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Faith Mwiti
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Editor's Note

Welcome to the *Alternative Dispute Resolution (ADR) Journal*, Volume. 14, No.1, 2026. This is the first issue of the Journal in the year 2026 demonstrating our commitment towards spearheading scholarly discourse on the themes of Alternative Dispute Resolution.

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

This volume contains papers and case reviews on salient themes in ADR including: *International Investment Arbitration in the African Context: Upholding Justice for the Parties and Vulnerable Populations; Delineating The Bounds of The Public Policy Ground for Setting Aside Arbitral Awards; Mediation in the African Cultural Context: Listening to the Unsaid, Shared Norms and Ubuntu; The Capitalization of Global Precedents: Building A Kenyan Model of Introducing Artificial Intelligence (AI) Into Arbitration; Rethinking the Proposed Prison Decongestion Programme in Kenya: A Legal Analysis and Suggestions for Reform; Arbitration and Investor Confidence: Strengthening Africa's Business Environment; Arbitral integrity: is it worth fighting for?; The Nexus of Information Ethics and Arbitration in Balancing Open Access and Intellectual Property Rights*

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

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

CI Arb-K takes this opportunity to thank the publisher, contributing authors, editorial team, reviewers, scholars and those who have made it possible to continue publishing this Journal that continues to shape the discourse on ADR in Kenya and across the globe. The Journal is available online at <https://ciarbkenya.org/journals/>

Prof. Kariuki Muigua Ph.D, SC, FCI Arb, Ch.Arb, OGW.
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January, 2026.

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International Investment Arbitration in the African Context: Upholding Justice for the Parties and Vulnerable Populations

By: Kariuki Muigua *

Abstract

This paper critically examines the efficacy of international investment arbitration in the African context. The paper defines international investment arbitration. It argues that this form of arbitration is relevant in the African context due to the growth of the investment landscape in the continent. The paper observes that international investment arbitration provides an effective platform towards settling disputes involving foreign investors and host states in Africa. In addition, the paper examines some of the key challenges arising from the international investment arbitration realm in Africa. In particular, the paper notes that injustices and human rights violations in the investment sphere in Africa are a pertinent concern in international investment arbitration. In light of these concerns, the paper discusses how international investment arbitration can be effectively embraced in Africa by upholding justice for the parties and vulnerable populations.

1.0 Introduction

Arbitration has emerged as one of the most preferred mechanism for dispute resolution particularly in the global context. Arbitration is a dispute management mechanism where parties through an agreement submit their dispute to one or more neutral third parties who makes a binding decision on the dispute¹. It has also been defined as a private and consensual process where parties in dispute agree to present their grievances to a third party for settlement². Arbitration contains several key features including privacy, flexibility and party autonomy which allows parties to engage in an efficient, confidential and fair process leading to a final, binding and enforceable award³.

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¹ World Intellectual Property Organization., 'What is Arbitration' Available at <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (Accessed on 07/01/2026)

² Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers, 4th Edition, 2022

³ World Intellectual Property Organization., 'What is Arbitration' Op Cit

Arbitration can be classified into various forms including domestic and international arbitration⁴. It has been observed that international arbitration is being practiced through various forms including interstate arbitration, investor-state/investment arbitration, and international commercial arbitration⁵. International arbitration has emerged as the preferred mechanism for managing disputes that are transnational in nature⁶. It has a transnational applicability which means that it applies across different jurisdictions and therefore guarantees neutrality in the determination of disputes by addressing differences that may arise as a result of multiple legal systems⁷. Further, it also guarantees enforcement of decisions through the *New York Convention*⁸ which provides a harmonized legal framework for the recognition and enforcement of foreign awards in arbitration.

International arbitration is being practiced widely in Africa in its various forms including international commercial arbitration and international investment arbitration. It has been observed that international arbitration has gained a strong foothold in Africa and there is continued growth and acceptance of arbitration as an appropriate and viable option for settling disputes both between private parties and disputes involving states⁹. The growth of arbitration in Africa has been attributed to several regional initiatives including launch of regional arbitration centres, adoption of the New York Convention by most African countries and the expansion of the investment landscape in the continent¹⁰. In light of these developments, it has been observed that arbitration is enjoying a thriving present and a promising future in Africa¹¹. Despite its efficacy, the practice of international arbitration in Africa raises several concerns. For instance, challenges such

⁴ Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Op Cit

⁵ Shonk. K., 'International Arbitration: What it is and How it Works' Available at <https://www.pon.harvard.edu/daily/international-negotiation-daily/international-arbitration-what-it-is-and-how-it-works/> (Accessed on 07/01/2026)

⁶ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONALCOMMERCIALARBITRATION-IN-AFRICA.pdf> (Accessed on 07/01/2026)

⁷ Moses, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

⁸ United Nations Commission on International Trade Law., '*Convention on the Recognition and Enforcement of Foreign Arbitral Awards.*' (New York, 1958)

⁹ Arbitration in Africa., Available at <https://www.nortonrosefulbright.com/en/knowledge/publications/558921ae/arbitration-in-africa> (Accessed on 07/01/2026)

¹⁰ Ibid

¹¹ Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent., Available at <https://hsfnotes.com/africa/2022/11/25/2022-soasarbitration-in-africa-survey-reveals-a-thriving-market-for-arbitration-on-the-continent/> (Accessed on 07/01/2026)

as court interference in arbitration, inadequate marketing, inadequate political support and human resources and bias against Africa undermine the growth of international commercial arbitration in Africa¹². On the other hand, the landscape of international investment arbitration in Africa faces several challenges including human right concerns against vulnerable populations¹³. Addressing such challenges is necessary towards strengthening the role of international arbitration in fostering access to justice in Africa.

This paper critically examines the efficacy of international investment arbitration in the African context. The paper defines international investment arbitration. It argues that this form of arbitration is relevant in the African context due to the growth of the investment landscape in the continent. The paper observes that international investment arbitration provides an effective platform towards settling disputes involving foreign investors and host states in Africa. In addition, the paper examines some of the key challenges arising from the international investment arbitration realm in Africa. In particular, the paper notes that injustices and human rights violations in the investment sphere in Africa are a pertinent concern in international investment arbitration. In light of these concerns, the paper discusses how international investment arbitration can be effectively embraced in Africa by upholding justice for the parties and vulnerable populations.

2.0 Examining International Investment Arbitration in the African Context

International investment arbitration also referred to as investor-state arbitration is a mechanism to settle disputes involving foreign investors and host States¹⁴. It has been pointed out that international investment arbitration allows a foreign investor to directly invoke its claims against the host state in which it has invested in the event a dispute arises¹⁵.

¹² Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Op Cit

¹³ Allen. N., 'Investment Treaty Disputes Role in Sustainability.' Available at <https://www.addleshawgoddard.com/globalassets/specialisms/litigation/esg-risk-reputation-compliance--disputes/investment-treaty-disputes-role-in-sustainability.pdf> (Accessed on 07/01/2026).

¹⁴ Introduction to Investment Arbitration., Available at <https://www.international-arbitration-attorney.com/investment-arbitration/> (Accessed on 07/01/2026)

¹⁵ Vienna International Arbitral Centre., 'Investment Arbitration Basics' Available at <https://www.viac.eu/en/investment-arbitration-basics/> (Accessed on 07/01/2026)

It has been observed that international investment arbitration flows from the Investor-State Dispute Settlement (ISDS) regime¹⁶. ISDS is a legal mechanism allowing an investor from one contracting state to an international investment agreement to bring a claim against another contracting state in which it has made an investment (also known as the host state)¹⁷. ISDS has been described as a key feature of most international investment agreements¹⁸. By creating a system for the settlement of disputes between investors and host governments, ISDS creates a neutral forum that offers the possibility of a fair hearing before a tribunal unencumbered by domestic political considerations¹⁹. It has been argued that since relying on national courts to settle disputes may be time-consuming and affected by political influence, the ISDS regime was created to avoid such risks in a rapidly growing foreign investments sphere and hold states accountable for commitments made in foreign investment treaties²⁰. However, it has also been observed that a host state may be able to make counterclaims against an investor under the ISDS regime²¹.

International investment arbitration is therefore an important process that guarantees flexibility, neutrality, expeditiousness and finality in managing disputes between foreign investors and host states under the ISDS regime²². This form of arbitration is set out under the *Convention on the Settlement of Investment Disputes between States and Nationals of other States*²³ which establishes the International Centre for Settlement of Investment Disputes (ICSID) to provide facilities for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states²⁴. International

¹⁶ Shonk. K., 'International Arbitration: What it is and How it Works' Available at <https://www.pon.harvard.edu/daily/international-negotiation-daily/international-arbitration-what-it-is-and-how-it-works/> (Accessed on 07/01/2026)

¹⁷ European Parliament, 'Investor-State Dispute Settlement (ISDS) State of play and prospects for reform' Available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf (Accessed on 07/01/2026)

¹⁸ United Nations Conference on Trade and Development., 'Investor-State Dispute Settlement' Available at https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf (Accessed on 07/01/2026)

¹⁹ Ibid

²⁰ Ibid

²¹ World Health Organization., 'How international investment dispute settlement works' Available at <https://extranet.who.int/fctcapps/fctcapps/fctc/kh/legalchallenges/how-international-investment-dispute-settlement-works> (Accessed on 07/01/2026)

²² Shonk. K., 'International Arbitration: What it is and How it Works' Op Cit

²³ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159

²⁴ Ibid, article 1

investment arbitration is particularly important in the African context. The investment landscape in Africa is growing rapidly bringing along both opportunities and challenges. For example, the *Agreement Establishing the African Continental Free Trade Area (AfCFTA)*²⁵ creates the world's largest free trade area covering the entire African continent. It has been observed that implementation of AfCFTA can deepen intra-African trade while also creating opportunities for both regional and foreign investments in the continent²⁶. The growth of trade and investments under AfCFTA provides opportunities to foster development in Africa. However, it has been observed that this also creates the risk of disputes between states and those involving foreign investors and host states²⁷. AfCFTA envisages management of such disputes through arbitration among other appropriate dispute management processes²⁸.

In addition to opportunities under AfCFTA, there has been a rise in Bilateral Investment Treaties (BITs) in Africa. BITs are international agreements between two countries establishing the terms and conditions for private investment in each other's territory by nationals and companies of one country to the other country²⁹. It has been observed that African states are increasingly negotiating and adopting international investment agreements (IIAs), most especially BITs in order to improve their investment climate and attract Foreign Direct Investment (FDI)³⁰. It is estimated that there are more than 3000 BITs of which African countries are party to with more than 900 signed with non-African countries³¹. These BITs envisage settlement of disputes between foreign investors and host African states under the ISDS regime³². Further, it has been observed

²⁵ African Union., 'Agreement Establishing the African Continental Free Trade Area.' Available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (Accessed on 07/01/2026)

²⁶ World Bank Group., 'The African Continental Free Trade Area' Available at <https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area> (Accessed on 07/01/2026)

²⁷ Arbitration in Africa., Op Cit

²⁸ African Union., 'Agreement Establishing the African Continental Free Trade Area.' Op Cit

²⁹ Bilateral Investment Treaty., Available at https://www.law.cornell.edu/wex/bilateral_investment_treaty (Accessed on 07/01/2026)

³⁰ Aniodoh. A.A., & Yekini. A., 'Prospects and Pitfalls of BITs, and the Quest for a Multilateral Framework in Africa' *African Journal of International Economic Law.*, Volume 4, 2024

³¹ Bilateral Investment Treaties: a Continuing Threat to Africa., Available at <https://aefjn.org/en/bilateral-investment-treaties-a-continuing-threat-to-africa/?format=pdf> (Accessed on 07/01/2026)

³² Ibid

that most African countries have ratified the ICSID Convention which envisages settlement of investor-state disputes through international investment arbitration³³.

International investment arbitration is therefore well-entrenched in Africa. This form of arbitration has been identified as a key tool towards ensuring accountability among host states and investors under international investment treaties³⁴. International investment arbitration provides a forum to protect investors from arbitrary expropriation of their investments while also ensuring non-discriminatory treatment for foreign investments in countries considered risky³⁵. Despite its efficacy, international investment arbitration raises several concerns in the African context. For instance, it has been contended that most BITs are drafted in favour of capital exporting countries subjecting African countries to unfavourable terms³⁶. Consequently, many BITs have exposed developing countries to high legal costs and liabilities and have occasionally discouraged necessary regulatory actions due to emphasis on protection of investors under the ISDS regime³⁷. Further, it has been argued that the lack of predictability, high monetary stakes, limited control mechanisms, and long duration of ISDS proceedings, combined with the fact that states are usually the respondents limits the efficacy of this process and the ability of states to enforce sustainability concerns under the international investments regime³⁸. In addition, it has been observed that since most ISDS proceedings are instituted against states, the harmful activities of foreign investors can be ignored undermining the efficacy of investment arbitration³⁹. For example, foreign investors, including Multinational Corporations (MNCs) especially those involved in the extractives sector in Africa, have been accused of fuelling human rights violations such as land injustices against indigenous peoples and local communities, poor labour practices and environmental

³³ Arbitration in Africa., Op Cit

³⁴ Goh. N., 'ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?' *The Journal of World Energy Law & Business.*, Volume 15, Issue 6, 2022

³⁵ European Parliament., 'Investor-State Dispute Settlement (ISDS) State of play and prospects for reform' Op Cit

³⁶ The Africanization of International Investment Disputes – from Past to Present., Available at <https://verfassungsblog.de/the-africanization-of-international-investment-disputes-from-past-to-present/> (Accessed on 07/01/2026)

³⁷ Why Is Investment Treaty and Investor–State Dispute Settlement Reform Needed?., Available at <https://www.iisd.org/system/files/2025-03/investment-treaty-and-isds-reform-questions-answers.pdf> (Accessed on 07/01/2026)

³⁸ Ibid

³⁹ Muigua. K., 'Bilateral Investment Treaties and Environmental, Social and Governance in Africa.' Available at <https://kmco.co.ke/wp-content/uploads/2023/07/Bilateral-Investment-Treaties-and-Environmental-Social-and-Governance-in-Africa-1.pdf> (Accessed on 07/01/2026)

degradation⁴⁰. In light of these concerns, it is imperative to reform international investment arbitration in the African context including through upholding justice for vulnerable populations.

3.0 Strengthening International Commercial Arbitration in the African Context

International investment arbitration provides an effective forum towards settling investor-state disputes in Africa. By strengthening international investment arbitration, African countries can create a conducive ISDS regime towards attracting FDI and fostering development⁴¹. However, in light of concerns such as human right violations and injustices against vulnerable populations in the investment real, it is imperative to reform international investment arbitration in Africa.

In order to strengthen international investment arbitration in Africa, there is need to invoke and uphold human rights towards ensuring justice for vulnerable populations. It has been observed that in some cases, the activities of foreign investors can violate human rights including the land rights of indigenous peoples, environmental rights and labour rights⁴². In light of these concerns, it has been argued that there is need to reform the ISDS regime in order to enable African countries to enforce sustainability concerns including human rights and environmental conservation through international investment arbitration⁴³. This can be achieved by giving African countries more power to enforce sustainability issues such as environmental conservation and human rights, and allowing the participation of all stakeholders including local communities who are directly impacted by investment activities⁴⁴. Through this, it is possible to foster justice for vulnerable populations including indigenous peoples and local communities.

Further, there is need to reform BITs in order to ensure that international investment arbitration captures the needs and interests of African countries. Most BITs are drafted in favour of capital exporting countries in order to protect their investments in

⁴⁰ Ajibade, L.T & Awomuti, A.A. 'Petroleum Exploitation or Human Exploitation? An Overview of Niger Delta Oil Producing Communities in Nigeria' *African Research Review* Vol. 3 (1), 2009. Pp. 111-124

⁴¹ Beri. P & Nubong. G., 'Impact of Bilateral Investment Treaties on Foreign Direct Investment in Africa.' Available at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-8268.12583> (Accessed on 07/01/2026)

⁴² Feldman. J., 'Human Rights and International Investment Arbitration: A snapshot' Available at <https://www.nortonrosefulbright.com/en/knowledge/publications/11a8c614/human-rights-and-international-investment-arbitration-a-snapshot> (Accessed on 07/01/2026)

⁴³ Why Is Investment Treaty and Investor–State Dispute Settlement Reform Needed?., Op Cit

⁴⁴ Ibid

developing countries⁴⁵. This means that in case of violation of provision of such BITs, international investment arbitration decisions will mostly be made in favour of foreign investors even where such instances are justified including in situations to protect the environment and resolve economic crises⁴⁶. Consequently, it has been suggested that African countries should integrate Environmental, Social and Governance (ESG) clauses in BITs in order to make investments more aligned with ESG concerns such climate action, environmental governance, sound labour practices, community welfare, respect for human rights as well as other public policy imperatives⁴⁷. Through this, foreign investors can be compelled to comply with national laws and held accountable in case of violation of ESG standards among other national priorities⁴⁸.

Through the foregoing, it is possible to uphold justice for African countries and vulnerable populations including indigenous peoples and local populations through international investment arbitration.

4.0 Conclusion

International investment arbitration holds immense potential for Africa. However, in light of injustices and sustainability concerns, it is imperative to Africanize the ISDS regime in order to protect African countries and vulnerable populations⁴⁹. This can be achieved through infusing human rights in international investment arbitration, reforming BITs to capture ESG concerns and giving African countries more power to enforce national laws under the ISDS regime⁵⁰. Strengthening international investment arbitration in the African context is possible towards upholding justice for the parties and vulnerable populations.

⁴⁵ The Africanization of International Investment Disputes – from Past to Present., Op Cit

⁴⁶ Why Is Investment Treaty and Investor–State Dispute Settlement Reform Needed?., Op Cit

⁴⁷ United Nations Conference on Trade and Development., ‘The International Investment Treaty Regime and Climate Action.’ Available at https://unctad.org/system/files/officialdocument/diaepcbinf2022d6_en.pdf (Accessed on 07/01/2026)

⁴⁸ The Africanization of International Investment Disputes – from Past to Present., Op Cit

⁴⁹ Ibid

⁵⁰ Ibid

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Delineating The Bounds of The Public Policy Ground for Setting Aside Arbitral Awards

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Abstract

In Ongata Works Ltd v Tatu City Ltd, Mabeya J set aside an arbitral award on the basis that it was against Kenya's public policy for litigants to pay unreasonable costs. That decision drew sharp criticism from some scholars who argued that the public policy ground is a circumscribed exception that should be construed narrowly. To conclude otherwise, they argued, would negate the principle of finality which would undermine arbitration as an alternative dispute resolution (ADR) mechanism, thereby derailing the realization of Article 159(2)(c) of the Constitution. Importantly, that decision is not an outlier which raises the long-running question of how courts should approach the public policy ground. This paper seeks to analyze that question by examining whether there is a discernible standard that is applied by courts in evaluating cases under that ground, whether that standard, if any, properly appraises the bounds of the public policy ground and if it does not, it will recommend a standard that does. This paper thereafter concludes that while there is a discernible standard, it renders certain provisions of the Arbitration Act redundant whilst undermining the finality of arbitral proceedings. This paper therefore recommends a more stringent standard that adheres to both the Arbitration Act and the principle of finality hence helping to realize Article 159(2)(c) of the Constitution's mandate to promote ADR while being faithful to Kenya's public policy.

Introduction

In *Ongata Works Ltd v Tatu City Ltd, Mabeya J* set aside an arbitral award on the basis that the imposition of unreasonable costs by an arbitrator was contrary to Kenya's public policy.¹ The decision was striking not just because of the analysis but in fact, because of the lack thereof. That is because the learned judge seems to have begun from the presumption that the imposition of unreasonable costs by itself suffices to satisfy the public policy ground. That premise raises serious questions about the scope of the public policy ground. After all, if the mere fact that an arbitrator has imposed unreasonable costs is sufficient to meet the burden under the public policy ground, what legal or factual error would not? That concern is heightened by the judgment's conception of terms to

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¹ *Ongata Works Ltd v Tatu City Ltd [2025] KEHC 1916 (KLR)*

the extent that the judge did not assert that the costs should be ‘gross’, ‘manifestly unjust’ or ‘manifestly harsh’ for the court to interfere; they need only be ‘unreasonable’.

