits;[15] Recognition and Enforcement, treating AJS outcomes as court rulings;[16] Facilitative Interaction, where AJS outcomes serve as evidence in court;[17] and Monism, where AJS processes act as initial tribunals with appeals reviewed fully. Deference and Recognition are preferred for efficiency, but flexibility allows Monism or Facilitative Interaction when needed. Despite progress, AJS frameworks primarily address civil and criminal matters, neglecting constitutional issues, which are

[13] Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy and Policy Framework' xxvi. < Available at https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/ > accessed 16 November 2024.

[14] Judiciary of Kenya, *State of the Judiciary and the Administration of Justice: Annual Report Financial Year 2023/2024* (Judiciary of Kenya 2024) 111.

[15] In *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] eKLR,* at paras 55-58, the court explained that the proportionality test necessitates a more rigorous review than traditional grounds of review. This increased scrutiny means that the substantive merits of the decision are given more weight. The court emphasised that proportionality goes beyond merely assessing procedural fairness; it requires the court to engage with the underlying merits of the decision itself, allowing for a more detailed evaluation.

[16] See *Kitur & Another v Kitur (ELC Case 68 of 2021) [2023] KEELC 17253 (KLR),* where a land ownership dispute between siblings was resolved through meetings facilitated by the area chief and family, with the court adopting the decision as its judgment. Similarly, in Keter v Seurei (Environment & Land Case 8 of 2021) [2023] KEELC 16131 (KLR), a boundary dispute was referred to clan-based AJS, and the court adopted the clan's resolution. See also Bor v Ngisirei (Environment & Land Case 103 of 2021) [2023] KEELC 443, where the court upheld a 1994 village elders' decision allocating 4 acres of disputed land to the plaintiff's late husband's family, finding it consistent with justice and morality.

[17] See *In the Matter of the Estate of Kirotie Ole Butu (Deceased) (Succession Cause 3 of 2022),* where the court adopted an AJS award, citing party consent and voluntariness. See also LWG v GBG (Matrimonial Case 6 of 2015) [2023] KEHC 26305 (KLR), where the court upheld an AJS agreement, rejecting a fresh hearing as res judicata.

classified as matters *sui generis*.[18] This paper explores how matters involving constitutional questions can be handled when before AJS bodies, as highlighted by the impeachment case of Kawira Mwangaza. Justice Linus Kassan's directive, informed by the President's suggestion to refer the matter to the Njuri Ncheke Council of Elders, raised concerns about judicial independence and the handling of constitutional questions by AJS bodies.[19] This paper proposes a collaborative approach between courts and AJS bodies in addressing matters on constitutional interpretation before AJS bodies. This is because AJS offers affordable, accessible, and culturally familiar dispute resolution, contrasting with the expensive and inaccessible nature of adversarial litigation,[20] and excluding matters from AJS simply because the bodies lack jurisdiction of giving binding constitutional interpretation will defeat the important purpose of Article 159(2c) of developing Traditional Dispute Resolution Mechanisms. Access to justice remains elusive when financial barriers, lack of representation, unfamiliarity, or system inefficiencies prevail.[21] The aim of the paper is to establish a mechanism in which the courts, especially the High Court, can retain their jurisdiction on Constitutional interpretation without ousting the jurisdiction of AJS bodies to handle matters that have a single or some aspects that require Constitutional Interpretation. It will do so by finding out the possibility of collaboration between courts and AJS bodies.

This paper begins by defining AJS in Kenya and examining its cultural roots. It then reviews the current AJS Framework and proceeds to contrasts AJS with ADR. While acknowledging AJS bodies lack constitutional interpretive jurisdiction, it proposes a framework for courts to address such constitutional issues arising in

[18] Law Society of Kenya v Supreme Court of Kenya & Another; Abdullahi SC & 19 Others (Interested Parties) (Petition E026 of 2024) [2024] KEHC 7819 (KLR) (Constitutional and Human Rights) (28 June 2024), para 34.

[19] Njihia S, 'Court Asks Njuri Ncheke to Mediate Mwangaza-MCAs Dispute' (Nairobi Law Monthly, 30 July 2024) https://nairobilawmonthly.com/court-asks-njuri-ncheke-to-mediate-mwangaza-mcas-dispute/ accessed 14 November 2024. Please note that this paper does not focus on the aspect of judicial accountability and independence.

[20] Constitution of Kenya 2010, art 160.

[21] UNDP, 'Analysis of the National Studies on the Capacities of the Judicial Institutions to Address the Needs/Demands of Persons with Disabilities,' (n 4 above).

AJS matters. It suggests collaboration between Courts and AJS bodies whereby when the Court refers a matter to AJS, then it should appoint a Constitutional Law expert whose role will be to watch over the matter to determine if a Constitutional Question is involved. If it is found to have questions that require constitutional interpretation, the matter should be taken back to court for interpretation. Drawing lessons from South Africa, the paper concludes with recommendations and emphasizes preserving cultural practices to sustain AJS in Kenya.

2.0 Defining Alternative Justice Systems: How Has It Been Applied Historically

Human societies have long established justice systems to maintain social order.[22] In Kenya, pre-colonial communities developed indigenous justice systems, known as customary, traditional, or alternative justice systems (AJS).[23] These systems, influenced by colonial and post-colonial frameworks, remain informal, flexible, community-driven, and focused on reconciliation and reparation rather than punishment.[24] They reflect each community's moral, spiritual, and cultural beliefs, with spiritual leaders' often guiding dispute resolution.[25] Today, AJS aligns with human rights principles such as equality, dignity, and non-discrimination, emphasising fairness and respect for individual rights.[26] Practically, it ensures equal access to justice, aligning the justice process with cultural identity.[27] The

[22] Judiciary of Kenya, '*Alternative Justice Systems Baseline Policy and Policy Framework,'* (n 12) xiv and 1.
[23] UNDP, '*Analysis of the National Studies on the Capacities of the Judicial Institutions to Address the Needs/Demands of Persons with Disabilities,'* (n 4 above) 34.
[24] Ibid 1.
[25] Sarah Kinyanjui, 'Restorative Justice in Traditional Pre-Colonial "Criminal Justice Systems" in Kenya' *Tribe Law Journal*.
[26] Kariuki Muigua, 'Mainstreaming Alternative Justice Systems in Africa,' 7 < *Available at* https://kmco.co.ke/wp-content/uploads/2023/11/Mainstreaming-Alternative-Justice-Systems-in-Africa.pdf > Accessed on 13th November 2024.
[27] United Nations Office on Drugs and Crime, 'Partners Welcome Move to Mainstream Alternative Justice Systems in Kenya' < Available at https://www.unodc.org/easternafrica/en/Stories/partners-welcome-move-to-mainstream-alternative-justice-systems-in-

Constitution of Kenya recognizes culture as a foundation of national identity, encouraging cultural integration in legal frameworks.[28] In communities like those in Northern Kenya, AJS addresses resource conflicts using culturally aligned solutions.[29] It can be defined as a justice system rooted in community traditions, utilising customary laws and cultural practices to resolve disputes, with an emphasis on restorative justice, reconciliation, and social harmony rather than punitive measures.

AJS operates on a reconciliatory approach that draws upon African concepts of communal unity and inclusivity.[30] Conflict resolution within AJS involves family and community structures, with a focus on the African values of togetherness—known as *Ujamaa* in Swahili-speaking cultures and *Ubuntu* in South Africa. These philosophies, encapsulated by the expression "I am because we are," emphasize peace, harmony, unity, and respect.[31] AJS prioritizes social cohesion and communal welfare over individual interests, making it an effective tool for reconciliation and fostering mutual understanding.[32] Defined as justice administered by communities using customary laws, cultural practices, beliefs, and emphasising community-led reconciliation, AJS functions as a restorative form of justice.[33] It seeks to foster social inclusion and offers an accessible, participatory, and efficient alternative to formal court processes, often at a lower

---

kenya.html#:~:text=Nairobi%2C%2027%20August%202020%20%E2%80%93%20The,partners%20in%20the%20policy's%20development > Accessed on 10th November 2024.

[28] Constitution of Kenya 2010, Article 10.

[29] Dido AD, *Embracing the Traditional Justice Systems in Northern Kenya: Prospects and Challenges* (29 October 2012).

[30] Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy and Policy Framework.' (n 12 above) 1, 12 and 15.

[31] Ibid

[32] Kinama, Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010 (n 1 above).

[33] United Nations Office on Drugs and Crime, 'Partners Welcome move to Mainstream Alternative Justice Systems in Kenya.' (n 25 above)

cost and with faster resolution times. It is increasingly recognized as an effective solution to reduce court backlogs while preserving cultural heritage and communal harmony.[34] AJS remains essential for providing accessible justice, particularly in rural areas, and holds significant potential for strengthening legal systems and fostering development in Kenya.[35] The next section of the paper seeks to draw a distinction between ADR and AJS so as to avoid the temptation of implementing the suggestions in this paper in ADR cases.

3.0 Distinguishing AJS from ADR: A Unique Pathway to Justice

The distinction between AJS and ADR is narrow, which could lead to confusion.[36] The Constitution of Kenya provides that courts and tribunals must promote alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, when exercising judicial authority.[37] The use of the word including and the absence of an Oxford Comma before 'and'[38] may create the impression that traditional dispute resolution (TDR), also referred to as alternative justice systems (AJS), is part of alternative dispute resolution (ADR). However, the drafters intended to treat ADR

---

[34] Ibid

[35] Policy Brief, 'Accelerating Women and Girl's Rights in Kenya: The Role of the Alternative Justice Systems Policy in Kenya,' < Available at https://www.studocu.com/row/document/kenyatta-university-parklands-law-campus/law-of-evidence/ajs-for-womens-rights-in-kenya-policy-brief/108377754 > Accessed on 16th November 2024.

[36] Muigua, '*Mainstreaming Alternative Justice Systems in Africa.' (n 24 above) 7-10.*

[37] Constitution of Kenya (2010) Article 159(2c).

[38] For the rules on how to use an Oxford Comma, See Grammarly, 'When to Use a Comma before "And" | Grammarly' (*When to Use a Comma Before 'And' | Grammarly*15 May 2023) < Available at https://www.grammarly.com/blog/punctuation-capitalization/comma-before-and/#:~:text=Although%20permissible%2C%20omitting%20the%20Oxford,use%20one%20to%20avoid%20confusion > accessed 29 December 2024.

and TDR as separate frameworks.[39] ADR typically involves formal methods such as mediation, reconciliation, and arbitration, while TDR operates through culturally rooted, community-based mechanisms under customary law. The ambiguous drafting risks conflating these two distinct approaches, which could undermine the unique role and significance of TDR. While both AJS and ADR offer alternatives to formal court proceedings, they are fundamentally different. ADR is a procedural framework, including methods like mediation, arbitration, and conciliation,[40] guided by established legal standards and integrated into the formal justice system.[41] It is largely secular, structured, and operates within legal frameworks like Kenya's Arbitration Act.