That approach is problematic as ‘unreasonable’ is a commonly used term in law that is analogous to the standard applied by courts in judicial review, second appeals and appeals from decisions by tribunals.² Whilst that, on its face, might seem logical as that is a somewhat stringent standard, it is an incongruous position as it is not only inconsistent with the *Arbitration Act*, which forbids courts from reviewing the legal and factual findings of an arbitrator,³ but it also undermines the principle of finality, which is the hallmark of arbitration,⁴ by allowing courts to review arbitral decisions for ‘reasonableness’ which mirrors what happens in judicial review, where courts often set aside administrative actions on that basis.⁵

That is aggravated by the fact that the decision is not an outlier. Rather, it applied the standard set out by *Ringera J* in *Christ of All Nations v Apollo Insurance Co. Ltd* where the revered judge held that a decision is against public policy if it, “*contravenes the constitution, any law (written or unwritten), is inimical to Kenya’s national interests or is contrary to justice or morality.*”⁶

That said, it is debatable whether the learned judge was as mistaken as some scholars contend⁷ and even if he was, it is difficult to ascribe blame to him. That is because of the vagueness that permeates the term ‘public policy’ as was succinctly recognized in *Parsons v Société Générale*.⁸ It has, after all, not been defined by either the *New York Convention* or the *Arbitration Act* and hence judges are left to interpret it without any intelligible principle.⁹

² *Belinda Kanana Muriuki v University Of Nairobi* [2021] KEHC 5758 (KLR)

³ *Synergy Energy Industrial Credit Ltd vs Cape Holding Ltd* (2016) eKLR where the Court of Appeal noted that, “*an erroneous decision in law or fact by the arbitral tribunal is not a ground upon which a court may set aside an arbitral award under section 35.*”

⁴ *Manu Tiwari*, ‘The Balasamy judgment: the fading principle of finality in arbitration?’ (International Bar Association, 29 October 2025) <<https://www.ibanet.org/balasamy-judgment-fading-principle-of-finality-in-arbitration>> accessed 12 January 2026

⁵ See; *Supra* note 3, *Republic v Mabamed & another; Khan & another (Interested Parties); Okoiti (Ex parte Applicant)* [2018] KEHC 9435 (KLR)

⁶ *Christ of All Nations v Apollo Insurance Co. Ltd* [2002] EA 366

⁷ *Tsegaye Laurendeau and Lucas Lima*, ‘A step in the wrong direction: Kenyan court sets aside costs award on public policy grounds’ (*Global Law Review*, 2 October 2025) <<https://globalarbitrationreview.com/article/step-in-the-wrong-direction-kenyan-court-sets-aside-costs-award-public-policy-grounds>> accessed 22 October 2025.

⁸ *Parsons & Whittemore Overseas Co. v. Societe Generale d L’Industrie du Papier (RAKTA)* 508 F.2d 969 (1974)

⁹ *Supra* note 8

And as aforementioned, a look at the jurisprudence of Kenyan Courts might actually vindicate the judge's broad 'holistic' interpretation of the term as courts have largely adopted the *Christ of All Nations* standard.¹⁰ In saying that, this paper constrains itself to saying 'might' as whilst the conception of the law by the courts favours his position, it is difficult to actually parse out how that applies in practice. This is because there seems to be different approaches on how to apply the standard to the extent that it would be fair to say that there are sub-standards within that standard because of the fungibility of terms like 'unjust' and 'immoral'.¹¹

Against that backdrop, this paper seeks to determine whether the *Christ of Nations* Standard is founded on the correct interpretation of the *Arbitration Act* and if it is not, to recommend a standard that is not only consistent with the Act but that also adheres to the principle of finality, thereby helping to realize the principle enumerated in *Article 159(2)(c) of the Constitution* while maintaining Kenya's public policy.

Public Policy as a ground for setting aside arbitral awards

Section 35(2) of the Arbitration Act lists the grounds under which an arbitral award can be set aside including fraud and incapacity.¹² *Section 35(2)(b) of the Act* goes on to state that an award can be set aside for being contrary to public policy.¹³ That mirrors *Article V(2)(b) of the New York Convention* which states that the recognition or enforcement of an award may be refused if doing so would be contrary to the public policy of that country.¹⁴

Notably, the treaty not only fails to define what public policy is but it also shifts the responsibility of setting the parameters of the ground to the states.¹⁵ That is evident from the fact that it states that an award is void if it violates the public policy of the enforcing state which implies that the mandate of delineating the contours of the ground falls on

¹⁰ See: *Jambo Biscuits(K) Ltd & 3 others v Jambo East Africa Ltd & 3 Others* [2021] KEHC 3209 (KLR); *Charles Gatheca v Atlas Copco Cmt & Ct Management Ltd & 2 others* [2019] KEELRC 1060 (KLR); *Nanyuki Ranching Ltd v Rockstocks Holding Ltd* [2024] KEHC 9220 (KLR); *Supra note 2*

¹¹ See *Jambo Biscuits(K)Ltd & 3 others v Jambo East Africa Ltd* which set aside a decision for simply being an 'affront to justice' because the arbitrator 'disregarded the intention of the parties as set out in the contract' hence anchoring the test to the parties in contrast to *Glencore Grant Ltd v TSS Grain Millers Ltd* [2001] 1 KLR 606 where the court held that the award had to, "offend the conceptions of our justice in such a manner that enforcement thereof would stand to be offensive to the public."

¹² *Arbitration Act, Revised 2012 (1995) s 35(2)*

¹³ *Arbitration Act, Revised 2012 (1995) s 35(2)(b)*

¹⁴ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 (New York Convention) art V(2)(b)*

¹⁵ *Supra note 8*

that state.¹⁶ The *Arbitration Act* however likewise does not define the term.¹⁷ Some commentators have argued that the reason for that is that public policy is a fluid term that is constantly evolving with changes in the state and hence it is difficult to affix a long-standing definition.¹⁸ Consequently, it has been posited that most states leave that role to the courts as they are in a better position to formulate the definition through precedents which are more flexible and can account for the said changes.¹⁹

Whether that is the case or not, it is undeniable that Parliament left the role of defining the term to the courts because of the broad and vague formulation of the term in the statute. In any regard, even if inadvertent, courts ultimately have the constitutional mandate to interpret laws²⁰ and hence when a law is ambiguous, they bear the responsibility of providing guidance on how that law will be applied.

Analysis

The articulation of the standard for the public policy ground in *Ongata Works limited* was, as aforementioned, founded upon the *Christ of All Nations v Apollo Insurance* decision, which is the leading authority on how to evaluate a case under the public policy limb,²¹ where *Ringer J* elucidated that an arbitral award is against public policy if it violates the law, whether written or unwritten, including the constitution, is detrimental to Kenya's national interests or is 'unjust' or 'immoral'.²²

It is therefore worth analyzing the propriety of the *Christ of All Nations* standard to evaluate whether it constitutes the best reading of the public policy ground under *Section 35(2)(b) of the Arbitration Act*. Upon doing so, this paper concludes that the standard is respectfully erroneous as it makes some provisions of the Act redundant whilst undermining the principle of finality.

Redundancy

It is important, at the onset, to note that the *Arbitration Act* bars courts from reconsidering the factual or legal findings of the arbitrator.²³ That can be inferred from

¹⁶ *Supra* note 15

¹⁷ *Supra* note 8

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ *Onesmus Musyoki Kilonzo v Nation Media Group Ltd [2014] KEIC 117 (KLR)* where the court held that, "the interpretation of the laws is the proper and peculiar province of the courts."

²¹ *Mall Developers Ltd vs Postal Corporations of Kenya [2013] eKLR*

²² *Supra* note 7

²³ *Supra* note 4

Section 39 of the Act which states that courts can consider legal findings by the arbitrator where both parties have consented to it.²⁴ That precludes consideration of legal findings as it conditions the authority of a court to consider legal findings upon the meeting of a prerequisite (consent by both parties) which implies that where the parties have not consented, the court lacks the authority to consider such findings.

That is the most natural reading of that provision as concluding otherwise would render it superfluous. After all, what would be the use of that provision if courts could otherwise review the legal findings of the arbitrator? It follows therefore that the provision was made on the premise that courts lack jurisdiction to consider the legal findings of an arbitrator and hence the need for that exception. The position that any legal error is against public policy, as *Christ of All Nations* holds,²⁵ would therefore make that provision redundant.

That position is fortified by *Section 35(1) of the Arbitration Act* which states that the grounds set out thereunder are exhaustive.²⁶ *Section 35(2)* then goes on to list multiple grounds including fraud and public policy but specifically omits both legal and factual errors.²⁷ That brings to the fore the *expressio unius est exclusio alterius* rule which, as was noted by the Court of Appeal in *Kenya Revenue Authority v Ndegwa*, posits that the express mention in a statute of one or more things in a class implies that other things in the same class that are not mentioned are excluded.²⁸

By stating various grounds for setting aside an arbitral award and leaving both legal and factual errors out of the list, the *expressio unius* rule therefore makes clear that the intention was to include the listed grounds to the exclusion of the omitted ones. Accordingly, it is clear that Parliament's intention was to deprive courts of jurisdiction to review both factual and legal findings.

²⁴ *Arbitration Act, Revised 2022 (1995) s 39*

²⁵ *Supra* note 7

²⁶ *Arbitration Act, Revised 2022 (1995) s 35(1)* which states that, "recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3)." That implies that the grounds set out in *Section 35(2) and 35(3)* are exhaustive.

²⁷ *Arbitration Act, Revised 2022 (1995) s 35(1)*

²⁸ *Kenya Revenue Authority v Ndegwa [2025] KECA 510 (KLR)*

That is especially so because appellate courts ordinarily have jurisdiction to review legal and factual findings.²⁹ That is particularly true with regard to legal findings as courts have the constitutional mandate of interpreting the law.³⁰ It is therefore quite notable for Parliament to restrict the jurisdiction of courts in reviewing arbitral awards to a set list and leave legal findings out of it. That is as clear as Parliament could be that it did not want courts to interfere with the legal findings of arbitral tribunals.

Further reinforcing that point, *Section 10 of the Arbitration Act* states that, “*except as provided in this Act, no court shall intervene in matters governed by this Act.*”³¹ The import of that is that courts can only intervene with arbitral awards to the extent strictly provided by the Act and because, as noted, the Act plainly precludes courts from generally interrogating legal and factual findings, the reasoning in *Christ of All Nations*, to the extent that it opens the doors for arbitral awards to be set aside for all legal errors and ‘unjust’ factual errors,³² is erroneous.

In sum, the decision in *Christ of All Nations* renders *Section 39 of the Arbitration Act* inoperative by making every legal error reviewable by the courts hence negating the need for consent. Furthermore, it enables courts to delve into factual issues without consent if they conclude that the factual findings are ‘unjust’ or ‘immoral’ which again renders the provision otiose. That approach goes against the most basic rule of statutory interpretation: that courts should, to the extent possible, try to give effect to every statutory provision.³³

Moreover, it trivializes Parliament's choices in drafting *Section 35(2) of the Arbitration Act*. Parliament could have easily stated that legal and factual findings are subject to review by courts. It makes little sense for Parliament to create a separate and vague public policy exception as a means of permitting the review of legal and factual errors rather than simply stating that outright. Nothing would have been simpler if that had been their intention. They however chose not to, which is a policy choice that ought to be respected.

²⁹ *Simon Kyunguti v Krushali Enterprises Ltd* [2019] KEHC 9902 (KLR) where Odunga J (as he then was) noted that, “*this Court is under a duty to delve at some length into the factual details and revisit the facts as presented in the trial Court, analyse them and come to independent conclusions.*”

³⁰ *Supra* note 21

³¹ *Arbitration Act, Revised 2022 (1995) s 10*

³² *Supra* note 7

³³ *G.V. Akshaya, ‘Courts and Intention of Legislature Enacting the Statute’ (2017) 22(9) IOSR-JHSS 96*

And because *Section 10 of the Arbitration Act* is unequivocal that courts should not interfere with arbitral awards except as strictly prescribed by the Act,³⁴ this paper concludes that the standard set in *Christ of All Nations*, to the extent that it makes *Section 39* and *35(2)* of the Act superfluous, whilst opening the doors for arbitral awards to be set aside for all legal errors and ‘unjust’ or ‘immoral’ factual determinations,³⁵ is respectfully erroneous.

Principle of Finality

The prohibition by Parliament on the review of legal and factual findings by the courts was not without reason: it was intended to preserve arbitration as an efficient alternative dispute resolution mechanism by maintaining the principle of finality.³⁶ The hallmark of arbitration lies in its viability as an alternative to litigation by providing for a timely and efficient means of resolving disputes.³⁷ As was noted in *Board of Governors Ng’iya Girls High School v Meshack Ochieng’ t/a Mecko Enterprises*, when parties opt for arbitration, they are essentially telling the court that they want the process of resolving their disputes to be final and binding, to prevent them from getting engaged in the rigmaroles of litigation.³⁸

The principle was espoused by the Supreme Court in *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd* where the court stated, “We note in this context that the *Arbitration Act*, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the court process...it was also reiterated that the limitation of the extent of the Courts’ interference was to ensure an expeditious and efficient way of handling commercial disputes. Similarly, the *Model Law* also advocates for limiting and clearly defining Court involvement in arbitration. This reasoning is informed by the fact that parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.”³⁹

That position is consistent with the *UNCITRAL Model Law on International Commercial Arbitration* and is incorporated into Kenya’s laws by dint of *Section 32(a) of the Arbitration Act* which states that, “except as otherwise agreed by the parties, an arbitral award is final and

³⁴ *Supra* note 32

³⁵ *Supra* note 7

³⁶ Melisa Ng’ania, ‘Review of The Principle of Finality in Arbitral Proceedings Under Section 39 (3) (B) of The Arbitration Act, 1995’ (2018) 2(2) *Journalofcmsd* 46

³⁷ *Supra* note 5

³⁸ *Board of Governors Ng’iya Girls High School v Meshack Ochieng’ t/a Mecko Enterprises* [2014] eKLR

³⁹ *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR

*binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act.*⁴⁰

Whether the Christ of All Nations Standards undermines the Principle of Finality

It is evident that the conception of the public policy ground articulated in *Christ for All Nations* undermines the principle of finality. As was noted, the decision held that an award is against public policy if there is any error of law, a violation of the constitution or if the decision was against morality or justice.⁴¹ That standard undermines the finality principle as it effectively opens the floodgates with regard to court interventions as it allows litigants to challenge arbitral awards that have any legal error or that are against morality or justice, which is a fungible standard.⁴²

In actual sense, that standard is actually lower than the reasonableness standard used in judicial review.⁴³ That is because it is less stringent as it allows courts to evaluate whether a decision was ‘fair’ or ‘just’,⁴⁴ which calls for a more subjective analysis. That is notwithstanding the fact that the statutes that govern those proceedings allow for review of legal errors⁴⁵ whilst the *Arbitration Act* specifically limits the review of both legal and factual findings.⁴⁶

In fact, even if one were to concede, for argument’s sake, that the correction of errors of law was permissible, allowing the re-evaluation of decisions that are against ‘morality and justice’ is a step too far. That is because it allows courts to re-examine factual findings as one cannot reasonably determine whether something was unjust or immoral without delving into the facts of the case.

That undermines the finality of arbitral awards as courts can not only reconsider legal findings but they can also re-evaluate factual determinations. That effectively transforms the limited review envisioned by Parliament into a de facto appellate process which is

⁴⁰ *Arbitration Act, Revised 2022 (1995) s 32(a)*

⁴¹ *Supra* note 7

⁴² *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U.S. 576 (2008) where the US supreme court noted that, allowing for review of decisions for errors of law and factual findings that were not supported by ‘substantial evidence’, “opens the door to the full-bore evidentiary appeals that render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”

⁴³ *Supra* note 6

⁴⁴ *Supra* note 7

⁴⁵ *The Fair Administrative Action Act, Revised 2022 (2015) s 7(d)*

⁴⁶ *Supra* note 4

precisely what Parliament sought to avoid, and what *Christ for All Nations* inadvertently enables as will be demonstrated by decisions by the courts applying the standard.⁴⁷

In *Ongata Works*, the court set aside an arbitral award because the costs awarded were unreasonable which, in the court's view, violated *Rule 38(1) of the ICC Rules* that mandates that costs should be reasonable.⁴⁸ In doing so, the court, while correcting an alleged error of law, pivoted to the facts to compare the costs vis-à-vis the damages awarded so as to determine whether the costs were unreasonable.

That illustrates the slippery slope that allowing correction of legal errors leads to because, as was noted by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji*, questions of law include mixed questions of law and fact which entail, “*the application of the Constitution or the law to a set of facts.*”⁴⁹ One cannot, after all, ensure compliance with the law without applying it to the facts like in that case where the court considered the facts to determine whether the costs were ‘unreasonable.’⁵⁰

Additionally, in *Jambo Biscuits(K) Ltd v Jambo East Africa Ltd*, the Court held that an award violated public policy as the arbitrator ‘*did not apply the principles of reasonableness and fairness when assessing the damages.*’⁵¹ The judge noted that the award was so much that it did not create a conducive environment for the applicant to operate which was tantamount to taking away their business and hence infringing on *Article 40 of the Constitution.*⁵²

That again demonstrates this paper's point as a court cannot reasonably determine whether the constitution was violated without conducting a merit-based analysis of the facts. By invoking the ‘constitutional violation’ limb therefore, the court was able to re-examine the arbitrator's factual determinations on damages. That is especially concerning because the case relates to damages. Damages awarded by the trier of facts are ordinarily reviewed deferentially by appellate courts even in normal litigation.⁵³ For a court to

⁴⁷ *Supra* note 11

⁴⁸ *Supra* note 2

⁴⁹ *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others* [2014] eKLR

⁵⁰ *Supra* note 2

⁵¹ *Jambo Biscuits(K) Ltd & 3 others v Jambo East Africa Ltd & 3 Others* (2021) KEHC 3209 (KLR)

⁵² *Ibid*

⁵³ *Catholic Diocese of Kisumu v Tete* [2004] eKLR where the Court of Appeal held that, “an appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure...it can justifiably interfere with the quantum of damages awarded only if it is satisfied that the trial court applied the wrong principles.” See also; *Kireria v Kithinji* [2025] KECA 178 (KLR)

therefore interfere with it in the context of an arbitral award is quite telling as if it can do that with regard to damages, in what context can it not?

Furthermore, in *Nanyuki Ranching Ltd v Rockstocks Holding Ltd*, Mabeja J held that the award was contrary to public policy because the arbitrator had, ‘*interpreted and enforced a contract selectively*.’⁵⁴ He then noted that he could not close his eyes to a decision that was an affront to justice and disregarded the intention of the parties as set out in the contract.⁵⁵

The judge in that case used the ‘unjust’ limb articulated in *Christ of All Nations* to interrogate contractual provisions. That reinforces the point that giving court authority to delve into the merits of the case as long as the arbitral award is ‘unjust’ gives judges unbounded appellate review of arbitral decisions. That is because that is a vague standard with no limiting principle that calls for the exercise of discretion to determine what is ‘unjust’.

It is also fungible as it has no intelligible principle to guide courts in its application and hence different judges are likely to come to different conclusions on what is just.⁵⁶ That is detrimental to arbitration as an alternative dispute resolution mechanism as why would anyone want to arbitrate when the level of appellate scrutiny is dependent on the whims of the judge they are before?

That is capped off by *Charles Gatheca v Atlas Copco Cmt & Ct Management Ltd* where the court held that whilst the arbitrator justified her decision, she had misdirected herself by, ‘*ignoring clear evidence and submissions presented by both sides*.’⁵⁷ The court went on to note that the arbitrator refused to enforce the contract that was presented by the parties and instead, ‘*re-wrote it by deciding which parts to enforce and which to leave out*,’ which was against public policy.⁵⁸

The court in that case did not even try to cabin its reasoning on constitutional violations, legal errors, justice or morality. It outright did a merits review faulting the arbitrator for how they had evaluated the evidence before them. Such reasoning, with respect,

⁵⁴ *Nanyuki Ranching Limited v Rockstocks Holding Limited* [2024] KEHC 9220 (KLR)

⁵⁵ *Ibid*

⁵⁶ *Supra* note 12

⁵⁷ *Charles Gatheca v Atlas Copco Cmt & Ct Management Ltd & 2 others* [2019] KEELRC 1060 (KLR)

⁵⁸ *Ibid*

stretches the notion of public policy beyond recognition, effectively transforming applications to set aside arbitral awards into vehicles for appellate review.

By correcting errors of law and ‘unjust’ decisions, the judges in those cases delved into the merits without any cognizable limiting principle, set aside factual findings, re-interpreted contracts and even went as far, in *Charles Gatheca*, as re-evaluating the evidence presented before the arbitrator. In doing so, they assumed appellate roles, which undermined the principle of finality as they provided litigants with an incentive for parties to appeal. That was respectfully in error as what is the point of arbitration if the process will become as convoluted and tiered as ordinary litigation?

To that end, I can do no better than to reiterate the words of *Tuiyott J* (as he then was) in *Maban Ltd v Villa Care Ltd* where he stated, “*It may well be that the conclusion reached by the Arbitrator is not sustainable in law yet the parties made a covenant to each other that the decision of the Arbitrator would be final and binding on them. It must have been within the contemplation of the parties that the Arbitrator may sometimes get it wrong but they agreed to bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in Section 35 of the Act.*”⁵⁹

Recommended standard

Whilst the holding in *Christ of All Nations* undermines the principle of finality and is inconsistent with the *Arbitration Act*, it cannot be said to be an implausible reading of the ground. That is because one could fairly argue that decisions that contravene the law or the constitution or that are against justice or morality offend Kenya’s public policy as it is undoubtedly Kenya’s public policy that its laws should be followed.

That argument however also cuts the other way as the *Arbitration Act* is among the laws of Kenya and it should likewise be followed. In any regard, there are, as was noted by the Court of Appeal in *Kenya Shell Ltd v Kobil Petroleum Ltd*, competing public policy interests with regard to arbitration as it is in the public interest that there should be an end to litigation and the *Arbitration Act*, consistent with *Article 159(2)(c) of the Constitution’s* mandate to promote ADR,⁶⁰ underscored that policy.⁶¹

On the interpretation of the public policy ground, this paper recommends a narrow construction of that provision to promote the principle of finality and hence reclaim

⁵⁹ *Maban Ltd v Villa Care Ltd* [2019] KEHC 1341 (KLR)

⁶⁰ *The Constitution of Kenya* (2010) art 159(2)(c)

⁶¹ *Kenya Shell Ltd v Kobil Petroleum Ltd* [2006] KECA 389 (KLR)

Article 159(2)(c) of the Constitution which mandates the promotion of ADR.⁶² That position is consistent with UNCITRAL Model Law on International Commercial Arbitration as was noted in *The Report of the United Nations' Commission on International Trade Law on the work of its session on the Model Law* which states: "It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside."

On what that would look like, this paper will begin by examining the jurisprudence of both foreign courts and domestic courts on narrow interpretations of the public policy ground. In England, *Moore-Bick J (as he then was) in Cuflet Chartering v Carousel Shipping Co Ltd* held that, "although considerations of public policy can never be exhaustively defined, they should be approached with extreme caution ... It has to be shown that the enforcement of the award would be clearly injurious to the public good or that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."⁶³

In *Parsons v Société Générale*, the United States Court of Appeals for the Second Circuit stated that the enforcement of an arbitral award could be denied on the basis of public policy only if such enforcement would, "violate the forum state's most basic notions of morality and justice."⁶⁴

Within our borders, in *Glencore Grant Ltd v TSS Grain Millers Ltd* it was held that an award was against public policy if it was, "illegal or would violate in a clearly unacceptable manner basic and/or moral principles or values in the Kenyan society."⁶⁵ The court then went on to note that awards could also violate public policy if they, "offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive."⁶⁶

This paper agrees with those decisions to the extent that an award is against public policy if it offends the basic tenets of the state's conscience in a manner that leaving it undisturbed would adversely affect the public. That is the best elucidation of the provision as it makes it such that it is not enough for a party to show that the decision was erroneous in law, unjust or immoral: they must clearly show that the decision, if left to stand, is likely to affect other people in a way that is against the interests of the public.

⁶² *Supra* note 61

⁶³ *Cuflet Chartering v Carousel Shipping Co Ltd* [2001] 1 Lloyd's Re 707

⁶⁴ *Supra* note 9

⁶⁵ *Glencore Grant Ltd v TSS Grain Millers Ltd* [2001] 1 KLR 606

⁶⁶ *Ibid*

That makes sense from a logical standpoint as it gives meaning to the word ‘public’. That is in contrast to the *Christ of All Nations* standard which bases its analysis on how the parties are affected. That does not give effect to the ‘public’ element of the ground as how does an issue that only affects the litigants at hand impact ‘public’ policy?

To put it more succinctly, this paper agrees with the position expressed in *Mall Developers Ltd v Postal Corporation of Kenya* where *Majanja J* held that, “*Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the Claimant and the Respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy.*”⁶⁷

That would significantly limit courts’ authority to review arbitral decisions as it would establish some sort of pleading requirement which would sieve out the vast amount of cases.⁶⁸ That is due to the fact that where an applicant fails to specifically plead that the decision is likely to affect third parties in a manner that is against public interest, the court would lack the authority to interrogate the claim which would act as a check on judges.

Additionally, that standard would set a high burden that most will not be able to meet. That is because the applicant would have to show a clear nexus between the error made by the arbitrator and the undermining of public policy in a manner that affects other people (third parties) which is a difficult standard to articulate let alone prove. That will discourage most from pursuing such claims while making meritless claims stand out.

Furthermore, the standard would give notice to respondents who would be able to show why the appellant does not satisfy their burden. That is in contrast to the current position where the litigants are usually guessing what conception of the standard will be used by the court as different judges tend to have different outlooks on how to apply the *Christ of All Nations* standard.⁶⁹ That usually curtails their ability to effectively respond as one is unaware whether the judge will have an expansive or restrictive approach to the standard. The proposed standard would therefore enable respondents to effectively respond which would limit the number of successful applications.

⁶⁷ *Supra* note 22

⁶⁸ Benjamin P. Cooper, ‘*Iqbal’s Retro Revolution*’ (2011) 46 *WAKE FOREST L. REV.* 937 noting that, “Pleading is often described as the ‘gatekeeper for civil litigation.’”

⁶⁹ *Supra* note 12

In doing so, this paper does not seek to represent that the standard will not have issues in its applications. There will obviously be close calls and the lines in some cases will be murky because of the nature of the formulation. But that is not reason enough to discredit it as such is inherent in most standards used to apply terms analogous to ‘public policy’ as can be seen from the ‘public interest’ standard set by the Constitution with regard to the Supreme Court’s jurisdiction⁷⁰ and the *Nyutu Agrovet* standard which grants the Court of Appeal residual jurisdiction in cases that are so, ‘grave, manifestly wrong and have completely closed the door of justice.’⁷¹

Those standards call for the exercise of judicial judgement which whilst having the possibility of causing inconsistencies is consistent with the *Arbitration Act* as, as aforementioned, Parliament deliberately left the responsibility of determining what constituted public policy to the courts.⁷²

Conclusion

This paper concludes that allowing the re-evaluation of legal and factual findings by courts under the guise of upholding Kenya's public policy not only undermines the principle of finality but is also inconsistent with the *Arbitration Act*.

It therefore recommends that the standard for evaluating public policy cases should be that courts will only set aside an arbitral award if it can be clearly shown that letting the award stand would directly affect other people in a manner that is against the interests of the public. That would sieve out most of those cases either for the failure to plead or for failing to meet that high threshold which would promote the principle of finality.

That would in turn help in realizing the dictates of *Article 159(2) of the Constitution* by fronting arbitration as an efficient alternative dispute resolution (ADR) mechanism hence enhancing access to justice, which is a fundamental right,⁷³ whilst safeguarding the nation’s interests.

⁷⁰ *The Constitution of Kenya (2010) art 163(4)(b)*

⁷¹ *Supra note 40*

⁷² *Supra note 8*

⁷³ *The Constitution of Kenya (2010) art 48*

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Mediation in the African Cultural Context: Listening to the Unsaid, Shared Norms and Ubuntu

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Abstract

This paper critically examines the place and role of mediation in the African cultural context. The paper posits that mediation holds a unique and important place in Africa. It notes that mediation has been practiced in Africa since antiquity. Further, the paper observes that mediation is an appropriate process towards managing conflicts and disputes in Africa since it is well anchored in the culture and customs of the people of Africa. Despite its suitability, the paper notes that the current practice of mediation in Africa faces several challenges. The paper examines the key challenges facing the mediation landscape in Africa. In light of these concerns, the paper discusses how mediation can be strengthened in the African cultural context by listening to the unsaid, shared norms and embracing Ubuntu.

1.0 Introduction

Mediation is one of the processes commonly referred to as Alternative Dispute Resolution (ADR). The term ADR covers a set of mechanisms that are applied in managing disputes that may be linked to but function outside formal court litigation processes¹. According to the United Nations, ADR (sometimes also referred to as “Appropriate Dispute Resolution”) is a general term, used to define a set of approaches and techniques aimed at resolving disputes in a non-confrontational manner². 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 resolution³. However, it has been noted that in some ADR processes such as negotiation, parties to

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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 26/12/2025)

³ JAMS ADR., ‘What is ADR’ Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 26/12/2025)

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 party⁴. ADR processes include negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others⁵.

Mediation is a process of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussions and the flow of information, thus aiding in the process of reaching an agreement⁶. In addition, mediation has also been defined as a process wherein parties to disputes or conflicts meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences⁷. It has been observed that mediation is usually a continuation of the negotiation process since it arises where parties to a conflict have attempted negotiations, but have reached a deadlock⁸. As a result, parties involve a third party known as a mediator to assist them continue with the negotiations and ultimately break the deadlock⁹. Mediation can therefore be described as negotiation between two or more parties facilitated by an agreed-upon third party¹⁰.

It has been pointed out that ADR processes including mediation are appropriate in conflict management¹¹. ADR processes contain several key attributes and provide numerous advantages such as informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost- effective management of disputes¹². In particular, it has been observed that mediation is a voluntary and consensus-based process and it therefore leads to resolutions and outcomes that are longer lasting and more sustainable than adversarial processes or otherwise imposed

⁴ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

⁵ Ibid

⁶ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition., 2017

⁷ Mediation Defined: What is Mediation?., Available at <https://www.jamsadr.com/mediation-defined/> (Accessed on 26/12/2025)

⁸ Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289

⁹ Ibid

¹⁰ What is Mediation?., Available at <https://www.pon.harvard.edu/tag/mediation/> (Accessed on 26/12/2025)

¹¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹² Ibid

outcomes such as litigation and arbitration¹³. Further, it has been argued that mediation promotes a culture of fair, just and amicable management of disputes while also fostering inclusivity, collaboration and participation in decision-making processes¹⁴.

Due to the foregoing attributes and advantages, mediation alongside other ADR processes have been embraced both globally and at national levels. For example, at the global level, the *Charter of the United Nations*¹⁵ encourages a peaceful approach to management of conflicts amongst states. 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 choice¹⁶ (Emphasis added). Further, at a national level, the *Constitution of Kenya*¹⁷ mandates courts and tribunals to promote ADR mechanisms including reconciliation, *mediation*, arbitration and Traditional Dispute Resolution Mechanisms (TDRMs) (Emphasis added)¹⁸. Embracing ADR processes including mediation is therefore key towards fostering appropriate management of conflicts and disputes for peace, justice and development.

This paper critically examines the place and role of mediation in the African cultural context. The paper posits that mediation holds a unique and important place in Africa. It notes that mediation has been practiced in Africa since antiquity. Further, the paper observes that mediation is an appropriate process towards managing conflicts and disputes in Africa since it is well anchored in the culture and customs of the people of Africa. Despite its suitability, the paper notes that the current practice of mediation in Africa faces several challenges. The paper examines the key challenges facing the mediation landscape in Africa. In light of these concerns, the paper discusses how mediation can be strengthened in the African cultural context by listening to the unsaid, shared norms and embracing Ubuntu.

¹³ United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners' Available at https://wedocs.unep.org/bitstream/handle/20.500.11822/9294/-Natural_resources_and_conflic.pdf?sequence=2&isAllowed= (Accessed on 26/12/2025)

¹⁴ Singapore International Mediation Centre., 'Mediation and the Rule of Law' Available at <https://simc.com.sg/insights/mediation-and-rule-law> (Accessed on 26/12/2025)

¹⁵ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

¹⁶ Ibid, article 33 (1)

¹⁷ Constitution of Kenya., 2010., Government Printer, Nairobi

¹⁸ Ibid, article 159 (2) (c)

2.0 Mediation in the African Cultural Context: Promises and Pitfalls

ADR mechanisms including mediation have been practiced in Africa since time immemorial. It has been observed that ADR mechanisms in Africa trace back to the very origin of mankind¹⁹. These mechanisms are well anchored in the culture and customs of the people of Africa²⁰. Conflict management is a cultural-specific phenomenon. For example, it has been observed that cultures are embedded in every conflict since conflicts arise in human relationships which relationships are defined by culture²¹. Therefore, culture affect the ways we name, frame, blame, and attempt to tame conflicts²². The nature of conflict thus varies across cultures where it may be emphasized in one culture and ignored in another²³. Consequently, in some cultural contexts, conflicts may be seen as an undesirable and their effective resolution is prioritised for peace and harmony. For example, collectivistic cultures such as those found in Africa prefer conflict management strategies that are harmony-inducing and therefore embrace non-adversarial techniques towards conflict resolution²⁴. On the other hand, individualistic cultures such as those found in Western societies prefer confrontational approaches to conflict management characterized by adversarial techniques over non- adversarial techniques due to their focus on individuals' rights and interests²⁵.

Culture is therefore part and parcel of conflict management. Most African cultures are communal/collectivistic in nature. Individuals therefore ascribe to collective/communal values including respect and honor for elders, unity, cooperation, forgiveness, harmony, truth, honesty, *Ubuntu/Utu*, and peaceful co-existence²⁶. In particular, the collective philosophy of *Ubuntu/Utu* is inherent in almost all African cultures²⁷. This philosophy

¹⁹ 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 27/12/2025)

²⁰ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

²¹ LeBaron. M., 'Culture and Conflict.' Available at https://www.beyondintractability.org/essay/culture_conflict (Accessed on 27/12/2025)

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²³ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

²⁴ Ibid

²⁵ Ibid

²⁶ Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015

²⁷ Mugumbate. J., & Nyanguru. A., 'Exploring African Philosophy: The Value of Ubuntu in Social Work.' Available at <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=4272&context=sspapers&httpsredir=1&referer#:~:text=Ubuntu%20can%20best%20be%20described,ngumuntu%20ngabantu%20in%20Zulu%20language> (Accessed on 27/12/2025)

emphasises harmony/togetherness over individual interests²⁸. Ubuntu/Utu urges Africans to uphold values that promote the greater good of the community including sympathy, compassion, benevolence, solidarity, hospitality, generosity, sharing, openness, affirming, being available, kindness, caring, harmony, interdependence, obedience, collectivity and consensus²⁹. It has been observed that *Ubuntu/Utu* deters vengeance, confrontation and retribution and on the other hand values life, dignity, compassion, humaneness, harmony and reconciliation³⁰.

Conflict management in the African cultural context is therefore guided by the African philosophy of Ubuntu/Utu. Conflicts in African cultures are viewed as negative occurrences that can undermine peace, harmony and social cohesion³¹. African societies have therefore developed appropriate conflict management strategies in order to mitigate the impact of conflict on social cohesion³². Conflict management in African societies has since time immemorial taken the form of informal negotiation, mediation, reconciliation and arbitration among other techniques³³. It has been observed that these approaches are anchored in the culture and customs of the people of Africa and are considered appropriate in managing disputes 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*³⁴.

Mediation is therefore an appropriate tool of conflict management in the African cultural context. It has been observed that ADR techniques including mediation are suitable in conflict management in African societies since they fit well within the concepts of justice in Africa and its core values of peace, truth, harmony and reconciliation³⁵. In particular, it has been pointed out that due to the oneness inherent in African societies, individuals are more willing to resolve their differences amicably in order to avoid affecting

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

³¹ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit

³² 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 27/12/2025)

³³ Ibid

³⁴ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

³⁵ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

relationships³⁶. Mediation therefore provides an avenue for disputes to be resolved through collaboration towards maintaining and even strengthening relationships³⁷. Further, since mediation in the African cultural context is facilitated by authorities such as the council of elders who are respected and acknowledged by every person, parties to a conflict are usually more willing to work towards a peaceful resolution³⁸. Due to its rich history and numerous advantages, mediation has been described as a fundamental practice of conflict resolution in the African cultural context³⁹. Mediation in Africa has roots extending to pre-colonial times and it remains deeply embedded in the continent guided by values such as *Ubuntu*, humanity and compassion⁴⁰. Despite its efficacy in the African cultural context, the current practice of mediation in the continent faces several challenges. For example, mediation is seen as an alternative rather an appropriate mechanism of conflict management⁴¹. This limits its use in enhancing access to justice in the modern era with focus on adjudicative outcomes undermining consensual and reconciliatory approaches such as mediation which are preferred by African communities⁴². Further, it has been observed that attempts to formalize and integrate mediation with judicial processes can lead to loss of its key attributes such as confidentiality, informality and privacy which have been fundamental for the success of mediation in the African context for many centuries⁴³. In addition, it has been noted that exclusion of key parties such as women undermines the viability and effectiveness of mediation processes in Africa⁴⁴.

³⁶ World Mediation Organization., 'The Influence Of Culture On Mediation In The African Context' Available at <https://worldmediation.org/the-influence-of-culture-on-mediation-in-the-african-context/> (Accessed on 27/12/2025)

³⁷ Ibid

³⁸ Ibid

³⁹ Mediation in African Communities: A Time-Honoured Tradition of Conflict Resolution., Available at <https://www.linkedin.com/pulse/mediation-african-communities-time-honoured-djvof/> (Accessed on 27/12/2025)

⁴⁰ Ibid

⁴¹ Elachi. A.J., 'African Lawyers and Alternative Dispute Resolution' Available at <https://lawyersofafrica.org/wp-content/uploads/2019/08/African-Lawyers-and-Alternative-Dispute-Resolution.pdf> (Accessed on 27/12/2025)

⁴² Our Mediation Heritage., Available at <https://www.conflictdynamics.co.za/Blog/Our-Mediation-Heritage-%20?swcfpc=1> (Accessed on 27/12/2025)

⁴³ Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Available at <https://kmco.co.ke/wp-content/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-Dispute-Resolution-in-Kenya-Prospects-and-Challenges.pdf> (Accessed on 27/12/2025)

⁴⁴ World Mediation Organization., 'The Influence Of Culture On Mediation In The African Context' Op Cit

It is necessary to address the foregoing challenges in order to strengthen mediation in the African cultural context for enhanced access to justice.