AJS, on the other hand, goes beyond procedural methods.[42] It is rooted in community values, cultural practices, and restorative justice, reflecting Kenya's plural legal traditions as recognised by the Constitution. AJS is not a "miniature court" but a system that empowers communities to resolve disputes autonomously, fostering long-term peace and reinforcing social cohesion.[43] It follows a baseline policy framework developed to guide its practice as discussed above.[44] This framework was the result of collaborative efforts by legal scholars and judges, who emphasized that Article 159 envisions a form of justice that extends beyond ADR's quasi-judicial nature.[45] AJS seeks to empower communities by enabling them to address disputes and issues of social justice autonomously, without reliance on government intervention. In essence, while ADR offers

[39] Report of the Constitution of Kenya Review Commission, Volume One: The Main Report (Reprinted with Technical Additions and Approved for Issue at a Special Meeting of the Commission Held on 4th March 2003) 214.
[40] Muigua, '*Mainstreaming Alternative Justice Systems in Africa.' (n 24 above) 7-10.*
[41] LA Kerbeshian, 'ADR: To Be Or...' (1994) 70 North Dakota Law Review 381.
[42] Muigua, '*Mainstreaming Alternative Justice Systems in Africa*,' (n 24 above) 8 and 20.
[43] Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy and Policy Framework,' (n 12 above) 6.
[44] Ibid.
[45] Muigua, 'Mainstreaming Alternative Justice Systems in Africa.' (n 24 above) 12. See the argument on customary jurisprudence.

flexibility within formal legal processes and is guided by procedural autonomy, AJS is embedded within the identity and autonomy of Kenyan communities, reflecting their cultural and social realities. AJS and ADR, while both offering alternatives to formal court proceedings, differ fundamentally in their nature and application. ADR operates within established legal frameworks, using structured, formal procedures to resolve disputes, while AJS is a community-driven process deeply embedded in cultural practices and social values, emphasizing restorative justice and communal resolution over legal formalism. By fostering preventive approaches to conflict, AJS aims to build long-term peace and reinforce Kenya's social fabric. Rather than merely compensating for the limitations of formal courts, AJS is a distinct expression of Kenya's diverse legal heritage, dedicated to empowering people as direct participants in their own justice processes. Therefore, the solutions offered in this paper ought to apply only to AJS, and not ADR, the aim being to avoid the confusion that may arise due to the similarities between the two. This then necessitates an analysis of the present framework guiding AJS in Kenya.

Current AJS Framework in Kenya

Kenya's AJS framework is key to expanding access to justice, especially in communities that rely on traditional dispute resolution.[46] The Constitution recognizes it as part of Kenya's plural legal system and encourages courts to promote traditional dispute resolution mechanisms.[47] Article 159 affirms these practices as part of Kenya's customary law, grounded in community values and traditions.[48] AJS is guided by a baseline policy framework rather than formal legislation and it acts as a bridge between the formal legal system and traditional modes of African justice in Africa.[49]

---

[46] Muigua, *Mainstreaming Alternative Justice Systems in Africa* (n 24 above) 12-13.
[47] Constitution of Kenya 2010, art 159(2) (c).
[48] Kinama, *Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya, 2010* (n 1 above).
[49] Muigua, '*Mainstreaming Alternative Justice Systems in Africa*,' (n 24 above) 16.

In the advent of the transformative constitution of 2010, the Judiciary established the AJS Taskforce[50] to examine dispute resolution outside the courts and develop a judicial policy.[51] In collaboration with legal experts like Justice Joel Ngugi and Dr. Steve Ouma Akoth,[52] the Taskforce developed the Alternative Justice Systems Framework and Baseline Policy. The policy aims to respect and transform indigenous justice systems without imposing formal legal constraints, aligning AJS with the Constitution's vision of justice beyond court-based resolution.[53] The policy stresses that AJS is not a "miniature court" but an expression of Kenya's plural legal systems, empowering communities in dispute resolution.[54] AJS addresses legal disputes and everyday justice needs,[55] with chiefs, elders, and community leaders playing key roles, especially in rural areas.[56] Councils of elders, such as the Njuri Ncheke, Kaya, and Myot councils, are trusted institutions that mediate disputes,[57] particularly over resources like land and water, offering a cost-effective, efficient alternative to formal courts.[58] These councils help maintain social harmony and economic stability.[59]

---

[50] Judiciary of Kenya, *Alternative Justice Systems Baseline Policy and Policy Framework* (n 12 above) *iv*. It is the AJS Taskforce that prepared the National AJS Policy.
[51] Ibid.
[52] Susan Lee, '*Multiple Doors to Justice in Kenya Report, Engaging Alternative Justice Systems*, Report,' December 2023.
[53] Judiciary of Kenya, *Alternative Justice Systems Baseline Policy and Policy Framework* (n 12 above) 6 which provides that 'This is why we talk about Alternative Justice Systems rather than the "miniature Courts" of Alternative Dispute Resolution (ADR).'
[54] Susan Lee, Multiple Doors to Justice in Kenya Report (n 49 above).
[55] Judiciary of Kenya, *Alternative Justice Systems Baseline Policy and Policy Framework* (n 12 above) 35.
[56] Ibid.
[57] Ibid.
[58] Kariuki Muigua, '*Traditional Conflict Resolution Mechanisms and Institutions,*' (2017) 7.
[59] Susan Lee, Multiple Doors to Justice in Kenya Report (n 49 above).

Despite the significant influence within communities, councils of elders currently lack formal recognition within the state structure, limiting their official authority.[60] The AJS framework is still in development, with several areas needing clarity such as the precise jurisdiction of these councils and their collaboration with or independence from formal courts. This paper deals specifically with collaboration. Currently AJS is governed by the National Judiciary AJS framework, which this paper hails because over legislation can interfere with the flexibility of AJS. In South Africa, there was an attempt to pass the Traditional Courts Bill, but its failure can be traced to several significant factors. Introduced in 2008, the Bill was widely criticised for its lack of consultation with rural communities, particularly women, and for its perceived unconstitutionality, especially regarding gender equality.[61] Critics argued that the consultations were limited to traditional leaders and local government officials, neglecting the views of rural residents.[62] This exclusion raised concerns that the Bill violated constitutional principles, notably the right to equality. Despite attempts at reform in later versions of the Bill, including those in 2012 and 2017, challenges persisted, particularly around the integration of customary law with common law principles. The introduction of an opt-out clause for residents in traditional areas added complexity, reflecting ongoing tensions regarding the voluntary nature of traditional court jurisdiction. These ongoing challenges suggest that the Bill's future remains uncertain, and any future attempts at enactment are likely to face significant scrutiny from the Constitutional Court. Kenya should be careful before making any attempt to legislate on AJS so as to avoid the South African dilemma. These issues will be

[60] Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy and Policy Framework.' (n 12 above).