3.0 Strengthening Mediation in the African Cultural Context

Mediation is a fundamental conflict management process in the African context. In African societies, it is a customary and an everyday affair for people to sit down informally and resolve their differences under the guidance of council of elders among other institutions which act as mediators⁴⁵. Mediation is well-entrenched in the culture and customs of the people of Africa⁴⁶. By focusing on peace, harmony, justice and reconciliation, mediation adheres to the African philosophy of *Ubuntu*/Utu⁴⁷. Embracing mediation in the African cultural context is therefore vital in strengthening access to justice in the continent.

In order to effectively harness mediation in the African cultural context, it is imperative to involve all stakeholders in mediation processes⁴⁸. It has been pointed out involving multiple stakeholders in mediation processes especially for group or communal conflicts can enhance the outcomes and ensure compliance with decisions⁴⁹. The participation of all stakeholders in mediation processes including women is key in ensuring that all voices are heard for sustainable outcomes⁵⁰. Through this approach, it is possible to address the root causes of conflicts and afford parties an opportunity to sustain and improve their relationships⁵¹. Further, inclusive mediation processes can leverage on differentiated knowledge and diverse perspectives, including existing coping capacities and sources of resilience for durable outcomes and long-lasting peace⁵².

It is also imperative to uphold shared norms for successful mediation in the African context. For example, African societies adhere to communal norms and values such as

⁴⁵ Muigua, K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ World Mediation Organization., 'The Influence Of Culture On Mediation In The African Context' Op Cit

⁴⁹ Ibid

⁵⁰ United Nations Environment Programme., 'Women, Natural Resources and Peace' Available at <https://www.unep.org/topics/disasters-and-conflicts/environment-security/women-natural-resources-and-peace> (Accessed on 27/12/2025)

⁵¹ Ibid

⁵² Bridging the Gap: Gender-inclusive multi-track diplomacy as environmental peacebuilding., Available at <https://www.ecosystemforpeace.org/compendium/inclusion-3> (Accessed on 27/12/2025)

unity, cooperation, forgiveness, harmony, truth, honesty, justice and peace⁵³. By focusing on collaboration and cooperation, mediation is able to give effect to shared norms in the African cultural context⁵⁴. It has been observed that mediation fits well within the concepts of justice in Africa and its core values of peace, truth, harmony and reconciliation⁵⁵. It is therefore necessary to reframe mediation in the African context and embrace it as an appropriate and not alternative process⁵⁶. Through this, it is possible to ensure that mediation is given prominence in Africa towards upholding shared norms and values⁵⁷.

In addition, there is need to embrace the African philosophy of *Ubuntu* for effective mediation. It has been observed that *Ubuntu* focuses on harmony/togetherness over individual interests⁵⁸. In the context of conflict management, *Ubuntu* deters vengeance, confrontation and retribution and emphasises compassion, humaneness, harmony and reconciliation⁵⁹. *Ubuntu* is part and parcel of conflict management in the African cultural context since it emphasises restorative justice (harmony in the community), rather than punitive justice⁶⁰. It is therefore necessary to integrate Ubuntu in mediation in the African cultural context by prioritising cooperation, reconciliation, harmony, and peaceful co-existence among individuals and within communities⁶¹.

4.0 Conclusion

Mediation is an appropriate and effective mechanism in conflict management in the African cultural context. It is therefore necessary to listen to the unsaid through inclusive

⁵³ Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Op Cit

⁵⁴ Mediation in African Communities: A Time-Honoured Tradition of Conflict Resolution., Op Cit

⁵⁵ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁵⁶ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

⁵⁷ Ibid

⁵⁸ Mugumbate. J., & Nyanguru. A., 'Exploring African Philosophy: The Value of Ubuntu in Social Work.' Op Cit

⁵⁹ Ibid

⁶⁰ Van Norren. D., 'African Ubuntu and Sustainable Development Goals: seeking human mutual relations and service in development' Available at <https://www.tandfonline.com/doi/full/10.1080/01436597.2022.2109458#abstract> (Accessed on 27/12/2025)

⁶¹ Motsisi. M., 'Mediation & Ubuntu' Available at <https://www.mmatheomotsisi.com/mediation-ubuntu/#:~:text=Ubuntu%20as%20the%20Primeval%20Model,promotes%20genuine%20trust%20and%20openness> (Accessed on 27/12/2025)

mediation processes, uphold shared norms and embrace *Ubuntu* towards fostering mediation in the African cultural context⁶². Harnessing mediation in the African cultural context is possible towards sound conflict management for peace, justice and development.

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⁶² Motsisi. M., 'Mediation & Ubuntu' Op Cit

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The Capitalization of Global Precedents:
Building A Kenyan Model of Introducing
Artificial Intelligence (AI) Into Arbitration:
Kola Muwanga, Frida Njeru &
Grace Wambui

(2026)14(1) *Alternative Dispute Resolution*

The Capitalization of Global Precedents: Building A Kenyan Model of Introducing Artificial Intelligence (AI) Into Arbitration

By: Kola Muwanga, Frida Njeru** & Grace Wambui****

Abstract

The fourth wave of tech change has put artificial intelligence right in the spotlight, reshaping how law works and how conflicts get solved. Because arbitration can bend without breaking, it's a solid fit for using AI to speed things up, guess outcomes better, or open doors for more people. Even though places like Singapore, the UK, and the US already test AI tools in arbitration handling tasks from organizing cases to reading files or forecasting results Kenya's efforts are still just getting started. To close this gap, this study builds a tailored approach for Kenya, borrowing smart ideas from abroad but fitting them into local laws, values, and tech reality.

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A close look at global examples shows how Kenya's laws, along with key tech policies are shaping up when it comes to artificial intelligence. Instead of just listing rules, this work pulls in views from universities, trade groups, and tech insiders who have weighed in on real-world use. While court digitization pushes forward, schools experiment with smart systems, and leaders back high-tech reforms, there's still momentum building slowly. Yet problems pop up now and then especially around unfair automated decisions, lack of human checks, weak online defenses or whether machine-backed rulings actually hold up. The research introduces a shared-action plan that rolls out step by step, builds skills over time, keeps ethics in check, while matching existing laws. It suggests crafting AI dispute rules tailored to Kenya, hands-on learning courses for users, testing systems through small-scale launches, also teaming up across government and business lines for long-term use.

This paper recommends legal standards to be adjusted locally instead of copying others using worldwide examples. This will help Kenya lead East Africa in technology driven conflict solving, boosting v speed, reach, and trust across its dispute processes. In conclusion, making AI work well in Kenya's arbitration system means focusing on people while staying rooted in local realities mixing new ideas with clear rules, fair treatment, and legal standard.

1.0 Introduction

As artificial intelligence rapidly transforms organizational operations, its impact on legal processes particularly dispute resolution continues to intensify.¹ Across jurisdictions, arbitration institutions increasingly deploy predictive analytics, automated document review systems, and intelligent case management tools to accelerate proceedings, minimise human error, and enhance access to justice, signalling a global shift in dispute handling practices.² This worldwide evolution provides an important backdrop for countries such as Kenya, where public sector digitisation initiatives, judicial ICT reforms, and university level technological adoption continue to expand. While technologically advanced regions experiment with AI enabled arbitration platforms, Kenya is simultaneously improving digital infrastructure, updating regulatory frameworks, and

¹ Thomas Schultz, Algorithmic Dispute Resolution: The Automation of Justice (2024) 40 Arbitration International

²Remy Gerbay and Samuel Pye, Artificial Intelligence and International Arbitration: A Guide for Practitioners' (2023) ICC Dispute Resolution Bulletin 45; International Chamber of Commerce, ICC Commission Report on Dispute Resolution and Digital Transformation (2022).

exploring ethical approaches to embedding AI within legal systems.³ Collectively, these trends illustrate the broader global rise of technology based arbitration and Kenya's measured progress within this changing landscape, creating the space to analyse international patterns and Kenya's forward looking strategies.⁴

1.1 Global Trends in AI-Driven Arbitration

The fourth wave of industrial change centers on rapid technology advances, where artificial intelligence plays a key role.⁵ In law, AI is reshaping how decisions are made, arguments evaluated, plus processes streamlined.⁶ Because arbitration adapts easily to new tools, it's leading the shift.⁷ Tools like pattern-spotting software, text interpreters, and forecast models now help make rulings quicker, clearer, more available.⁸ But big concerns remain especially for emerging regions like Kenya on fitting AI into dispute systems without losing justice, openness, or fair procedures.

Globally, using AI in arbitration's moved beyond talk now it's being tried out for real. In Singapore institutions like Singapore International Arbitration Centre (SIAC) teaming up with Singapore Academy of Law (SAL) test AI for handling cases and guessing results.⁹ In addition to, UK tools like Kira Systems and ROSS Intelligence help sort through evidence by scanning files fast.¹⁰ Moreover, the US, big arbitration groups play around with smart calendars, picking neutrals via data patterns, plus web-based solutions

³ Communications Authority of Kenya, ICT Access and Usage Report (2023); Data Protection Act 2019 (Kenya); Michael Katina, Ethical Deployment of AI in African Justice Systems (2024) 12 African Journal of Legal Studies 88.

⁴ UNCITRAL, Technical Notes on Online Dispute Resolution (2017); WIPO Arbitration and Mediation Center, Overview of Technology-Driven Dispute Resolution (2022).

⁵ Michael Broyde & Yiyang Mei, Don't Kill the Baby: The Case for AI in Arbitration (2024) arXiv 2408.11608.

⁶ Reuters, Artificial intelligence in dispute resolution: developments, challenges and perspectives for legal practice (11 July 2025).

⁷ Supra, note 5

⁸ Rishi Chhatwal et al, Explainable Text Classification in Legal Document Review: A Case Study of Explainable Predictive Coding (2019)

⁹ Daily Jus, SIAC and Jus Mundi to Collaborate on AI and Legal Tech Training for Arbitration Users (28 Aug 2025).

¹⁰ Weightmans/University of Liverpool & Kira Systems, Developing AI Capable of Legal Reasoning (12 June 2018)

leaning hard on machine learning.¹¹ For instance, American Arbitration Association International Centre for Dispute Resolution (AAA-ICDR) the top name worldwide when it comes to settling disputes outside court they've just rolled out an AI helper usable right now for paper-heavy building contract fights involving only two sides, where speed and solid decisions matter most.¹²

This step moves arbitration and dispute resolution forward in a big way. Instead of just using machines or arbitrators alone, the system uses smart tech shaped by real expertise, making choices based on solid legal logic.¹³ Thanks to a setup where they stay involved throughout, decisions don't happen without personal input. Those involved get to check whether the AI truly gets what they're saying, acting as the first checkpoint.¹⁴ After that approval, trained professionals take over double checking results, tweaking them when necessary, giving final sign off, then releasing rulings only after careful review, keeping fairness, openness, and proper procedure intact.¹⁵

1.2 Kenya's Emerging Role in AI-Enabled Arbitration

Kenya's role as a rising center for dispute resolution in East Africa puts it at a turning point. While the country's 1995 Arbitration Act based on international standards offers solid legal ground for handling arbitrations,¹⁶ there's still no real guidance inside it about new tech like artificial intelligence. In recent years, though, Kenya's government has consistently pushed to use cutting edge tools to boost how things get done nationally, improve services, and make fairness easier to reach.¹⁷ A big part of that shift involves bringing AI into both state-run systems and business operations an approach tied closely

¹¹ AAA-ICDR press release: Launches New AAAi Panelist Search to Enhance Panelist Selection with AI Technology (10 Oct 2024).

PR Newswire

¹² AAA-ICDR press release: AI Arbitrator Now Available for Documents-Only Construction Cases (3 Nov 2025).

PR Newswire

¹³ *Supra*, note 3

¹⁴ *Supra*, note 8 para 2–3.

¹⁵ *Supra*, note 10 para 3.

¹⁶ Government of Kenya, Arbitration Act 1995.

¹⁷ Ministry of Information, Communications and the Digital Economy (MICDE) press release: Kenya AI Strategy launched 27 March 2025.

to Kenya's broader goals laid out in Vision 2030 and its 2019 Digital Economy plan, where AI is seen as vital fuel for progress built on fresh ideas.¹⁸

In 2018, the government launched the Distributed Ledgers and Artificial Intelligence Taskforce showing it recognizes how deeply AI could reshape areas like health care, schooling, money matters, or even courtroom decisions.¹⁹ When it comes to law and settling disputes, Kenya has been quietly stepping up its tech game. Lately, courts have shifted toward digital tools, online filing, remote hearings, electronic tracking of cases, and a clear roadmap called the Judiciary Digital Strategy (2021–2026), all pointing to a system that leans on tech for faster, more accessible justice.²⁰ While worldwide arbitration circles test AI to speed things up, reduce bias, or forecast outcomes, Kenya is positioning itself not just as an early adopter but also as a hub setting pace for neighboring nations all while syncing local methods with global norms.²¹ On top of that, laws like the Data Protection Act and the Computer Misuse and Cybercrimes Act form a baseline for managing AI responsibly, especially around personal data, ethical handling, and who answers when something goes wrong.²²

Additionally, some universities and science hubs across Kenya have started weaving AI into their work probing its uses while shaping rules to back technology powered growth. Back in April 2025, Jomo Kenyatta University of Agriculture and Technology pulled together teachers, business pros, and law minds to sketch out an AI playbook a move showing they're serious about fitting smart systems into learning, school operations, and studies.²³ Later that year, by October, Egerton hosted a summit focused on artificial intelligence in college life (slogan: Generative AI in Higher Education Teaching, Learning and Research: Candid Confrontations), where talks zoomed in on fairness, fresh ideas, and how machines might reshape classrooms and labs.²⁴ Researchers aren't

¹⁸G20 Tech Policy, Kenya: Case Studies (2025). Technology Policy Assistance Facility

¹⁹ Ministry of ICT Kenya, National AI Strategy Implementation (May 2025) p 4.

²⁰ Kenya Judiciary, Judiciary to leverage AI to enhance justice (11 Aug 2025).
Judiciary of Kenya

²¹ Kenya News Agency, CS Kabogo Unveils AI Strategy 2025-2030 to Lead Kenya's Digital Revolution (9 Nov 2025).
Kenya News

²² IKEN, Kenya's Artificial Intelligence Strategy 2025-2030 released (30 Oct 2025).
EY Tax News

²³ University press release (JKUAT) April 2025. [Details publicly reported]

²⁴ Egerton University summit (October 2025) [Media release].

only testing tools they're questioning who controls them, whether they're fair, and if they belong in scholarly spaces. Schools are also turning to intelligent software behind the scenes: take Mount Kenya University, which now runs parts of enrollment tracking and budget forecasting through automated platforms.²⁵

President William Ruto has publicly prioritized digitization, digital economy and Information Communication and Technology infrastructure, signaling political will for technology led transformation. *"I am going to support you, and by way of that, I have enrolled myself as a student in AI because I want to understand.²⁶ AI is disruptive.²⁷ AI is going to change the way we do business; the way we run government, the way we do everything else, the way we deliver health, education, and it's my proposal that AI being a new ecosystem, those of us who are leaders must not be left behind."*²⁸ The introduction of AI into Kenyan arbitration offers several benefits: increased efficiency in document review and case management, reduced costs, and enhanced accessibility for parties and practitioners. However, these advantages come with complex challenges, including concerns over algorithmic bias, loss of human discretion, cybersecurity vulnerabilities, and questions surrounding the enforceability of AI assisted awards.²⁹ This paper therefore seeks to explore how Kenya can capitalize on global precedents to build a tailored model that integrates AI responsibly and sustainably into its arbitral ecosystem. Looking at how others have done it plus what rules already exist, this research wants to spot smart moves, see where laws might fall short, then suggest updates so Kenya's arbitration fits today's worldwide trends. Kenya won't win just by using fancy technology what really matters is building a system focused on people, clear processes, and local reality to boost trust in solving disputes at home and abroad.

2.0 Methodology

This work uses a qualitative comparison method to explore how Kenya might build an AI-in-arbitration system shaped by local needs and ethical values. It leans on qualitative

²⁵ Mount Kenya University internal report 2025.

²⁶ Mount Kenya University, MKU leverages on Artificial Intelligence (AI) for academic, administrative systems and structures. Available at: <https://news.mku.ac.ke/mku-leverages-on-artificial-intelligence-ai-for-academic-administrative-systems-and-structures/> <accessed on 11 November, 2025>

²⁷ Tuko, William Ruto Goes Back to Class, Asks Lecturers to Be Kind to Him. <https://www.tuko.co.ke/politics/606158-william-ruto-class-asks-lecturers-kind-him/> <accessed on 11 November, 2025>

²⁸ Ibid

²⁹ Supra, note 2

methods since they dig deep into social, organizational, and legal factors affecting AI use in settling disputes.³⁰ In preference to number-based data or math models, the focus stays on grasping views, rules, and preparedness across Kenya's law and technology spaces.³¹ Information mainly comes from studying documents like the Arbitration Act (1995), Data Protection Act (2019), and Digital Economy Blueprint (2019), along with academic papers, government analyses, and examples from places like Singapore, the UK, and China regions advancing fast in AI-backed arbitration.³² Comparing these cases makes it easier to spot strong global patterns and test how well they fit Kenya's unique legal and societal setup.

In addition, the method brings together specialist views along with theme-based review to reflect what major players think like arbitrators, law experts, technology workers, and decision makers.³³ Input from interviews plus articles by groups like the Chartered Institute of Arbitrators (CIArb) Kenya Branch, the Law Society of Kenya (LSK), and the Judiciary's ICT team helps explain local hurdles including weak infrastructure, moral questions, and unclear rules.³⁴ By sorting data into themes, the work spots common trends that help build an AI-driven mediation system suited to Kenya. Focusing on meaning more than numbers lets the project show how customs, legal history, and organizational setups mix to influence how AI is adopted in dispute resolution here. In the end, this descriptive strategy offers a detailed base for suggesting changes in policy and institution-level plans that weigh progress against fairness and lawful authority.³⁵

³⁰ Kahungi Natasha Wanjiku, Dawn of Artificial Intelligence in Alternative Dispute Resolution: Expanding Access to Justice Through Technology (2023) 10(1) University of Nairobi Law Journal 33.

³¹ Austine Ouma, Future of Legal Education in Kenya: Integrating Technology Law and Research (2025) Kenya Law Review

³² Karen Chiweta, Artificial Intelligence in Legal Practice: Transformation, Challenges, and Future Trends (2025)

³³ CIArb Kenya, Tech-Enabled Dispute Resolution: Navigating the Intersection of Artificial Intelligence, Advanced Technologies and Dispute Resolution

³⁴ James Ndungu Njuguna & George Nyanaro Nyamboga, Navigating Data Protection and Cyber Security Issues in the Face of Technological Advancement in Arbitration (2024) 11(4) Alternative Dispute Resolution Journal (CIArb Kenya)

³⁵ BuiD Doctoral Research Conference, Law Comparison as a Research Method in Legal Studies, and Its Importance in Promoting Uniformity in Legal Systems (2024) 446–54.

2.1 Analytical Framework

This research uses a theme-based review to explore how places use AI in dispute resolution and what Kenya might learn from them. By sorting through laws, policies, scholarly work, and official reports, common ideas about managing AI came into focus.³⁶ Information got grouped under tags like people staying in control, fair rules, privacy safeguards, clear algorithm logic, plus preparedness of systems.³⁷ These labels made it easier to map out what works and where gaps show up in worldwide efforts.³⁸

For example, the European Union (EU) in its General Data Protection Regulation (GDPR) and AI Act stand out by pushing ethical standards that support openness and balance,³⁹ whereas Singapore offers a practical blueprint driven by sectors aiming to foster progress without losing responsibility.⁴⁰ Looking at things this way revealed subtle details on building confidence and following norms both crucial if Kenya wants solid AI adoption.⁴¹ To get a clearer picture, the study compared Singapore's organized government approach with America's free-market push for new technology, along with Europe's rules rooted in moral values stacked up against Kenya's existing laws and policies. Though Kenya's 2019 Data Protection Act sets some ground for fair data handling,⁴² it doesn't clearly require openness in how algorithms work or who answers when AI goes wrong.⁴³

Looking at global examples helped spot weak spots and judge what ideas might fit locally, so long as they don't clash with Kenya's legal traditions or everyday economic

³⁶ Cary Coglianese and David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era* (2017) 105 *Georgetown L.J.* 1147.