[61] Tsegai Berhane Ghebretekle and Macdonald Rammala, 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' (2018) 12(2) Mizan Law Review 332-333.

[62] Sindiso Minisi Weeks, 'South Africa's Traditional Courts Bill 2.0: Improved but Still Flawed' The Conversation (27 March 2017) < Available at https://theconversation.com/south-africas-traditional-courts-bill-2-0-improved-but-still-flawed-74997 > Accessed 15 November 2024.

addressed in the proposed normative framework and recommendations for reform by doing a comparative study of South Africa. The next section makes an argument that in practice and actual sense, AJS is the main system of access to justice and courts are the alternative with the aim being to establish that if we oust the jurisdiction of AJS to deal with certain matter, simply by placing reliance that they lack the jurisdiction to interprete the Constitution, then we might hinder access to justice of many citizens. The paper will propose collaboration rather than an express ouster of jurisdiction.

4.0 Developing A Normative Framework On Collaboration

One of the most significant challenges facing Alternative Justice Systems (AJS) in Kenya is their inability to address matters requiring constitutional interpretation. This limitation undermines the autonomy and relevance of AJS, particularly in cases where disputes necessitate an understanding of constitutional provisions. The gap is evident in the handling of cases like the Mwangaza impeachment proceedings, where the Njuri Ncheke, a respected council of elders, played a role in arbitrating the dispute.[63] Despite their cultural authority, the Njuri Ncheke lacked the capacity to interpret constitutional principles underlying such high-stakes matters, revealing critical deficits in AJS frameworks. The Kenyan Constitution emphasizes values such as fairness, equality, and inclusion, which must underpin any justice mechanism. However, AJS systems often prioritize customary practices over constitutional mandates.[64] This was apparent in the Mwangaza case, where procedural fairness and constitutional interpretation were secondary to cultural and community norms. Such an approach risks undermining the supremacy of the Constitution, especially when traditional mechanisms are used to arbitrate disputes with legal and political implications. Despite all this, it does not mean that collaboration cannot be establish.

[63] Njihia, 'Court Asks Njuri Ncheke to Mediate Mwangaza-MCAs Dispute' (n 17 above).
[64] Rebecca Holland-Blumoff, 'Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation' (2017) 85 Fordham Law Review 2081, 2083.

The National Alternative Justice Systems (AJS) Policy in Kenya outlines six modes of collaboration between courts and AJS bodies,[65] mainly focusing on cases where AJS decisions are appealed or when matters are pending before AJS forums. However, the policy does not address scenarios where constitutional interpretation is involved within AJS processes. For example, in a land dispute resolved by an AJS forum based on customary law principles, one party might argue that the decision violates constitutional rights, such as the right to property or equality. This could necessitate constitutional interpretation, which the AJS forum may not be equipped to handle, requiring referral to the courts. Similarly, if an AJS forum deals with a case touching on constitutional rights like the right to a fair trial or freedom of expression, its decision could be challenged on constitutional grounds. These examples underscore the need for a framework that facilitates collaboration between AJS bodies and the formal judiciary in matters requiring constitutional interpretation. This paper proposes that such collaboration be established to ensure that AJS processes are consistent with constitutional principles and uphold the rule of law. The Mwangaza impeachment case exemplifies the urgent need for reforms that integrate constitutional principles into AJS practices without diluting their cultural essence. This begs the question, how will the interaction work? Interaction of the Courts with AJS, therefore, is not only unavoidable, but Courts are duty-bound to ensure that the interaction is a reality.[66]

4.1 Interaction of the Courts with AJS

The Constitution of Kenya mandates the judiciary to promote alternative dispute resolution mechanisms, including traditional forms.[67] This acknowledgment shows the importance of AJS in reducing the burden on formal courts and enhancing access to justice, particularly for marginalized communities. However, while this collaboration is encouraged, it is imperative to delineate the boundaries

[65] Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy and Policy Framework.'57-58.
[66] Ibid, 57.
[67] Constitution of Kenya (2010) Article 159(2c)

of jurisdiction and authority, especially concerning constitutional interpretation. The Constitution envisioned that it is the courts that have the mandate of constitutional interpretation.[68] This conforms to the school of thought that the interpretation of laws falls uniquely and appropriately within the domain of the courts.[69] Article 165(3) (d) vests the High Court with original and primary jurisdiction to hear any question regarding the interpretation of the Constitution. This includes, inter alia, determining whether any law or action is inconsistent with the Constitution and whether any act purportedly done under the Constitution contravenes its provisions. The High Court serves as the organic interpreter of constitutional questions, and its findings are binding unless overturned by the Court of Appeal or the Supreme Court.[70] Consequently, AJS bodies, while vital in dispute resolution, lack the authority to offer binding interpretations of the Constitution. Even if AJS forums venture into interpreting constitutional provisions, such interpretations remain non-binding and susceptible to judicial scrutiny.