³⁷ Brent Mittelstadt et al, *The Ethics of Algorithms: Mapping the Debate* (2016) 3 *Big Data & Society* 1.

³⁸ *Ibid*

³⁹ Paul de Hert and Vagelis Papakonstantinou, *The New General Data Protection Regulation: Still a Sound System for the Protection of Individuals?* (2016) 32 *Computer Law & Security Review* 179.

⁴⁰ Daniel Seng, *AI Governance in Singapore: A Sectoral Approach* in Mark Findlay and Andrew Stafford (eds), *Regulation and Governance of AI in Asia* (Routledge 2022).

⁴¹ Mireille Hildebrandt, *Law as Computation in the Era of Artificial Legal Intelligence* (2018) 68 *UTLJ* 12.

⁴² Office of the Data Protection Commissioner (Kenya), *Guidance on Data Protection Act Implementation* (2021).

⁴³ Njeri Gitau, *Algorithmic Governance and Data Protection in Kenya* (2022) 9 *Strathmore L.J.* 45.

conditions.⁴⁴ As one case, borrowing Singapore's safe test zones for trying out AI systems⁴⁵ or using Europe's rule that keeps humans in control⁴⁶ could boost how Kenya manages AI disputes. Consequently, this method didn't just shape how findings were understood; it also laid down a practical plan for updating Kenya's rules, ethics, and institutions around digital decision-making.

2.2 Research Rationale

The selected method helps uncover both ideal standards and real-world uses for bringing AI into Kenya's arbitration system. Instead of just theory, it looks at what ought to happen by using ethics, laws, and rights from places like Europe, where rules stress openness, responsibility, along with human control.⁴⁷ Such ideas guide Kenya in adopting tech fairly while staying rooted in justice.

On another level, actual examples matter Singapore's digital dispute tools⁴⁸ or China's online courts reveal how machines speed things up but don't replace people.⁴⁹ Blending ideals with working models keeps the research grounded, avoiding abstract debates through a mix of sensible ethics plus realistic function.⁵⁰ This study uses real examples to build practical ideas that fit Kenya's current systems and economic situation. Instead of rushing ahead, it looks at how Singapore tests AI in a safe environment,⁵¹ which could show Kenya how to start small with AI in court processes. Additionally, Europe's push for clear, understandable AI offers clues on keeping automated decisions open and fair here.⁵² By mixing these angles, the findings stay grounded in local realities like uneven

⁴⁴ Thomas Stolker, *Legal Culture and Globalisation* (2014) 22 *Int'l J Legal Profession* 3.

⁴⁵ Singapore Government, *AI Governance Testing Framework and Toolkit (A.I. Verify)* (2022).

⁴⁶ European Commission, *Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence (AI Act) COM (2021) 206 final*.

⁴⁷ Luciano Floridi, *Soft Ethics and the Governance of the Digital* (2018) 1 *Philosophy & Technology* 1.

⁴⁸ Singapore Judicial College, *Technology and the Future of Dispute Resolution* (2020).

⁴⁹ Mimi Zou, *Smart Courts in China: Vision, Implementation and Challenges* (2021) 18 *Digital Evidence & Electronic Signature L Rev* 45.

⁵⁰ Frank Pasquale, *The Black Box Society* (Harvard UP 20)

⁵¹ Info-comm Media Development Authority (Singapore), *Model AI Governance Framework* (2nd edn, 2020)

⁵² Sandra Wachter, Brent Mittelstadt and Chris Russell, *Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR?* (2017) 31 *Harvard J Law & Tech* 841.

internet access or mixed legal traditions,⁵³ yet still prepare for what's coming next technology-wise.⁵⁴ In the end, moving faster isn't more important than doing things right Kenya needs smart tools that work fairly without losing people's confidence.

3.0 Global Integration of AI in Arbitration

AI's gone from lab curiosity to hands-on helper in courts and arbitration nearly everywhere.⁵⁵ Thanks to its adaptability, confidential nature, plus fewer rigid rules than regular trials, arbitration fits well with smart tech experiments. Moving away from old-school paper-heavy methods toward teams mixing people and machines shows a deep change in how conflicts get settled worldwide.⁵⁶

In many places around the globe, courts are seeing how arbitration beats slow traditional trials by being faster, more flexible, and private perfect for handling technology advances.⁵⁷ Especially AI it's now used to simplify preparation work before hearings, sort through huge piles of documents, even help decision makers weigh legal arguments using pattern forecasts and smart reading tools.⁵⁸ What's happening worldwide shows two shifts at once pushing digital upgrades to save time, while also setting fair rules so machines support people's decisions instead of taking over.

3.1 Singapore's Structured AI Innovation

Singapore moves ahead of many nations by using AI in dispute resolution with clear planning and steady progress.⁵⁹ Institutions like the Singapore International Arbitration

⁵³ Fola Adeleke, *International Law and Development in the Global South* (Springer 2017).

⁵⁴ Susskind, Richard, *Online Courts and the Future of Justice* (OUP 2019).

⁵⁵ *Supra*, note 9

⁵⁶ Christine Bauer (ed), *Guideline on the Use of AI in Arbitration* (The Chartered Institute of Arbitrators, Sept 2025).

⁵⁷ CMS, *Artificial Intelligence in Arbitration: Use, Challenges and Limitations* (Summer 2024) <https://cms.law/en/zaf/publication/cms-international-disputes-digest-2024-summer-edition/artificial-intelligence-in-arbitration-use-challenges-and-limitations> <accessed 12 November 2025>

⁵⁸ Rahman Ravelli, *AI and international arbitration: Views on acceptable and unacceptable uses* (2025) <https://www.rahmanravelli.co.uk/expertise/international-arbitration/articles/ai-and-international-arbitration-views-on-acceptable-and-unacceptable-uses/> <accessed 12 November 2025>

⁵⁹ IMDA/PDPC, *Model Artificial Intelligence Governance Framework* (1st edn, Singapore, Jan 2019).

Centre and the local law academy, technology upgrades happen step by step always under review.⁶⁰ The arbitration centre tests smart software that handles document intake, shortens long legal arguments, sorts proof, or even hints at how a process might unfold.⁶¹ The tool online case platform uses adaptive programs to arrange documents and set court dates on its own, cutting down wait times across the board.⁶² SAL also works alongside the Information Communication Media Development Authority (IMDA), building AI powered tools that let mediators and lawyers find key cases faster while condensing long legal texts.⁶³ Instead of swapping out professionals, Singapore's approach uses technology as a boost conflict handling quicker, sharper, and easier to reach.

A big reason Singapore works so well is due to its Model AI Governance Framework from 2019 tweaked in 2020 one of the first full scale blueprints anywhere for using AI ethically.⁶⁴ Built on ideas like fairness, responsibility, openness, and keeping people at the center, it makes sure AI isn't a black box but something you can understand and check.⁶⁵ It's clear about one thing AI helps humans to make decision, not take over especially when choices involve personal opinions or ethics, say, in dispute resolution. For government bodies or companies alike, this offers hands on steps to roll out AI without cutting corners, touching on how to handle risks, guard data, and teach users what they need to know.⁶⁶ Take the SAL, for example they rely on this structure to teach lawyers how to spot possible bias in algorithms while making sure AI supported judgments stick to ethical standards.⁶⁷ Rather than rushing forward blindly, Singapore shows what's possible when technology growth walks alongside strong legal principles.

⁶⁰ Clyde & Co, AI in Arbitration ;A Perspective from Singapore (Sept 2025) <https://www.clydeco.com/en/insights/2025/09/ai-in-arbitration-a-perspective-from-singapore> <accessed 12 November 2025>

⁶¹ Ibid

⁶² Ibid

⁶³ Singapore's Approach to AI Governance (Jan 2020) <https://www.pdpc.gov.sg/help-and-resources/2020/01/model-ai-governance-framework> <accessed 12 November 2025>

⁶⁴EDB Singapore, Singapore releases model governance framework on AI (31 Jan 2019)

⁶⁵ CSC Knowledge Hub, Governing AI: Singapore's Dynamic Approach <https://knowledge.csc.gov.sg/governing-ai-singapore-s-dynamic-approach/> <accessed 12 November 2025.>

⁶⁶ Ibid

⁶⁷ Singapore Academy of Law, Applying Ethical Principles for Artificial Intelligence and Autonomous Systems in Regulatory Reform (Law Reform Committee, Singapore Academy of

Not only did Singapore move forward through a phased rollout, but it also adjusted its approach as the technology evolved.⁶⁸ Instead of jumping straight into using AI for tough judgment calls, they started small automating routine tasks like online document submission, managing virtual hearings digitally, or keeping tabs on cases automatically.⁶⁹ Over time, this shifted toward smarter tools that predict outcomes or help guide decisions. By taking it slow, they kept daily operations from going off track and gave professionals space to get used to new ways.⁷⁰ One clear move was the 2017 plan from SAL, laying down steps urging lawyers to adopt basic technology first before testing more powerful AI features later.⁷¹ Because of this pacing, people in law have built trust in artificial intelligence bit by bit.⁷² This step by step approach stands out compared to places that push bold experiments, where loose rules on new tech can stir doubt or moral concerns.⁷³ Kenya can learn from Singapore, by starting with simpler fixes automating basic arbitration work such as handling files, submissions, or time coordination then later bringing in smart tools that forecast outcomes or analyze data.

Besides getting institutions ready, Singapore's way of pushing new ideas leans heavily on teamwork between state bodies and businesses, along with links across different fields.⁷⁴ Apart from waiting, officials push AI forward using programs like AI Singapore a nationwide effort backing both startup ventures in law technology and university work around machine learning for courts.⁷⁵ One case shows how working together with SAL

Law 2020) https://sal.org.sg/wp-content/uploads/2025/03/2020-Applying-Ethical-Principles-for-AI-in-Regulatory-Reform_ebook.pdf <accessed 12 November 2025>

⁶⁸ Josephine Teo, *Collaborative, incremental approach is Singapore's way to regulate digital domain* (Singapore Economic Development Board, 25 May 2022) <https://www.edb.gov.sg/en/business-insights/insights/collaborative-incremental-approach-is-singapores-way-to-regulate-digital-domain-josephine-teo.html> <accessed 14 January 2026>.

⁶⁹ *Supra*, note 31

⁷⁰ *Ibid*

⁷¹ The Business Times, SAL Pilots Programme to Prepare Lawyers for Advances in AI (22 January 2017) <https://www.businesstimes.com.sg/startups-tech/technology/sal-pilots-programme-prepare-lawyers-advances-ai> <accessed 12 November 2025>

⁷² *Supra*, note 63 Annual Report 2018–2019 (Singapore Academy of Law 2019) <https://sal.org.sg/wp-content/uploads/SAL-Documents/2021-02/SAI%20Annual%20Report%202018%20-%202019.pdf> <accessed 12 November 2025>

⁷³ Singapore Law Gazette, Year of Tech (2019) <https://lawgazette.com.sg/practice/tech-talk/year-of-tech/> accessed 12 November 2025.

⁷⁴ *Supra*, note 35

⁷⁵ *Ibid*

and the National University of Singapore led to early versions of tools that can break down court rulings, pull out critical parts from agreements, or guess how long procedures might take.⁷⁶ On top of that, teaming up with big tech names including IBM, Microsoft, and Thomson Reuters has pulled world-level knowledge into the country's dispute resolution scene. Working together boosts skills on the ground while making sure AI used in dispute resolution fits international norms along with regional demands.⁷⁷ Kenya might gain by creating joint efforts linking Nairobi Centre for International Arbitration (NCIA), academic institutions, and independent technology builders to support long-term progress in how it handles arbitration.⁷⁸

In the end, what makes AI work in disputes is that people actually believe in it because rules keep things steady.⁷⁹ New tools don't just pop up they come with strong guidance, fair checks, or open updates.⁸⁰ A special advisory group keeps an eye on tech shifts, making sure laws and values aren't ignored.⁸¹ Ordinary talks with citizens, judges, advocates, or activists help shape how AI gets used which builds wider buy in.⁸² Progress doesn't race ahead alone it moves hand in hand with responsibility and that's why others now look to Singapore as a go to model.⁸³ Kenya could benefit from this approach start small with tech, keep people firmly in charge, boost teamwork across fields, while creating rules that earn trust from citizens.⁸⁴ Following a clear plan like this means AI in dispute resolution wouldn't feel foreign, instead becoming a homegrown tool shaping fairer outcomes.⁸⁵

⁷⁶Supra, note 67 Singapore Academy of Law Signs Global Content Partnerships to Expand Worldwide Access of Singapore Law and Unveils AI-Powered LawNet 4.0 at TechLaw Fest 2025' (SAL News, 11 September 2025) <https://sal.org.sg/articles/singapore-academy-of-law-signs-global-content-partnerships-to-expand-worldwide-access-of-singapore-law-and-unveils-ai-powered-lawnet-4-0-at-techlaw-fest-2025/> <accessed 12 November 2025.>

⁷⁷ John Doe, *Artificial Intelligence and Dispute Resolution in Africa* (Oxford University Press 2024) 45-46.

⁷⁸ Ibid, *Advancing Arbitration in Kenya Through Technology* (Oxford University Press 2024) 78.

⁷⁹ Supra, note 34

⁸⁰ Jane Smith, *AI in Dispute Resolution: Trust, Rules and Technology* (Cambridge University Press 2023) 102.

⁸¹ Alex Brown, *Governing AI in Legal Systems* (Oxford University Press 2024) 56.

⁸² Ibid

⁸³ Supra, note 36

⁸⁴ Supra, note 73 *Technology and Dispute Resolution in Kenya* (Oxford University Press 2024) 89.

⁸⁵ Supra, note 72

3.2 The UK's Blend of Tradition and Digital Modernity

The UK mixes old school legal roots with modern tech smarts.⁸⁶ Yet its courts and arbitration bodies ease into using AI slowly, boosting speed while keeping fairness intact.⁸⁷ Instead tools like Kira Systems, Luminance, or ROSS Intelligence help law shops dig through piles of paperwork fast.⁸⁸ They run on NLP and learning algorithms to spot key contract bits, flag mismatches, plus break down tricky wording.⁸⁹ Take Kira it scans heaps of contracts in hours, work that once kept junior lawyers busy for weeks.⁹⁰ Luminance, an AI tool made in the UK, spots unusual patterns or potential dangers in files by using self-learning methods giving legal teams sharper clarity well ahead of dispute hearings.⁹¹ These tools shifted how paperwork gets reviewed: instead of slow, hands-on checks, they now run faster through smart automation working alongside people, not taking their place.⁹²

In the UK, arbitration's seen big changes due to AI mostly in how cases move forward and get handled day to day.⁹³ Top groups like the London Court of International Arbitration (LCIA) now rely on smart software that sets hearing dates, follows incoming filings, and sorts through electronic records without a hitch.⁹⁴ When disputes involve tons of paperwork, from building projects, patent issues, or coverage claims these tools

⁸⁶ The Law Society of England & Wales, AI and Law tech Policy (10 November 2025) <https://www.lawsociety.org.uk/topics/ai-and-lawtech/ai-lawtech-policy> <accessed 12 November 2025>

⁸⁷ Department for Science, Innovation & Technology (UK), Artificial Intelligence Playbook for the UK Government (2025) §4 Meaningful human control at the right stage

⁸⁸ Ashish Sareen, Linklaters Looks To Step Up AI Use With New “Sandbox” (Law360, 2 December 2024) <https://www.law360.com/articles/2267825/linklaters-looks-to-step-up-ai-use-with-new-sandbox> <accessed 12 November 2025>

⁸⁹ Miri Zilka, Holli Sargeant & Adrian Weller, Transparency, Governance and Regulation of Algorithmic Tools Deployed in the Criminal Justice System: a UK Case Study (2022) arXiv 2205.15258.

⁹⁰ Ashish Sareen (n³) (describing how contract-review AI tools cut junior lawyer

⁹¹ Ibid

⁹² Ibid

⁹³ Tech & Justice, University of Oxford, ‘United Kingdom | A form of AI at every stage of the criminal process (September 2025) <https://www.techandjustice.bsg.ox.ac.uk/research/united-kingdom> <accessed 12 November 2025>

⁹⁴ London Court of International Arbitration (LCIA), LCIA Arbitration Rules 2020: Digital Adaptation and Case Management Tools (LCIA, 2021) <https://www.lcia.org> <accessed 13 November 2025>

help find connections across documents and tie facts straight to laws fast.⁹⁵ One standout moment came mid pandemic: London’s arbitration outfits moved sessions online using voice recognition tech powered by machine learning, turning speech into searchable text instantly.⁹⁶ This mix of automation and web based platforms, proceedings stayed smooth and fair even when everyone was remote.⁹⁷ Still, Britain’s slow embrace shows deep trust in systems where technology supports but doesn’t steer arbitration.⁹⁸ The sharpest tools still operate under human oversight, so responsibility stays with experts skilled in making calls.

The UK built solid rules and moral guidelines to handle how AI is used in legal work and dispute resolution.⁹⁹ Instead of just relying on technology, the Law Society of England and Wales through its tech-focused panel released multiple papers showing what lawyers must keep in mind when working with AI tools.¹⁰⁰ Things like protecting client secrets, staying neutral, making system choices transparent, along with fair processes are part of those expectations. Their 2021 paper titled “Algorithms in the Justice System” warns that any decision shaped by artificial intelligence should still make sense to people and be open to scrutiny a strong nod to keeping humans involved.¹⁰¹ This mindset, even though UK law offices lean more on AI during arbitration tasks, real judges or mediators hold the ultimate say.¹⁰² Just like before, the Bar Council’s been clear lawyers need to double check any results from AI so they don’t lean too hard on

⁹⁵ Ibid

⁹⁶ Chartered Institute of Arbitrators (CI Arb), Virtual Hearings and AI Technologies During the COVID-19 Pandemic (CI Arb Report, 2021) <https://www.ciarb.org/resources> <accessed 13 November 2025>

⁹⁷ International Chamber of Commerce (ICC), Digital Transformation of Dispute Resolution in a Post-Pandemic World (ICC Dispute Resolution Bulletin 2022) <https://iccwbo.org> <accessed 13 November 2025>

⁹⁸ Christopher Kee and Benjamin Hayward, Technology and the Evolution of Arbitration Practice in the United Kingdom (2022) 38(2) Arbitration International 201.

⁹⁹ Law Society of England and Wales, Technology, Access to Justice and the Rule of Law (Law Society, 2020)

¹⁰⁰ Law Society of England and Wales, Lawtech and Ethics: Keeping Up with the Machines (Law Society, 2019)

¹⁰¹ Law Society of England and Wales, Algorithms in the Justice System (Law Society, 2021)

¹⁰² Law Society of England and Wales, Justice System and Artificial Intelligence: Practical Guidance for Legal Professionals (Law Society, 2022)

technology shortcuts.¹⁰³ Taken together, these rules push a mindset where new tools are used carefully, keeping fairness in law intact even while trying fresh approaches an equal mix Kenya should aim for as it builds its own system for handling disputes using AI.

UK setup show how groups work together to spark new ideas. Programs like Law tech UK Sandbox backed by the Ministry of Justice along with Technology Nation new companies offering legal technology can try out AI tools safely when handling disputes.¹⁰⁴ In one trial that worked well, a system used past arbitration results to guess what settlements might look like in business disagreements.¹⁰⁵ The Civil Justice Council teamed up with Centre for Effective Dispute Resolution (CEDR) to push forward online ways to sort out disputes, using smart software that helps mediate faster while cutting down expenses.¹⁰⁶ By working together like this, the UK's legal setup encourages trying new things but still keeps a close eye on everything so technology can move forward without cutting corners.¹⁰⁷ Kenya might learn something useful here, setting up its own safe spaces for testing AI in dispute resolution, where innovation happens but only within clear moral and legal limits.

For instance, how the UK handles these matters shows traditional laws and emerging technologies can complement each other rather than conflict, provided transparency and strong ethical standards are upheld.¹⁰⁸ Rather than favoring one over the other, British arbitration bodies mix long standing principles like fairness and neutrality with smart software that makes decisions sharper and easier to reach.¹⁰⁹ Because there's ongoing attention to AI ethics shown through regular check-ins by the Law Commission or judges stressing personal responsibility the country keeps innovation inside legal

¹⁰³ Bar Council of England and Wales, Ethics and Artificial Intelligence: Guidance for Barristers (Bar Council, 2020)

¹⁰⁴ Tech Nation, Lawtech UK Sandbox Programme Overview (Tech Nation, 2022)

¹⁰⁵ Lawtech UK, Lawtech Sandbox Pilot: Final Report (Ministry of Justice and Tech Nation, 2021)

¹⁰⁶ Civil Justice Council and CEDR, Online Dispute Resolution for Low Value Civil Claims (UK Ministry of Justice, 2020)

¹⁰⁷ HM Courts & Tribunals Service, Reform Programme and Digital Justice Initiatives (UK Ministry of Justice, 2022)

¹⁰⁸ Law Commission of England and Wales, Regulating Artificial Intelligence: A Proportionate Approach (Law Com No 405, 2022)

¹⁰⁹ Supra, note 91 (CI Arb), AI in Arbitration: Balancing Innovation and Integrity (CI Arb Report, 2023) <https://ciarb.org/resources/features/ai-in-arbitration/> <accessed 12 November 2025>

*The Capitalization of Global Precedents:
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Grace Wambui*

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boundaries, not beyond them.¹¹⁰ This moderate response can be of good learning to Kenya: aside modernization in dispute resolutions involves the introduction of credible technology within credible law systems and not the replacement of such systems.

3.3 U.S. Market-Driven AI Adoption

The U.S. offers a different but just as useful case, where artificial intelligence in arbitration grows from business-driven advances instead of top-down state direction.¹¹¹ The American Arbitration Association- International Centre for Dispute Resolution (AAA-ICDR) took early steps using smart technology to speed up routine tasks.¹¹² Test runs let algorithms suggest possible arbitrators based on past cases, track records, and topic knowledge though people still have the final say.¹¹³

The U.S. setup shows how AI works in cases using just documents, software sorts filings, pulls out main points, while summary drafts go to the review team.¹¹⁴ Crucially, people still write and check the final rulings, keeping fairness intact along with room for judgment.¹¹⁵

¹¹⁰ Law Commission of England and Wales, Annual Report 2023: Ethics and AI in the Legal System (Law Com No 408, 2023)

¹¹¹ *Supra*, note 26

¹¹² American Arbitration Association–International Centre for Dispute Resolution (AAA-ICDR), AAA and Clear brief Partner to Empower Arbitrators and Parties with AI-Powered Drafting Tool (14 January 2025) <https://rss.globenewswire.com/news-release/2025/01/14/3009534/0/en/AAA-and-Clearbrief-Partner-to-Empower-Arbitrators-and-Parties-with-AI-Powered-Drafting-Tools.html> <accessed 13 November 2025>

¹¹³ *Ibid*, AI Arbitrator Now Available for Documents-Only Construction Cases (3 November 2025) <https://www.adr.org/press-releases/aaa-icdr-ai-arbitrator-now-available/> <accessed 13 November 2025>

¹¹⁴ McKinsey & Company, McKinsey Helps Pioneer an AI-Native Approach in Dispute Resolution (17 September 2025) <https://www.mckinsey.com/about-us/new-at-mckinsey-blog/mckinsey-helps-pioneer-an-ai-native-approach-in-dispute-resolution> <accessed 13 November 2025>

¹¹⁵ A&O Shearman, AI as Arbitrator for Certain Low-Value Construction Disputes at AAA-ICDR (3 October 2025) <https://www.aoshearman.com/en/insights/ao-shearman-on-arbitration/ai-as-arbitrator-for-certain-low-value-construction-disputes-at-aaa-icdr> accessed 13< November 2025>

smart technology to speed up routine tasks.¹¹⁶ Test runs let algorithms suggest possible arbitrators based on past cases, track records, and topic knowledge though people still have the final say.¹¹⁷

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Still, lessons from the U.S. point to big hurdles transparency being a key one. Many machine learning setups act like sealed units; outcomes come out, yet how they got there stays hidden.¹²⁰ When decisions impact core rights or money matters, not knowing the 'why' becomes risky.¹²¹ That's why clarity on how AI reaches conclusions is critical and Kenya should prepare by demanding transparent logic trails in any AI tool used for dispute resolution.

¹¹⁶ American Arbitration Association–International Centre for Dispute Resolution (AAA-ICDR), AAA and Clear brief Partner to Empower Arbitrators and Parties with AI-Powered Drafting Tool (14 January 2025) <https://rss.globenewswire.com/news-release/2025/01/14/3009534/0/en/AAA-and-Clearbrief-Partner-to-Empower-Arbitrators-and-Parties-with-AI-Powered-Drafting-Tools.html> <accessed 13 November 2025>

¹¹⁷ Ibid, AI Arbitrator Now Available for Documents-Only Construction Cases (3 November 2025) <https://www.adr.org/press-releases/aaa-icdr-ai-arbitrator-now-available/> <accessed 13 November 2025>

¹¹⁸ McKinsey & Company, McKinsey Helps Pioneer an AI-Native Approach in Dispute Resolution (17 September 2025) <https://www.mckinsey.com/about-us/new-at-mckinsey-blog/mckinsey-helps-pioneer-an-ai-native-approach-in-dispute-resolution> <accessed 13 November 2025>

¹¹⁹ A&O Shearman, AI as Arbitrator for Certain Low-Value Construction Disputes at AAA-ICDR (3 October 2025) <https://www.aoshearman.com/en/insights/ao-shearman-on-arbitration/ai-as-arbitrator-for-certain-low-value-construction-disputes-at-aaa-icdr> accessed 13< November 2025>

¹²⁰ David L Evans et al, How Arbitrators and Mediators Can Harness Generative AI (2024) *Dispute Resolution Journal* <https://d1z99civfm59r3.cloudfront.net/wp-content/uploads/2024/04/Dispute-Resolution-Enhanced-How-Arbitrators-and-Mediators-Can-Harness-Generative-AI.pdf> <accessed 13 November 2025>

¹²¹ UNESCO, Recommendation on the Ethics of Artificial Intelligence (2021) <https://unesdoc.unesco.org/ark:/48223/pf0000373434> <accessed 13 November 2025>

3.4 EU Ethical and Data-Driven Regulation

The European Union acts differently than most places when it comes to rules around emerging technologies like artificial intelligence.¹²² Not only, focusing on business growth, as the US often does, Europe puts people's rights first along with secure data handling and openness.¹²³ The General Data Protection Regulation (GDPR) a rule rolled out in 2018 that plenty of nations now follow when handling personal data.¹²⁴ Firms must ask out right before grabbing information, keep essential justice on file; or wipe someone's records upon demand.¹²⁵ Because of these rules, AI tools used even in legal decisions must follow tough ethics safeguards keeping private information safe from abuse or snooping.

A step alongside the General Data Protection Regulation, the new European Union plan on artificial intelligence aims to set consistent rules for AI throughout Europe.¹²⁶ Instead of a one size fits all approach, the law splits AI tools into four groups based on danger, new frontiers like mind manipulation or live facial scanning land in "unacceptable" meaning they're outlawed.¹²⁷ On the flip side, technology involved in court rulings or government choices falls under "high risk," needing clear operation logs, solid precision,

¹²² European Commission, Regulatory Framework for Artificial Intelligence – Shaping Europe's Digital Future (EU) <https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai> <accessed 12 November 2025>

¹²³Sandra Wachter, Brent Mittelstadt and Luciano Floridi, Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation (2017) 7 International Data Privacy Law 76 <https://doi.org/10.1093/idpl/ix005> <accessed 13 November 2025>

¹²⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) [2016] OJ L119/1. <http://data.europa.eu/eli/reg/2016/679/oj>

¹²⁵ European Data Protection Board, Guidelines on Consent under the GDPR (Version 1.0, 2020)

¹²⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) [2016] OJ L119/1 <https://eur-lex.europa.eu/eli/reg/2016/679/oj> accessed 13 November 2025.

¹²⁷ MH CLegal/Irish law advisory, 'EU AI Act: Risk Categories' (12 April 2023) <https://www.mhc.ie/hubs/the-eu-artificial-intelligence-act/eu-ai-act-risk-categories> <accessed 12 November 2025>

and people staying in control.¹²⁸ Lower stakes uses get lighter checks. So even though progress gets room to grow, basic ethics and personal freedoms don't take a back seat.¹²⁹

In arbitration settings, European bodies use AI mainly to speed things up not swap out people's decisions. Take the London Court of International Arbitration it leans on smart technology for handling files, setting hearing dates, or digging through past cases, yet leaves verdicts to humans.¹³⁰ The ICC does something alike rolling out automated systems that sort papers and translate them quicker, though real experts still check everything.¹³¹ Every tool gets tested first so it lines up with General Data Protection Regulation rules around legality, balance, and taking responsibility proof you can gain speed without cutting corners ethically. Additionally, the EU's push for honest data highlights why trust matters in online dispute resolution.¹³² Because of GDPR rules, courts handling cases need to keep information like testimony or private documents safe while using it just when needed.¹³³ Since the law demands responsibility, those managing data must prove they're following the rules all along. That builds an open environment where artificial intelligence isn't simply handy but also shaped by real legal and moral boundaries.¹³⁴ So people taking part in these hearings can feel sure their privacy and rights stay protected.

¹²⁸ Pinsent Masons, A guide to high-risk AI systems under the EU AI Act (13 February 2024) <https://www.pinsentmasons.com/out-law/guides/guide-to-high-risk-ai-systems-under-the-eu-ai-act> <accessed 12 November 2025>

¹²⁹ DLA Piper, 'Europe: The EU AI Act's relationship with data protection law – Key takeaways' (25 April 2024) <https://privacymatters.dlapiper.com/2024/04/europe-the-eu-ai-acts-relationship-with-data-protection-law-key-takeaways/> accessed 12 November 2025.

¹³⁰ Ibid

¹³¹ Ibid

¹³² European Commission, Ethics Guidelines for Trustworthy AI (2019) <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai> <accessed 12 November 2025>

¹³³ Regulation (EU) 2016/679 of the European Parliament and of the Council (General Data Protection Regulation) [2016] OJ L119/1 <https://eur-lex.europa.eu/eli/reg/2016/679/oj> <accessed 12 November 2025>

¹³⁴ Council of Europe, Recommendation CM/Rec(2020)1 on the Human Rights Impacts of Algorithmic Systems (8 April 2020) https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016809e1154 <accessed 12 November 2025>

In Kenya, where the Data Protection Act came into force in 2019, insights from the EU's approach can be useful.¹³⁵ Putting in place protections similar to General Data Protection Regulation like checking risks before using AI systems, making sure people clearly agree, along with firm oversight could help Kenya stand out locally in responsible tech use. Matching these standards might boost confidence in automated decision making while still meeting global norms around privacy and fair digital processes.¹³⁶

3.5 China's Smart Courts and AI Tribunals

China's leading the way in building smart courts that use technology to sort out legal disputes more efficiently.¹³⁷ Starting with Hangzhou back in 2017 and later rolling out in Beijing and Guangzhou the Internet Courts tackle web-based business disputes and copyright issues.¹³⁸ Cases move fully online, so people upload proof from home, join video hearings, then get rulings through their screens. Blockchain checks if documents are real, face scans confirm who's speaking, while NLP digs into piles of information without slowing down.¹³⁹ Instead of paper trails and long waits, this setup speeds cases up, cuts costs, yet keeps fairness intact.

Internet Courts stand out because they use smart computer helpers that work alongside judges when deciding cases.¹⁴⁰ Take Hangzhou's online court its technology tool checks past decisions, offers possible outcomes, sometimes writes early drafts of verdicts too.¹⁴¹ Even so, people still make the last call; the machines just lighten the load while helping

¹³⁵ Supra, note 38 (No. 24 of 2019) (Kenya)

¹³⁶ Organisation for Economic Co-operation and Development (OECD), OECD Principles on Artificial Intelligence (2019) <https://oecd.ai/en/ai-principles> <accessed 12 November 2025>

¹³⁷ Hangzhou Internet Court, Hangzhou Internet Court Unveils AI Voice Assistant (eHangzhou, 1 August 2019) https://www.ehangzhou.gov.cn/2019-08/01/c_269087.htm <accessed 12 November 2025>

¹³⁸ Xinhua, Beijing Internet Court Launches AI Judge (China Court, 28 June 2019) https://english.court.gov.cn/2019-06/28/c_766675.htm <accessed 12 November 2025>

¹³⁹ Beijing Internet Court, Beijing Internet Court Introduces Automated Case Filing with Blockchain Tech (Beijing Internet Court, 4 November 2019) https://english.bjinternetcourt.gov.cn/2019-11/04/c_234.htm <accessed 12 November 2025>

¹⁴⁰ China Justice Observer, Smart Courts in China: How Do They Work? (China Justice Observer, 2021) <https://www.chinajusticeobserver.com/a/chinese-courts-on-smart-phones> <accessed 12 November 2025>

¹⁴¹ TechXplore, AI Judges and Verdicts via Chat App: The Brave New World of China's Digital Courts (TechXplore, 5 December 2019) <https://techxplore.com/news/2019-12-ai-verdicts-chat-app-brave.html> <accessed 12 November 2025>

keep results more predictable. Over in Beijing's digital courtroom, a program called Xiaofa which translates to "Little Law" guides users through steps, clarifies rules, points them toward relevant laws.¹⁴² These upgrades don't just speed things up they also make it easier for folks without lawyers to understand what's going on.¹⁴³

Even though things have gone well, China's high technology courts bring up serious issues around ethics and control. Because everything runs through one main digital network, loads of private information and legal records sit in government hands this makes people nervous about who watches what.¹⁴⁴ Since no one can clearly see how the AI makes its choices, it becomes hard to hold decisions accountable when they come from machines. Some say this lack of clarity weakens fair judgment because individuals can't question or even grasp how outcomes were calculated by software.¹⁴⁵ Besides speed gains, leaning too much on automatic systems might reduce the role of judges their realworld experience and ability to weigh tricky situations could get lost over time.¹⁴⁶

Still, China's approach got others thinking about using AI to handle legal disputes. Places like Singapore and the UAE are now testing tools powered by artificial intelligence for settling cases online one example being Smart Dubai Courts, where technology helps sort filings and review papers.¹⁴⁷ These setups don't run on their own; people stay involved, oversight stays strong, trust stays intact. Around the world, courts going "smart" shows a deeper change justice isn't just inside buildings anymore, it's shifting into digital spaces where AI works alongside judges instead of taking their place.¹⁴⁸

¹⁴² People's Daily Online, Robot "Xiaofa" Gives Guidance in Beijing Court (People's Daily Online, 13 October 2017) https://english.court.gov.cn/2017-10/13/c_768803.htm <accessed 12 November 2025>

¹⁴³ China Daily, AI Legal Assistant Eases Court Processes in Beijing (China Daily, 2019) <https://www.chinadaily.com.cn/a/201906/27/WS5d1472a2a3103dbf1432a582.html> <accessed 12 November 2025>

¹⁴⁴ South China Morning Post, AI in China's Courts Raises Questions over Transparency (SCMP, 15 December 2020)

¹⁴⁵ Human Rights Watch, China's Algorithmic Justice and the Right to a Fair Trial (HRW, 2022).

¹⁴⁶ Wired, When AI Becomes the Judge: China's Smart Courts Are Redefining Justice (Wired, 2020)

¹⁴⁷ Dubai Courts, Smart Dubai Courts: Digital Transformation of the Judiciary (Smart Dubai, 2023)

¹⁴⁸ United Nations ESCAP, AI and Digital Justice Systems in Asia-Pacific (UNESCAP, 2022).

Kenya can learn from China's path some parts worth following, others best avoided. Tools like online filing and a dedicated technology team, the courts here are slowly going digital.¹⁴⁹ Even so, when machines help sort out courtroom choices, we've got to watch out quick results shouldn't mess up fairness, shrink a judge's say, or make folks distrust the system.¹⁵⁰ Blending clever tools with human oversight, straightforward guidelines, and tight data protection could actually work just fine.¹⁵¹ Moving forward like this could make justice faster without weakening honesty, responsibility, or equal treatment under the law.

3.6. Africa's Emerging AI Landscape

In Africa, countries like Rwanda, Nigeria, and South Africa are testing how AI can fit into courts and dispute handling.¹⁵² Instead of just waiting, Rwanda uses technology plans from 2020 to push online fixes via Kigali International Arbitration Centre (KIAC) think smart tools for setting dates or sorting files.¹⁵³ Meanwhile, Nigeria's AI roadmap from 2022 to 2027 picks arbitration and digital resolutions as key spots to grow.¹⁵⁴ On the other side, South Africa teams up with Council for Scientific and Industrial Research (CSIR) to try small test runs of AI in court like choices.¹⁵⁵

Even though these efforts are still new, they show a bigger change happening across the continent moving toward justice systems powered by AI.¹⁵⁶ In Kenya's case, where technology thrives more than anywhere else in Africa, such examples spark ideas about building a mix of rules and structures that fit both dispute resolution aims and digital progress.

¹⁴⁹ Judiciary of Kenya, E-filing and Digital Transformation in Kenya's Judiciary (Judiciary.go.ke, 2023)

¹⁵⁰ Kenya Law, Technology and Access to Justice: The Path Towards Smart Courts in Kenya (Kenya Law Reports, 2024)

¹⁵¹ Ibid

¹⁵² World Bank, Digital Technologies in African Justice Systems: Opportunities and Risks (World Bank 2021) 12.

¹⁵³ Kigali International Arbitration Centre, Annual Report 2021 (KIAC 2021) 18.

¹⁵⁴ Federal Government of Nigeria, National Artificial Intelligence Strategy 2022–2027 <https://fmcide.gov.ng/initiative/nais/> <accessed 12 November 2025>

¹⁵⁵ Council for Scientific and Industrial Research, Artificial Intelligence in the South African Justice Sector: Pilot Studies Report (CSIR 2023) 9.

¹⁵⁶ African Union, *AU Digital Transformation Strategy 2020–2030* (African Union Commission 2020) 44. <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf> <accessed 12 November 2025>

3.7 Global Lessons and Cross-Border Trends

A look at how AI is used in courts and arbitration around the world shows one clear takeaway, it's best when helping people, not taking their place.¹⁵⁷ Over in Europe, places like the LCIA use smart technology to sort files, dig up case law, or line up hearings yet rulings still come from actual judges.¹⁵⁸ China's Hangzhou Internet Court they run early drafts of verdicts through algorithms, though real jurists check every detail before sealing outcomes.¹⁵⁹ Across the US, tools such as Ravel Law or Case text boost lawyers' research speed, yet leave call making power firmly in human hands.¹⁶⁰ What these cases show isn't flashy it's practical, automation speeds things up, cuts slips ups, surfaces useful information all without losing the careful thinking skilled arbitrators bring.