There is a school of thought that suggests everyone,[71] including the Executive and Legislature, can interpret the Constitution.[72] Article 10 of the Constitution emphasizes national values and principles of governance, implying that all arms of government and independent offices are engaged in interpreting and applying constitutional principles in their respective domains.[73] This still cannot grant

[68] See Constitution of Kenya 2010, Art 165(3).
[69] Robert J Pushaw, 'Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis' (2002) 80 *North Carolina Law Review* 1188–1190.
[70] Evans Ogada, 'An Analysis of Walter Khobe's "The Jurisdictional Remit of the Supreme Court of Kenya Over Questions Involving the Interpretation and Application of the Constitution"' (2020) 5 Kabarak Journal of Law and Ethics 64.
[71] Charles B G Ouma, Constitutional Law II Lecture Notes (CUEA CLS 107, the Catholic University of Eastern Africa) 4.
[72] Rachel E Barkow 'More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102(2) Columbia Law Review, 239.
[73] Charles Ouma, 'Constitutional Law II Lecture Notes,' (n 67 above).

jurisdiction of Constitutional Interpretation to AJS bodies as they are neither part of an arm of government or an independent office. This perspective does not diminish the judiciary's unique role. Article 165 affirms that the courts, particularly the High Court, hold the authority to interpret the Constitution authoritatively. While other entities may engage in interpretative efforts, the judiciary's determinations remain binding and final. Thus, the argument that AJS bodies or any other entity can independently interpret the Constitution with binding authority is untenable within Kenya's constitutional framework.

4.2 Structuring Collaboration Between Courts and AJS

In practice, this distinction becomes crucial in cases referred to AJS that may touch on constitutional questions. For example, consider a land inheritance dispute resolved by an AJS forum based on customary practices. If such practices appear to contravene constitutional principles of equality and non-discrimination under Article 27,[74] the issue inevitably requires constitutional interpretation. Similarly, disputes involving the application of cultural practices that potentially infringe on children's rights and the child's best interest may also present constitutional questions.[75] These scenarios demonstrate that AJS mechanisms, while resolving disputes effectively, might inadvertently encroach upon constitutional territory, necessitating judicial oversight. Given these realities, collaboration between courts and AJS bodies in matters of constitutional interpretation requires a structured approach. Courts should closely supervise AJS proceedings in cases where constitutional questions may arise. When a court refers a matter to AJS, it should appoint a constitutional law expert to attend the proceedings. This expert's role would be to monitor and identify potential constitutional issues as the AJS forum deliberates. Upon identifying such issues, the expert should ensure they are referred back to the court for binding interpretation. This process ensures that constitutional questions are resolved with finality within the judiciary's domain while allowing AJS forums to proceed with the non-constitutional aspects of the

[74] See Constitution of Kenya 2010, Art 27.
[75] Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy and Policy Framework.'57.

dispute. This approach applies only when the court has referred the matter to AJS. In cases where the court has not referred the matter, judicial interference should be avoided, with the aim of maintaining the integrity of the AJS process unless the matter is appealed against by the dissatisfied party. In such instances, the six-throng threshold for review outlined in the National AJS policy should apply.[76] This model preserves the integrity of constitutional interpretation and ensures consistency in the application of constitutional principles across all levels of governance. It also reinforces the complementary relationship between AJS forums and the judiciary.[77] AJS bodies retain their role as efficient and culturally relevant mechanisms for dispute resolution, while courts uphold their constitutional duty as the ultimate arbiters of constitutional matters.

This collaborative approach is not only pragmatic but also aligns with Kenya's constitutional framework. By enabling courts and AJS forums to work together, each respecting the jurisdictional limits of the other, the legal system can ensure that justice is delivered efficiently and in accordance with the Constitution. For instance, in the land inheritance example, the AJS forum can focus on mediating

[76] Ibid. The six-throng test outlines six distinct standards for the interaction between Courts and AJS processes, noting that these are not conjunctive but represent separate approaches. Avoidance occurs when Courts disregard previous AJS proceedings and awards, which contradicts Article 159 of the Constitution, mandating Courts to promote alternative dispute resolution. Monism applies when AJS awards are appealed to the Courts for a de novo review of both facts and law, where Courts should respect AJS processes and focus on procedural propriety and proportionality, without interfering with party autonomy. Deference occurs when Courts review AJS cases solely for procedural propriety and proportionality, considered the most appropriate interaction between Courts and AJS. Convergence happens when Courts defer to AJS processes only if both parties agree, while still acknowledging that AJS is an alternative dispute resolution forum. Recognition and Enforcement in the Mode of Arbitral Awards treats AJS awards as final and binding, with Courts only ensuring that the award meets legal standards without altering it, unless it is unconscionable or violates public policy. Facilitative Interaction involves Courts accepting AJS awards as evidence, determining their weight and relevance while confirming procedural propriety during the AJS process.
[77] Ibid, 57-58.

the dispute and crafting an equitable resolution, while the courts provide definitive guidance on the constitutional issues of gender equality and non-discrimination. Similarly, in cases involving children's rights, AJS forums can address the cultural and familial aspects of the dispute, but constitutional questions such as the best interests of the child under Article 53 should be referred to the judiciary for authoritative interpretation.[78] This model also reduces the likelihood of judicial intervention at a later stage, as constitutional questions would have already been addressed conclusively. While the Constitution of Kenya promotes interaction between courts and AJS bodies, it unequivocally designates the judiciary as the final authority on constitutional interpretation. A structured framework for collaboration, involving the appointment of constitutional law experts and judicial oversight, can enhance the effectiveness of AJS mechanisms while safeguarding the Constitution's supremacy. This approach not only respects the unique strengths of each dispute resolution mechanism but also ensures that justice is delivered in a manner that is both constitutionally sound and culturally sensitive. In the next section of the paper, a study of South Africa's jurisprudence on Traditional Dispute Resolution systems will be conducted to explore potential lessons that Kenya can draw to enhance collaboration between courts and AJS bodies. South Africa's history and its well-developed system of traditional dispute resolution offer valuable insights into how Kenya might structure a similar collaboration framework that respects both cultural practices and constitutional principles.