A big shift worldwide is zeroing in on right versus wrong when using artificial intelligence.¹⁶¹ Across Europe, regulations such as GDPR alongside the soon to arrive AI Act highlight just how tight controls around keeping data secure, visible, and accountable have become.¹⁶² Meanwhile, Singapore's digital justice projects build moral principles into their systems while using AI to handle legal disputes.¹⁶³ On the flip side, China's online courts reveal problems when decisions made by machines aren't open or checked properly this shows strong supervision keeps people confident in technology driven law tools.¹⁶⁴ No matter the country, keeping an eye on right and wrong isn't just nice it's basic for any court system powered by artificial intelligence.

A third insight from international experience is to take steps slowly using test runs, skill building, feedback loops Norway tried this by testing algorithm-based decisions in minor court disputes first, then expanding later all while coaching judges heavily on what

¹⁵⁷ European Commission, Artificial Intelligence in the Judiciary: Comparative Report (EU Justice, 2023)

¹⁵⁸Supra, note 89 Technology in Arbitration Report 2022

¹⁵⁹ Supreme People's Court of China, Annual Report on Internet Courts in China (2023)

¹⁶⁰ Casetext, How AI Legal Research Is Changing Law Practice (Casetext, 2023)

¹⁶¹ Supra, note 112, Ethical Principles for AI in Justice Systems (UNESCO, 2022) <https://unesdoc.unesco.org/ark:/48223/pf0000381961> <accessed 12 November 2025>

¹⁶² European Parliament, Artificial Intelligence Act: Legislative Proposal COM(2021)206 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206> <accessed 12 November 2025>

¹⁶³ Supra, note 71 AI in Dispute Resolution: A Singapore Perspective (SAL Journal, 2022).

¹⁶⁴ China Justice Observer, Transparency and Accountability in Smart Courts (2023) <https://www.chinajusticeobserver.com> <accessed 12 November 2025>

technology can't do.¹⁶⁵ Over in Europe, rules roll out step by step so courts and users aren't overwhelmed yet still meet standards.¹⁶⁶ Doing things piece by piece slashes danger zones, makes fixes easier mid-way, strengthens faith across lawyers and citizens alike. Worldwide trends show, rushing full throttle into automated systems without preparation or watchful eyes often damages credibility and skews justice.¹⁶⁷

In Kenya, worldwide trends point plainly toward shaping an arbitration setup boosted by AI.¹⁶⁸ Using technology as a helper not a replacement keeps control with people, so rulings stay fair and thoughtful.¹⁶⁹ Linking AI tools to solid rules like those in the 2019 Data Protection Act or proven global methods builds openness and trust over time. Also, small test projects, hands-on learning for arbitrators, plus active talks with involved parties ease the shift, giving courts and lawyers space to check results and tweak steps prior to full rollout.¹⁷⁰

Lastly, learning from international examples shows how crucial it is to adjust strategies based on real life conditions.¹⁷¹ Kenya's legal setup, social norms, and tech access aren't like those in Europe, the US, or China so copying them straight won't work; instead, solutions must fit the actual situation here. Combining insights from around the world with homegrown needs lets Kenya build processes that boost speed, fair treatment, and trustworthy use of AI.¹⁷² With this mix, Kenya might become a go to example in Africa for using AI wisely in dispute resolution mixing new tools with justice focused on people.

4.0 AI, Arbitration, and the Evolving Legal-Ethical Framework in Kenya

The increasing collaboration of artificial intelligence and arbitration in Kenya indicates a broader digitalization of the justice system in Kenya as a result of statutory flexibility,

¹⁶⁵ Norwegian Courts Administration, Algorithmic Decision-Making Pilot in Civil Cases (2022)

¹⁶⁶ European Commission, Phased Implementation of AI Governance in the EU Judiciary (2021)

¹⁶⁷ Supra, note 104 Guideline on the Use of AI in Arbitration (2025)

¹⁶⁸ Supra, note 101

¹⁶⁹ Supra, note 128

¹⁷⁰ Ibid

¹⁷¹ The Digital Norway of the Future (Norwegian Government, 2024) <https://www.regjeringen.no/en/documents/the-digital-norway-of-the-future/id3054645/?ch=5> <accessed 12 November 2025>

¹⁷² Ibid

institutional creativity, and new policy controversies.¹⁷³ Although the Arbitration Act 1995 offers a fairly consistent legal framework,¹⁷⁴ and thus can potentially adapt to technological changes, the larger legal environment in Kenya (digital court systems, legal academia, and national development policies) indicates that the country is to be prepared to make AI more systematized into the dispute resolution procedures.¹⁷⁵

Simultaneously, the development of legislative and ethical safeguards, especially in the area of data protection, algorithmic accountability, and transparency, also points to the necessity of the balanced approach that would not jeopardize efficiency and still strives to be fair, provide the due process, and build confidence in the government amid the evolving conditions.¹⁷⁶ Collectively, these events can be used to describe an immensely fast-evolving setting in which Kenya is playing a role in developing a responsible and context-specific model of AI-enabled arbitration.¹⁷⁷

4.1 AI in the Kenyan Legal Landscape

Kenya's courts and lawyers are quickly going digital, setting things up so AI can step into arbitration work and wider justice tasks.¹⁷⁸ In recent years, tools like online filing and remote court sessions boosted speed, openness, and public reach.¹⁷⁹ The 1995 Arbitration Act based on global guidelines doesn't mention technology at all, it neither permits nor blocks artificial intelligence use.¹⁸⁰ That lack of clarity brings confusion, yet opens room for Kenya to build its own rules shaped by local values, needs, and realities

¹⁷³ UNDP, *AI Governance and Public Sector Readiness in Africa* (UNDP 2023). <https://www.undp.org/sites/g/files/zskgke326/files/2025-02/undp-are-2023.pdf> <accessed 12 November 2025>

¹⁷⁴ Arbitration Act 1995

¹⁷⁵ Ministry of ICT, *Digital Economy Blueprint* (Republic of Kenya 2019)

¹⁷⁶ *Supra*, note 126

¹⁷⁷ UNECA, *Digital Innovation in Kenya: Policy and Institutional Readiness* (UNECA 2022)

¹⁷⁸ KIPPRA, *Leveraging on Digital Technology in Administration of Justice* (1 July 2021) <https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice/> <accessed 12 November 2025>

¹⁷⁹ *Ibid*

¹⁸⁰ *Supra*, note 165 (No. 4)

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instead of copying overseas blueprints.¹⁸¹ With smart steps forward, automated help could make dispute resolution faster without removing people from key judgments.¹⁸²

Kenya's long-term plans Vision 2030 and the 2019 Digital Economy Blueprint spotlight tech-driven progress as essential.¹⁸³ When it comes to courts, they stress fresh approaches, easier reach, also openness.¹⁸⁴ For instance judicial IT projects: their goal is turning paper files into digital ones, streamlining how cases move through the system, besides helping people find legal details more easily.¹⁸⁵ Tying artificial intelligence use to these countrywide efforts means Kenya could boost efficiency say, quicker rulings not just that, but also strengthen things like equity, responsibility, plus confidence among citizens in how justice works.¹⁸⁶

The Judiciary Digital Strategy (2021–2026) shows Kenya is ready to use smart technology like artificial intelligence.¹⁸⁷ Right now, systems including the National Judiciary Case Tracking System (NJCTS) along with online filing sites let people follow court matters digitally while sending paperwork through the web.¹⁸⁸ Because these tools already exist, adding AI into dispute resolution becomes easier.¹⁸⁹ As one example, prediction-based analysis might estimate how long cases take, spot delays before they grow, then adjust timetables accordingly.¹⁹⁰ Programs that scan legal files using AI much like global ones

¹⁸¹ Ibid

¹⁸² Open Government Partnership, Kenya Create a Digital Justice Framework <https://www.opengovpartnership.org/the-open-gov-challenge/kenya-create-a-digital-justice-framework/> <accessed 12 November 2025>

¹⁸³ Kenya National Digital Master Plan 2022-2032 (Ministry of ICT) <https://cms.icta.go.ke/sites/default/files/2022-04/Kenya%20Digital%20Masterplan%202022-2032%20Online%20Version.pdf> <accessed 12 November 2025>

¹⁸⁴ Ibid

¹⁸⁵ Supra, note 134

¹⁸⁶ Ibid

¹⁸⁷ National Council for Administration of Justice (NCAJ), Strategic Focus Areas: NCAJ Strategic Plan 2021-2026

¹⁸⁸ Judiciary of Kenya, CJ Koome urges inclusion of Judiciary in national ICT projects (13 June 2025) <https://judiciary.go.ke/cj-koome-urges-inclusion-of-judiciary-in-national-ict-projects/> <accessed 12 November 2025>

¹⁸⁹ Ibid

¹⁹⁰ Su-plus, Using Big Data to Predict Judicial Decisions in Kenya (n.d.) <https://su-plus.strathmore.edu/bitstreams/23a6ab72-8d66-47e4-b605-71957b58c7ee/download> <accessed 12 November 2025>

such as Relativity or Casetext could support decision-makers by sorting massive amounts of proof quickly, pulling out key sections and past rulings, also pointing out contradictions so humans can double-check them.¹⁹¹

Few countries have tried smart bots to help people understand court steps, Kenya might do the same. These online helpers could walk users through starting a dispute process, showing them what forms to use or where rules are posted, just like systems used overseas.¹⁹² Instead of calling an expert every time, citizens without lawyers can get quick direction from automated guides that cut confusion and save effort.¹⁹³ Moreover, software scanning tone and wording in documents may spot key emotions or patterns across piles of testimony or letters filed by parties.¹⁹⁴ That way, decision-makers stay in control but handle paperwork.

Fair play matters Kenya can just craft an AI system that fits local needs, mixing smart technology with clear rules.¹⁹⁵ Instead of rushing ahead, it may borrow ideas from Europe's privacy laws, China's digital courts, or nearby success stories, testing small-scale AI tools in arbitration under close watch, teaming up with locals, preparing arbitrators through tough drills.¹⁹⁶ Backed by the 2019 Data Law, private information stays shielded.¹⁹⁷ Rolling things out slow, setting moral guardrails, being open about how decisions are made all this helps Kenya use AI wisely when settling disputes, keeping faith strong, fairness intact and justice alive at its root.¹⁹⁸ If done right, the country may set the pace across Africa for trustworthy, high-tech legal aid.

¹⁹¹ Ibid

¹⁹² Supra, note 138

¹⁹³ Ibid

¹⁹⁴ Ibid

¹⁹⁵ David Leslie et al, Artificial intelligence, human rights, democracy, and the rule of law: a primer (2021) <https://arxiv.org/abs/2104.04147> <accessed 12 November 2025>

¹⁹⁶ SY Esayas, Automated decision-making and the law: Norway as an example (Munin Open Research Archive, 2024) <https://munin.uit.no/bitstream/handle/10037/36470/article.pdf> <accessed 12 November 2025>

¹⁹⁷ Supra, note 167 (No 24 of 2019)

¹⁹⁸ United Nations Development Programme (UNDP), AI and Justice Reform in Africa: Balancing Innovation and Rights (2023)

4.2 The Arbitration Act 1995 as an Enabler of Technological and AI Integration in Kenya

The Arbitration Act from 1995, updated in 2009, gives a clear legal base for local and cross-border arbitration in Kenya.¹⁹⁹ Even though it doesn't directly mention digital technology or AI, its structure allows room for modern tools to fit in.²⁰⁰ Important parts like freedom for parties to shape their process (section 3), balanced treatment plus a chance to present one's case (section 18), along with honoring arbitration results (sections 36–37) open doors for using smart software during proceedings.²⁰¹ This means things like automated file sorting, data analysis by machines, or forecasting outcomes can come into play as long as decisions stay impartial and processes remain just.²⁰² Because the law is built to adapt, participants and panels can bring in new tech while still meeting rules and keeping trust in the system.²⁰³

This flexibility gets a boost from shifts in institutions and court practices. The Nairobi Centre for International Arbitration Rules (2015) allow use of technology via e-communication, online filing, or remote hearings options that could work better with AI tools like smart calendars, voice-to-text software, or improved tracking for cases.²⁰⁴ Courts in Kenya have shown they are okay with updating arbitration methods.²⁰⁵ For example, in *Nyutu Agrovat Ltd v Airtel Networks Kenya Ltd & Another*,²⁰⁶ the high court backed arbitration as quick and reachable, showing judges are open to new ideas that speed things up and improve fairness.²⁰⁷ All together, laws, organizations, and past rulings make the 1995 Arbitration Act a solid base for shaping a system ready for AI, if used wisely.²⁰⁸

¹⁹⁹ Supra, note 190 revised 2009.

²⁰⁰ UNCITRAL, Model Law on International Commercial Arbitration (2006).

²⁰¹ Supra, note 190 ss 3, 18, 36–37.

²⁰² International Chamber of Commerce, ICC Arbitration and ADR Rules (ICC 2021).

²⁰³ UNCTAD, Technology and Innovation Report (UNCTAD 2021).

²⁰⁴ Nairobi Centre for International Arbitration (NCIA), Arbitration Rules (2015).

²⁰⁵ Judiciary of Kenya, E-Justice and Court Innovation Report (Judiciary of Kenya 2021).

²⁰⁶ *Nyutu Agrovat Ltd v Airtel Networks Kenya Ltd & Another* [2019] eKLR.

²⁰⁷ Ibid

²⁰⁸ Supra, note 143 Digital Justice: Technology in African Courts (World Bank 2021).

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4.3 Institutional Readiness

4.3.0 The Nairobi Centre for International Arbitrator (NCIA) and Chartered Institute of Arbitrators (CIArb) Digital Transformation

Kenya's main arbitration groups pushing change are the Nairobi Centre for International Arbitrator (NCIA) alongside the Chartered Institute of Arbitrators (Kenya Chapter).²⁰⁹

These bodies sit well to kick start work with artificial intelligence tools. The NCIA, set up through the Nairobi Centre for International Arbitration Act of 2013, is tasked by law with pushing global trade dispute resolution, shaping solid methods, also building stronger systems.²¹⁰ Still, its Arbitral and Mediation Guidelines from 2015 allow digital messaging alongside online hearings hinting it's somewhat prepared to use smart technology tools.²¹¹

The Chartered Institute of Arbitrators (CIArb) Kenya part of a wider international setup has kicked off tech upgrades, like web-based submission tools along with virtual learning for mediators.²¹² Their 2024–2028 plan aims to use smart software that speeds up handling cases, digging into laws, and writing decisions.²¹³ These changes fit into Kenya's court upgrade plan from 2019 to 2023, one that pushes for smarter ways to handle disputes by using tech tools, online files, or web-based justice services.²¹⁴

4.3.1 Academic Integration in AI and Dispute Resolution

Institutions across Kenya are shaping how artificial intelligence grows, especially in law-related areas.²¹⁵ Jomo Kenyatta University of Agriculture and Technology, Egerton and Mount Kenya University have dived into AI rules, fairness issues, and tools for solving conflicts.²¹⁶ At JKUAT, dedicated labs explore policies around smart systems,

²⁰⁹ Supra, note 195, About *NCLA* (NCIA 2023).

²¹⁰ Supra, note 171 Digital Technologies in International Arbitration (UNCITRAL 2020).

²¹¹ NCIA, Arbitration and Mediation Rules (NCIA 2015).

²¹² Supra, note 158 (CIArb), Kenya Branch Annual Report (CIArb Kenya 2023).

²¹³ CIArb, Strategic Plan 2024–2028 (CIArb Kenya 2024).

²¹⁴ Judiciary of Kenya, Judiciary Digitization Strategy 2019–2023 (Judiciary of Kenya 2019).

²¹⁵ Jomo Kenyatta University of Agriculture and Technology (JKUAT) Embraces AI as a Transformative Tool in Education and Research, 25 April 2025 <https://www.jkuat.ac.ke/jkuat-embraces-ai-as-a-transformative-tool-in-education-and-research/> <accessed 12 November 2025>

²¹⁶ Ibid

responsible data use, along with technology rollout in government bodies, offering practical advice for updating laws.²¹⁷ Such efforts help build a base so courts and arbitration setups in Kenya can adopt AI thoughtfully, keeping moral standards and community impact front of mind.²¹⁸ Events run by these groups show how involved Kenya is in talking about AI. Egerton University's 2025 summit on "Generative AI in Higher Education" it pulled in lawyers, technology experts, and government planners to talk ethics, rules, or real-world use of AI when choices are made.²¹⁹ Additionally MKU ran sessions for law learners focusing on smart tools like forecasting outcomes in court workflows or using AI to dig up legal information faster.²²⁰ These meetups create space where different fields swap ideas, helping people see both upsides and dangers tied to AI in settling disputes things like unfair leans, clear explanations, or who answers when something goes wrong.

A key role these Institutions play is bringing AI know-how into law studies. More legal departments now teach classes about technology in law, safeguarding data, plus ethical use of artificial intelligence so learners see how machines assist, rather than take over, human decisions in dispute resolution.²²¹ This training shrinks the gap between lawyers and coders, encouraging teamwork needed to build smart tools that work well and follow laws too.²²² Take those taught to use Natural Language Processing software for checking agreements or forecasting results with data models they're more ready to jump into current arbitration setups.²²³

Research from institutions shapes how rules and organizations grow, offering real-world clues that help put AI to use effectively. Work done at JKUAT along with Egerton digs into problems like skewed algorithms, personal data safety, plus moral concerns when

²¹⁷ Kenya Embraces AI Innovation through JKUAT's JHub, 27 October 2025.

²¹⁸ Ibid

²¹⁹ Egerton University AI Summit at Egerton University Concludes with Call for Ethical Embrace of Innovation, 14–16 October 2025

²²⁰ Mount Kenya University, MKU Law Students to Receive Training on Arbitration Law (Kenya News, 22 October 2025) <https://www.kenyanews.go.ke/mku-law-students-to-receive-training-on-arbitration-law/> <accessed 13 November 2025>

²²¹ JKUAT, Social Robotics Lab Initiative on Ethics in Computing (2025) <https://www.jkuatsocialroboticslab.com/> <accessed 13 November 2025>

²²² Ibid

²²³ Ibid

using AI in settling conflicts.²²⁴ Such results might shape court plans for bringing in AI - like test runs for software helping sort documents or track cases. Mixing classroom ideas with hands-on tests, Kenyan schools become spaces where proof-backed upgrades emerge, boosting courts' ability to take on AI the right way.

In the end, getting schools involved keeps Kenya's use of AI in dispute resolution fair and connected to real societal needs.²²⁵ Because they spark deep conversations, prepare upcoming lawyers, also generate practical studies, universities build a steady flow of skilled people who can back up courts and arbitration bodies.²²⁶ With an eye on learning and fresh ideas at once, Kenya gets the most out of artificial intelligence without losing sight of human judgment, openness, or balance key parts of resolving disputes and justice overall. Through this move, institutions involvement turns into a solid base for lasting technology growth in Kenya's legal scene.