4.3 Comparative Insights from South Africa

South Africa provides an effective model for integrating customary law into a constitutional framework, demonstrating how traditional practices can coexist with constitutional principles. The South African Constitution recognizes customary law as a legitimate source of law,[79] provided it aligns with constitutional principles such as equality, non-discrimination, and human

[78] Constitution of Kenya 2010, Art 53.
[79] Constitution of the Republic of South Africa, 1996, Section 211.

dignity.[80] This recognition ensures that the legal system reflects South Africa's diverse cultural heritage while upholding fundamental rights. The South African judiciary has developed mechanisms to address the interplay between customary law and constitutional requirements.[81] Courts often consult cultural specialists or community elders to ensure that decisions involving customary law are both culturally informed and consistent with constitutional principles.[82] This meets the element of facilitative interaction[83] established in the AJS policy the only difference being that actual consultation has not been officially formalized in Kenya. This approach promotes inclusivity and ensures that traditional practices are respected without undermining constitutional values. The advisory role assigned to traditional leadership today is a stark departure from its earlier position under the homeland system, where chiefs exercised both legislative and administrative powers.[84]

The Kenyan Constitution should explicitly recognize traditional courts as part of the justice system, drawing from South Africa's model, where roughly 1,500 traditional courts are constitutionally acknowledged.[85] These courts, despite their

---

[80] See Paula Jackson and others, *South African Government in Review: Anti-Corruption, Local Government and Traditional Leadership* (HSRC Press 2009) 47.

[81] See Bhe and Others v Magistrate, Khayelitsha, and Others (2005). Para 109-116. < Available at https://www.saflii.org/za/cases/ZACC/2004/17.html > See also Bennett Human Rights and African Customary Law under the South African Constitution (Juta & Co., Ltd, Cape Town 1997) 61. In this cases, Courts in South Africa refused to develop rules to govern the operation of customary law and stated that that would undermine the principle of flexibility.

[82] Shilubana and others v Nwamitwa [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC) Para 49 and 56 have demonstrated the courts' role in adapting customary law to promote equality. Here, the Court upheld a community's decision to appoint a female chief, aligning with constitutional principles of gender equality.

[83] Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy and Policy Framework.'58.

[84] Tsegai Berhane Ghebretekle and Macdonald Rammala, 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' (2018) 12(2) *Mizan Law Review* 335.

[85] TW Bennett, *Customary Law in South Africa* (Juta & Co 2004) 141.

diverse structures across communities,[86] play a vital role in resolving local disputes within cultural frameworks. Kenya could establish a registration process to formally recognize traditional courts across its communities, ensuring their practices align with constitutional principles such as equality and fairness. Registration would legitimize these courts, preserve cultural heritage, and provide oversight to maintain consistency with national legal standards. This approach would strengthen Alternative Justice Systems (AJS) by bridging the gap between formal and informal justice systems, fostering trust, and ensuring culturally sensitive justice delivery. This will be an important step as before registration, the Judiciary can take time to offer training on Constitutional interpretations and the legal adherences standards that this leaders and elders should stick to. This is because most if not all constitutional principles are deeply engraved within many African cultures.

In addition to this, allowing courts to involve elders or cultural specialists when hearing appeals from AJS decisions could improve the integration of customary and constitutional law. Having them as *Amicus Curiae* in cases that the parties have consented to using AJS or matters involve issues that touch on the African Tradition and cultures. For instance, when a party challenges an AJS ruling on constitutional grounds, courts could seek input from elders familiar with the cultural context of the case. This would ensure that the court's final decision respects both constitutional principles and the cultural foundations of the original ruling. By adopting such practices, Kenya could create a justice system that reflects its cultural diversity while protecting constitutional rights. This approach would also build trust in the legal system by ensuring that traditional values are acknowledged in judicial processes. Additionally, it would provide a framework for resolving potential conflicts between customary law and constitutional principles, enabling harmonious coexistence. For AJS mechanisms to gain legitimacy, their decisions must be respected by the formal judicial system. Courts should adopt a deferential approach, intervening only when an AJS decision

[86] Ibid.

clearly violates constitutional provisions.[87] This respect mirrors the treatment of ADR outcomes, which are generally upheld unless procedural or substantive flaws are evident. By respecting AJS rulings, courts reinforce the credibility of these mechanisms and encourage their use as an alternative to formal litigation. This approach also alleviates the burden on the formal justice system, promoting efficiency and accessibility in dispute resolution.

5.0 Conclusion

While the universality of human rights is crucial, framing these rights predominantly through a Western lens risks imposing a rigid, one-size-fits-all standard that overlooks the richness and diversity of other cultural traditions.[88] The western culture of having courts as the main administrators of justice should not be privileged over African Systems and other systems.[89] Alternative Justice Systems (AJS) highlight the importance of culturally grounded approaches to justice, offering accessible and meaningful resolutions within local contexts. However, these systems must still align with constitutional thresholds and universal principles, challenging the Western notion that human rights are best expressed through state-centric or legalistic frameworks. By fostering decolonised discourse and embracing the dynamic nature of cultural practices, AJS provide a necessary critique of Western dominance, demonstrating that justice can be both universal and locally relevant. Kenya's Alternative Justice Systems (AJS) framework is essential for expanding access to justice, particularly in rural communities, where it offers an accessible, community-driven approach to dispute resolution. The 2010 Constitution acknowledges AJS as part of Kenya's plural legal

---

[87] See the approach taken by the court in *LWG v GBG* (Matrimonial Case 6 of 2015) [2023] KEHC 26305 (KLR).

[88] Surya Subedi, 'Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian"
Concept of Human Rights from the Perspectives of Hinduism', (1999-2000) 30 California Western International
Law Journal 45 at 49.

[89] Simon Tay, 'Human Rights, Culture and the Singapore Example', (1995-1996) 41 McGill Law Journal 743 at 748.

system, highlighting the importance of traditional mechanisms in delivering justice. Despite its legal recognition, challenges remain in fully integrating constitutional principles, such as fairness and equality, within AJS structures. Councils of elders, such as the Njuri Ncheke, remain vital in resolving conflicts, but their decisions often lack constitutional grounding. Furthermore, issues of gender inequality and the exclusion of marginalized groups continue to hinder the full potential of AJS. This is where the collaboration this paper suggests can work best.

On future research directions, a key concern is the loss of cultural knowledge among younger generations, as many youths are no longer embracing their heritage. This erosion of culture risks undermining the future of AJS. Efforts to preserve and promote cultural practices must be prioritized to ensure the survival of these systems. The collaboration will act as a way of modernizing AJS while still allowing it to be culturally resonant and thus will aid in maintaining it through ages. Mechanisms for teaching and embedding culture into the justice system can also safeguard its relevance for future generations. Ultimately, AJS should be viewed as an integral, not alternative, part of Kenya's legal landscape, capable of fostering justice, unity, and cultural preservation for all. Our culture is our life, if we lose it then we will be nothing more than walking dead creatures. AJS is essential in preservation of this.

Bibliography

Books and Articles

Dido AD, *Embracing the Traditional Justice Systems in Northern Kenya: Prospects and Challenges* (29 October 2012).

Kariuki Muigua, 'Mainstreaming Alternative Justice Systems in Africa' https://kmco.co.ke/wp-content/uploads/2023/11/Mainstreaming-Alternative-Justice-Systems-in-Africa.pdf accessed 13 November 2024.

Kemboi LK, 'Courts as Monopolies: What Does It Mean for Access to Justice?' (IEA Kenya, 5 March 2024) https://ieakenya.or.ke/blog/courts-as-monopolies-what-does-it-mean-for-access-to-justice/ accessed 14 November 2024.

Kinama E, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) *Strathmore Law Review* 25.

Njihia S, 'Court Asks Njuri Ncheke to Mediate Mwangaza-MCAs Dispute' (Nairobi Law Monthly, 30 July 2024) https://nairobilawmonthly.com/court-asks-njuri-ncheke-to-mediate-mwangaza-mcas-dispute/ accessed 14 November 2024.

Policy Brief, 'Accelerating Women and Girl's Rights in Kenya: The Role of the Alternative Justice Systems Policy in Kenya' https://www.studocu.com/row/document/kenyatta-university-parklands-law-campus/law-of-evidence/ajs-for-womens-rights-in-kenya-policy-brief/108377754 accessed 16 November 2024.

Sarah Kinyanjui, 'Restorative Justice in Traditional Pre-Colonial "Criminal Justice Systems" in Kenya' *Tribe Law Journal*.

United Nations Office on Drugs and Crime, 'Partners Welcome Move to Mainstream Alternative Justice Systems in Kenya' https://www.unodc.org/easternafrica/en/Stories/partners-welcome-move-to-mainstream-alternative-justice-systems-in-kenya.html#:~:text=Nairobi%2C%2027%20August%202020%20%E2%80%93%20

The,partners%20in%20the%20policy's%20development accessed 10 November 2024.

United Nations Development Programme (UNDP), *Analysis of the National Studies on the Capacities of the Judicial Institutions to Address the Needs/Demands of Persons with Disabilities, Minorities and Women Strengthening Judicial Integrity through Enhanced Access to Justice* (2013).

UNDP, 'Access to Justice Practice Note' (2004).

UNDP, *Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (Bangkok, UNDP, 2005).

Legal and Policy Documents

Constitution of Kenya 2010.

Judiciary of Kenya, *Alternative Justice Systems Baseline Policy and Policy Framework* https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/ accessed 16 November 2024.

Judiciary of Kenya, *State of the Judiciary and the Administration of Justice: Annual Report Financial Year 2023/2024* (Judiciary of Kenya 2024).

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), Article 8.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 14(1).

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

Case Laws

Alexkor Ltd v Richtersveld Community 2003 (12) BCLR 1301 (CC) (Constitutional Court of South Africa) [51].

Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa 2005 (1) SA 580 (CC) (Constitutional Court of South Africa) [41].

Council of Governors v Senate & another (2014) eKLR.

In *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* [2016] eKLR, paras 55–58.

Kitur & Another v Kitur (ELC Case 68 of 2021) [2023] KEELC 17253 (KLR).

Keter v Seurei (Environment & Land Case 8 of 2021) [2023] KEELC 16131 (KLR).

Bor v Ngisirei (Environment & Land Case 103 of 2021) [2023] KEELC 443 (KLR).

In the Matter of the Estate of Kirotie Ole Butu (Deceased) (Succession Cause 3 of 2022).
LWG v GBG (Matrimonial Case 6 of 2015) [2023] KEHC 26305 (KLR).

Law Society of Kenya v Supreme Court of Kenya & Another; Abdullahi SC & 19 Others (Interested Parties) (Petition E026 of 2024) [2024] KEHC 7819 (KLR) (Constitutional and Human Rights) (28 June 2024), para 34.

MM v MN 2013 (4) SA 415 (CC) (Constitutional Court of South Africa) [23].

Other Sources

See *Arbitration and Mediation in Kenya*.
See https://www.youtube.com/results?search_query=ANNUAL+AJS+CONFERENCE accessed 29 December 2024.

For the rules on how to use an Oxford Comma, See Grammarly, 'When to Use a Comma before "And" | Grammarly' (15 May 2023).

Call for Submissions

Alternative Dispute Resolution is a peer-reviewed/refereed publication of the Chartered Institute of Arbitrators, Kenya, engineered and devoted to provide a platform and window for relevant and timely issues related to Alternative Dispute Resolution mechanisms to our ever growing readership.

Alternative Dispute Resolution welcomes and encourages submission of articles focusing on general, economic and political issues affecting alternative dispute resolution as the preferred dispute resolution settlement mechanisms.

Articles should be sent as a word document, to the editor (editor@ciarbkenya.org/ c.c.: admin@kmco.co.ke) and a copy to the editorial group (adrjournal@ciarbkenya.org). Articles should ideally be around 3,500 – 5,000 words although special articles of up to a maximum of 7,500 words could be considered.

Articles should be sent to the editor to reach him not later than Thursday 15th May 2025. Articles received after this date may not be considered for the next issue.

Other guidelines for contributors are listed at the end of each publication. The Editor Board receives and considers each article but does not guarantee publication.

Guidelines for Submissions

The Editorial Board welcomes and encourages submission of articles within the following acceptable framework.

Each submission: -

should be written in English

should conform to international standards and must be one's original Writing

should ideally be between 3,500 and 5,000 words although in special cases certain articles with not more than 7,500 words could be considered
should include the author'(s) name and contacts details

should include footnotes numbered

must be relevant and accurate

should be on current issues and developments.

Recent Conflict Management books by Kenyan authors

PAUL
NGOTHO

AVAILABLE
Call: +254 728 130 925

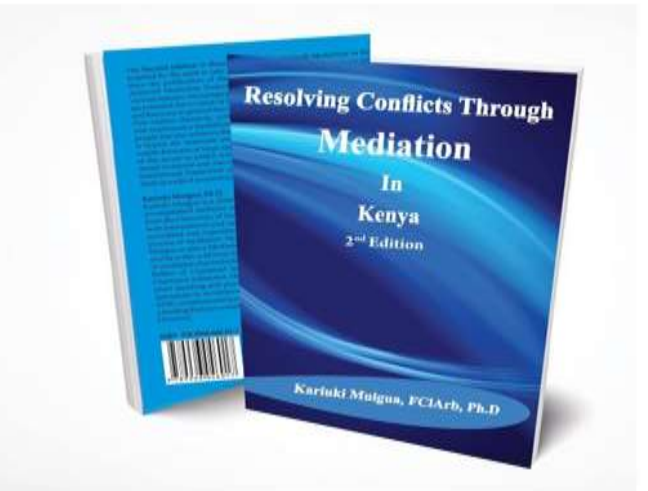

Securing Lasting Peace and
Justice in Africa
through
Appropriate Dispute Resolution

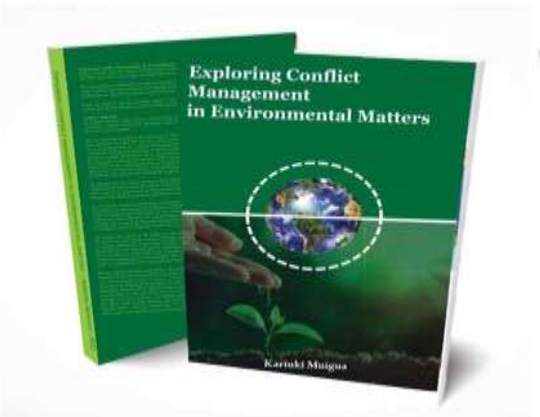
Recent Conflict Management books by Kenyan authors

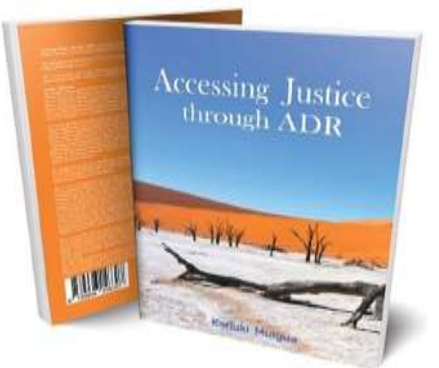
KARIUKI MUIGUA

AVAILABLE

Call: +254 722 818 932







Recent Conflict Management books by Kenyan authors

DR. KENNETH WYNE MUTUMA & JACQUELINE WAIHENYA

AVAILABLE

Call: +254 708 708 071

WILFRED MUTUBWA

AVAILABLE

Call: +254 723 469 931

ADR | ALTERNATIVE DISPUTE RESOLUTION

The Alternative Dispute Resolution Journal aims to provide original in-depth investigations of both theoretical and practical questions on international arbitration and ADR.

It covers all areas of international dispute settlement, including commercial and investment arbitration and all other modes of ADR, such as negotiation, adjudication, expert determination, and mediation. It captures all topics in relation to both private and public law, including public international law, and welcomes articles that take a variety of approaches including doctrinal, historical, comparative, sociolegal, philosophical, political analysis and economic analysis of law.

The ADR Journal is an essential reading for anyone involved in dispute resolution – whether as judge, international arbitrator, party representative, mediator, adjudicator, corporate advisor, government official, in-house, academic, or graduate/post-graduate student.

We welcome scholarly articles aiming to contribute to and advance the academic debate, as well as articles aiming to provide analysis of developments in case law, legislation, and practice in the field of Alternative Dispute Resolution.

For Marketing opportunities, contact:
marketing@ciarbkenya.org

Chartered Institute of Arbitrators, Kenya.
Flamingo Towers, Mara Road, Upper Hill, Mezzanine 1A
P.O. Box 50163-00200, Nairobi
Cell: +254 734-652205 or +254 722-200496
Email: info@ciarbkenya.org Website: www.ciarbkenya.org

ISSN 3078-2120

CIArb

3078-2120