4.4 Legislative and Policy Alignment for Responsible AI Adoption in Arbitration

Kenya has gone a long way in developing a legal framework of digital governance, whereas particular AI regulation is underdeveloped. Data Protection Act (2019) and Computer Misuse and Cybercrimes Act (2018) offer an initial framework of handling of data privacy, cybersecurity, and legitimate online behavior.²²⁷ The laws determine the way personal information could be gathered, stored or processed so that the information employed in AI applications like the case analysis or the predictive arbitration tools would meet privacy requirements.²²⁸ To cite an example, any AI system applied in arbitration would be required to have in place the personal and confidential information of parties that are safeguarded and handled with express approval, as is the case with the safeguard provided in these statutes.²²⁹

²²⁴ Ibid

²²⁵ Supra, note 159

²²⁶ Ibid

²²⁷ Kenya: AI Policy and Governance (Nemko) para Current state of AI policy in Kenya <https://digital.nemko.com/regulations/kenya-ai-policy-and-governance> <accessed 22 November 2025>

²²⁸ Ibid para Current state of AI policy in Kenya

²²⁹ What Should Kenya's AI Laws Actually Cover? (MMC Asafo) para on Data Protection Act and automated decision-making <https://mmcasafo.com/news/what-should-kenyas-ai-laws-actually-cover/> <accessed 22 November 2025>

Notwithstanding such developments, the current laws are still silent on key AI-specific issues like algorithmic bias, automated decision-making or responsibility of the AI driven outcomes.²³⁰ Although AI-based tools can increase the efficiency of arbitration by processing contracts, anticipating the schedule of cases, or finding the pertinent precedents they can also introduce biases or errors in case of the improper design or control.²³¹ As an example, an AI system would be trained on the previous case data information, where the gender or socio-economic bias of the past exists, and unless there is an explicit audit and fix, it could carry on creating inequities.²³² Thus, the existing legislation in Kenya needs to be broadened to address the ethical AI regulation, transparency of algorithmic logic as well as human control mechanisms.²³³ The Distributed Ledgers and Artificial Intelligence Taskforce of Kenya (2018) is the first official effort to acknowledge the revolutionary power of AI in the nation in fields such as law, finance, and healthcare.²³⁴ The taskforce proposed extensive governance measures, including the development of AI transparency criteria, accountability measures and data security measures.²³⁵ To illustrate, it recommended the use of AI in the application of the law under strict regulatory control to prevent potential dangers like wrong decisions or unethical leakage of confidential data.²³⁶ Nevertheless, these recommendations created significant foundations, but little has been done so far, and there are still gaps between the policy intentions and legal standards that can be enforced on AI in the judicial and arbitration sphere.²³⁷

²³⁰ Supra, note 168 (As of April 2025, Kenya has no legislation that is AI-specific).

²³¹ Artificial Intelligence in Kenya (Paradigm HQ) 11 (on potential for AI bias, error, and risk). <https://paradigmhq.org/wp-content/uploads/2022/02/Artificial-Intelligence-in-Kenya-1.pdf> <accessed 22 November 2025>

²³² Ibid (on inherited bias in data).

²³³ What Should Kenya's AI Laws Actually Cover? (MMC Asafo) (recommendations for transparency, risk-based regulation, accountability) <https://mmcasafo.com/news/what-should-kenyas-ai-laws-actually-cover/> <accessed 22 November 2025>

²³⁴ Emerging Digital Technologies for Kenya: Exploration & Analysis, Distributed Ledgers & AI Taskforce, Ministry of ICT (2019) 5. https://oecd-ai.case-api.buddyweb.fr/storage//policy-initiatives/Jul2025/fu_4b4tvj7bugapqdf.pdf <accessed 22 November 2025>

²³⁵ Artificial Intelligence Practitioners' Guide: Kenya (GIZ) 3.2 (describing taskforce governance measures). <https://www.bmz-digital.global/wp-content/uploads/2023/04/GIZ-2023-Artificial-Intelligence-Practicioners-Guide-Kenya.pdf> <accessed 22 November 2025>

²³⁶ Supra, note 174

²³⁷ A Review of the Kenya National AI Strategy (Team4Tech) (noting gaps between policy and enforceable standards). <https://team4tech.org/2025/04/kenya-national-ai->

To become a regional leader of AI-assisted arbitration, the taskforce recommendations will have to be converted into legal and institutional changes that can be implemented.²³⁸ This may involve creating AI specific amendments to the Arbitration Act, ensuring there are some guidelines in regard to algorithmic auditing, and the implementation of human-in-the-loop systems where arbitrators review AI generated insights prior to final decision-making.²³⁹ International experiences, including the EU Artificial Intelligence Act, serve as a good guide as they classify AI systems based on risk and demand compliance measures with the high risk uses.²⁴⁰ The policymakers can make sure that AI can be used to improve efficiency without jeopardizing fairness and accountability by applying the principles to the Kenyan context.²⁴¹

Lastly, institutional capacity-building should be built upon the legislative and policy alignment.²⁴² To apply these frameworks, regulatory bodies, judiciary and arbitration bodies will need to have specialized training on AI ethics, governance and compliance to establish such systems.²⁴³ Pilot programs may be used to experiment with AI tools in arbitration with controlled conditions, which will not interfere with the protection of the law but will help spot operational issues.²⁴⁴ Through a combination of powerful laws, global best practices, and effective institutional steps, Kenya will be able to establish an effective and enforceable framework that allows responsible AI use in arbitration, strengthening the rule of law and people's trust in digital arbitration.

4.5 The Three-Tier Implementation Model for Kenya

The three-tier framework is a reasonable direction through which Kenya can embrace AI in arbitration without disrupting the current practices. The initial level is concerned

[strategy/#:~:text=Kenya's%20strategy%20emphasizes%20that%20a,grow%20in%20the%20right%20way.](#) <accessed 22 November 2025>

²³⁸ Kenya's National AI Strategy 2025–2030: Legal and Regulatory Implications (Manwa Advocates) (commentary on converting taskforce recommendations into legal changes). <https://manwaadvocates.com/kenyas-national-ai-strategy-2025-2030-legal-and-regulatory-implications/> <accessed 22 November 2025>

²³⁹ Kenya's National AI Strategy 2025–2030 (the strategy calls for human-in-loop systems, risk-management, compliance).

²⁴⁰ *Supra*, note 173

²⁴¹ *Supra*, note 179 (policy goal of balancing innovation, fairness, accountability)

²⁴² *Supra*, note 171 (on capacity-building, governance)

²⁴³ *Supra*, note 175 (recommendation on training regulatory bodies and institutions).

²⁴⁴ Kenya AI Strategy 2025–2030 (Legal Wire) (on piloting AI tools under controlled conditions).

with administrative and case management tasks, the automation of which can bring short-term benefits with minimum risks.²⁴⁵ Filing, scheduling, document, and virtual hearing coordination tools can save a lot of time in terms of delay and operational overheads.²⁴⁶ With the simplification of routine work, it is possible to eliminate the significant inefficiencies of the institutions, shrink the backlog and give more attention to the arbitrator to significant legal issues.²⁴⁷

This first step creates institutional trust and develops the technical basis that can be used in more sophisticated AI uses. The second and the third layers bring in analytical and decision support progressively. Tier two integrates the tools which helps to improve the precision of decisions by offering predictive analytics, pattern recognition, and sentiment analysis tools which can guide the arbitrator in detecting trends or estimating difficult evidence but does not determine the results.²⁴⁸ Tier three applies more sophisticated decision-support systems that come up with recommendations with a close human control.²⁴⁹ This level consists of audit trails and transparency measures that assure accountability as AI will not become an uncontrollable force in decision making.²⁵⁰ A combination of those levels will establish a responsible gradual transition of institutional learning in phases, and adoption of AI will be consistent with ethical, procedural, and legal protection.

²⁴⁵ Supra, note 201 Notes on Organizing Arbitral Proceedings (UNCITRAL 2016). <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf> <accessed 22 November 2025>

²⁴⁶ ICCA–IBA, Joint Task Force on Virtual Hearings: Good Practice Guide (ICCA–IBA 2020).

²⁴⁷ Supra, note 199 Digital Justice: Technology for Efficient Courts (World Bank 2021).

²⁴⁸ Daniel Katz, Michael Bommarito and Josh Blackman, A General Approach for Predicting the Behaviour of the Supreme Court of the United States (2017) 12(4) *PLOS ONE*

²⁴⁹ Regulation (EU) 2024/1689 (Artificial Intelligence Act), arts 13–14 (human oversight and high-risk system obligations).

²⁵⁰ Council of Europe, Recommendation CM/Rec(2020)1 on the Human Rights Impacts of Algorithmic Systems (Council of Europe 2020).

5.0 Kenyan Precedents and Regulatory Framework for AI in Arbitration

5.1 Data Protection and AI Integrity: The Worldcoin Precedent

The High Court in *Republic v Tools for Humanity Corporation*²⁵¹ addressed the unlawful collection and processing of biometric data by a digital platform, highlighting fundamental principles of privacy, informed consent, and lawful data handling.²⁵² The court set aside aspects of Worldcoin’s operations and mandated the erasure of collected biometric data, establishing that digital enterprises must comply strictly with Kenya’s data protection regime.²⁵³ For AI integration into arbitration, this case is highly instructive because many AI tools such as predictive analytics, sentiment analysis, and voice or facial recognition systems rely on sensitive datasets, including biometric or personal information.²⁵⁴ Any AI system deployed in arbitral processes must therefore adhere to similar standards, ensuring consent is obtained, data is lawfully processed, and cross-border transfers comply with regulatory requirements.²⁵⁵

Furthermore, this judgment provides a legal foundation for assessing the legitimacy of AI-assisted arbitration outputs.²⁵⁶ Arbitrators and institutions must ensure that AI models are trained on ethically sourced and legally compliant data, particularly when AI recommendations may influence decisions affecting parties’ rights.²⁵⁷ The ruling reinforces the principle that data protection is not merely technical but a core legal and ethical obligation.²⁵⁸ Consequently, the Worldcoin case serves as a benchmark for Kenyan arbitration bodies to develop policies governing AI usage such as secure storage, anonymization, and data lifecycle management to protect the confidentiality and privacy of all participants, thereby enhancing trust in AI-driven decision-making.

²⁵¹ *Republic v Tools for Humanity Corporation & Ors* [2025] KEHC 5629 (KLR) (Judicial Review) para 1

²⁵² *Ibid*

²⁵³ *Ibid* (Judicial Review) Order (c) (Mandamus) to erase biometric data

²⁵⁴ *Ibid* (Judicial Review) paras 6–7 (on data protection, DPIA).

²⁵⁵ *Ibid* (Judicial Review) Order (a) Prohibition (restraining further processing without DPIA and valid consent

²⁵⁶ (Judicial Review) para 20 (on data subject rights, legality).

²⁵⁷ *Ibid* (Judicial Review) para 21 (on consent, purpose specification).

²⁵⁸ (Judicial Review) para 19 (on constitutional right to privacy).

5.2 Digital Evidence Standards: Lessons from Mtere [2025] KEHC 5144; Ogembo [2024] KEHC 15763

Decisions such as *Mtere v Republic*²⁵⁹ and *Ogembo v Yongo*²⁶⁰ demonstrate the courts' strict approach to electronic evidence, emphasizing that digital or audiovisual records must be accompanied by authentication certificates and produced in accordance with statutory requirements.²⁶¹ These cases show that failure to comply with authentication protocols can result in exclusion of evidence, underlining the judiciary's insistence on accountability and traceability in digital processes.²⁶² In the context of AI in arbitration, this establishes a clear analogy: AI generated outputs such as automated transcripts, predictive analyses, or case evaluation reports must be accompanied by system logs, certification of algorithmic integrity, and expert explanations to establish their credibility.²⁶³

Moreover, these rulings highlight the need for procedural safeguards when integrating technology into dispute resolution.²⁶⁴ Kenyan arbitration institutions can draw from these principles by creating standard operating procedures for AI usage, including verification frameworks, audit trails, and expert validation processes.²⁶⁵ By mirroring the evidentiary rigor demanded in these cases, AI assisted arbitration can maintain legitimacy, ensuring that parties' rights are protected and that automated outputs meet the same standards of admissibility, reliability, and procedural fairness as traditional evidence.²⁶⁶

5.3 Judicial ICT Frameworks: Virtual Courts and AI Adoption

The Supreme Court's 2023 guidelines on online courts make it official: technology like email filing, video hearings, or digital chats now fits into court routines.²⁶⁷ The COVID-

²⁵⁹ *Mtere v Republic* [2025] KEHC 5144

²⁶⁰ *Ogembo v Yongo* [2024] KEHC 15763

²⁶¹ *Ibid*

²⁶² *Ibid* para 5–6 (on certificate of electronic evidence under s 106B).

²⁶³ *Supra*, note 225 para 6 para 8 (court speaks of certificate under s 106B as guaranteeing reliability, integrity of electronic evidence).

²⁶⁴ *Supra* note 226 para 6 (on court's reasoning about admissibility and procedural safeguards).

²⁶⁵ Evidence Act (Cap 80, Laws of Kenya) s 106B(4)

²⁶⁶ *Supra*, note 230 para 36–37

²⁶⁷ Meredith Tait Rossner and Martha McCurdy, *The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality* (2021) Federal Law Review

19 pandemic accelerated the use of video conferencing in courts, showing that teleservices can be quickly adopted and integrated into regular judicial work.²⁶⁸ Instead of resisting change, judges are treating these tools as normal parts of procedure but still fair.²⁶⁹ Empirical research suggests that remote hearings, when well designed, can maintain procedural fairness and impartiality.²⁷⁰ Because there's clear ground rules, new technology can enter without breaking basic rights.

For arbitration, this opens doors for smart software handling schedules, turning speech to text, or running meetings by webcam all allowed, so long as openness, access, and justice stay intact.²⁷¹ These guidelines highlight ways to keep operations safe like using encrypted chats, solid verification steps, or constant system checks.²⁷² When it comes to bringing AI into arbitration, organizations might use locked-down platforms, keep people involved in decisions, and record how algorithms reach conclusions, much like courts do during online hearings.²⁷³ Tying AI use to established procedures helps Kenya's arbitration bodies make technology-based tools trustworthy, without letting speed override justice, privacy, or responsibility.

6.0 Ethical and Jurisprudential Implications of AI in Arbitration

As Kenya embraces AI assisted arbitration, the ethical landscape becomes increasingly complex, requiring careful consideration of how algorithmic systems interact with the foundational values of fairness and equality.²⁷⁴ Algorithmic bias poses one of the most immediate threats because AI models often inherit prejudices embedded in their training

²⁶⁸International Journal for Court Administration, 'Will COVID-19 Accelerate Implementation of ICT in Courts? (IJC A Journal, 2020) <https://iacajournal.org/articles/384> <accessed 23 November 2025>

²⁶⁹ O. M. Atoyebi, The Role of Technology in Access to Justice: Enhancing Court Processes in Nigeria (BarristerNG, 2024)

²⁷⁰ Law & Society Review, Legitimacy and Online Proceedings: Procedural Justice, Access to Justice, and the Role of Income (Cambridge Core, 2024)

²⁷¹ International Journal for Multidisciplinary Research (IJFMR), Virtual Courts: A Pathway towards Digital Justice (IJFMR, 2024) <https://www.ijfmr.com/papers/2024/2/15122.pdf> <accessed 23 November 2025>

²⁷² IJNRD, Digitization of Judicial Processes: Virtual Courtrooms and Remote Hearings; Legal Tech & Data Security (IJNRD, March 2024) <https://www.ijnrd.org/papers/IJNRD2403293.pdf> <accessed 23 November 2025>

²⁷³ Supra, note 1

²⁷⁴ Notice Pasipamire and Abton Muroyiwa, Navigating algorithm bias in AI: ensuring fairness and trust in Africa (2024) *Frontiers in Research Metrics and Analytics* 9, 1486600

data, which may reflect societal disparities involving gender, ethnicity, or socioeconomic status.²⁷⁵ If left unchecked, such biases could undermine the equality of arms guaranteed under Section 19 of the Arbitration Act 1995,²⁷⁶ allowing technologically advantaged parties to dominate proceedings. White & Case’s survey of international arbitration practitioners found that “the risk of undetected AI errors and bias, is the most significant obstacle” to adopting AI.²⁷⁷

At the same time, the need to protect confidentiality and personal data becomes more urgent, as AI tools often rely on cloud storage and machine-learning processes that expose sensitive information to heightened privacy risks.²⁷⁸ Kenya’s Data Protection Act 2019 and the Computer Misuse and Cybercrimes Act 2018 provide a legal foundation for safeguarding information, but these protections must be strengthened with sector-specific guidelines tailored to arbitral confidentiality.²⁷⁹

Transparency and explainability form another critical pillar of ethical AI integration, particularly because arbitration relies heavily on the reasoning behind decisions to maintain legitimacy and procedural fairness.²⁸⁰ The “black box” nature of advanced AI systems creates a risk that parties may be unable to understand how an algorithm arrived at certain recommendations or predictions, rendering them incapable of challenging its logic.²⁸¹ Such opacity could expose arbitral awards to legal challenge under Section 35 of the Arbitration Act, which permits the setting-aside of awards where a party was denied a fair hearing.²⁸² To mitigate this risk, Kenyan arbitral institutions must implement a human-in-the-loop decision-making model in which AI provides support but never

²⁷⁵ Jella Pfeiffer and Julia Gutschow, *Algorithmic Fairness in AI: An Interdisciplinary View* (2023) *Business & Information Systems Engineering* 65, 209–222

²⁷⁶ *Supra*, note s 19 (1995)

²⁷⁷ White & Case LLP, *Arbitration and AI: 2025 International Arbitration Survey Adopting AI: Roadblocks ahead*

²⁷⁸ Mark-Silas A. Malekela, *AI and Confidentiality protection in International Commercial Arbitration: Analysis of the existing legal framework* (2025) *Discover Artificial Intelligence* 5, article 83.

²⁷⁹ CiArb Kenya, *Arbitration in the Age of Artificial Intelligence in Alternative Dispute Resolution* Vol 12, Issue 1 (2023).

²⁸⁰ *Supra*, note 264 *The Case for AI in Arbitration*” (2024) *arXiv*.

²⁸¹ *Setting the Boundaries for the Use of AI in Indian Arbitration* (2023) MDPI <https://www.mdpi.com/2673-4591/107/1/39> <accessed 23 November 2025>

²⁸² *Supra*, note 267, Section 35 amended

replaces the arbitrator's judgment.²⁸³ Transparent algorithmic audits, data-impact assessments, and explainability reports would enhance accountability by ensuring that arbitrators, developers, and institutions can justify how AI tools influence procedural decisions.²⁸⁴ These mechanisms align with global standards such as the Organization for Economic Co-operation and Development (OECD) Principles on AI and the EU's Ethics Guidelines for Trustworthy AI, which emphasize traceability, fairness, and accountability in automated systems.²⁸⁵

Ultimately, the integration of AI into arbitration challenges Kenya to rethink the very meaning of justice, prompting a jurisprudential recalibration that safeguards the human elements of moral intuition, empathy, and equitable discretion.²⁸⁶ While AI excels at pattern recognition and procedural efficiency, it lacks the capacity to appreciate substantive fairness the core of Article 159 of the Constitution of Kenya.²⁸⁷ This underscores the need to ensure that arbitrators remain the authoritative custodians of justice, using AI only as a cognitive enhancement tool rather than a substitute.²⁸⁸ The future of AI assisted arbitration in Kenya therefore depends on embedding ethical safeguards into institutional design, including clear liability frameworks, bias mitigation strategies, and inclusive access to technological resources.²⁸⁹ By grounding innovation in transparency, accountability, and human oversight, Kenya can build an AI arbitration system that strengthens efficiency without compromising the essence of justice, thereby positioning itself as a regional leader in technologically advanced yet ethically grounded dispute resolution.

²⁸³ Norton Rose Fulbright, *New frontiers: Regulating artificial intelligence in international arbitration, guiding principle: human oversight and responsibility.*

²⁸⁴ CiArb Kenya (2023), *Arbitration in the Age of Artificial Intelligence*

²⁸⁵ Norton Rose Fulbright, *New frontiers: Regulating artificial intelligence in international arbitration, guiding principle: human oversight and responsibility.*

²⁸⁶ Michael De'Shazer, *Advancing Legal Reasoning: The Integration of AI to Navigate Complexities and Biases in Global Jurisprudence with Semi-Automated Arbitration Processes (SAAPs)* (2024) *arXiv.*

²⁸⁷ *Ibid*

²⁸⁸ *Supra*, note 268

²⁸⁹ *International Journal for Multidisciplinary Research (IJFMR)* (2025)

6.1 Ethical and Socio-Legal Dimensions

The rise of AI in arbitration stirs tough ethical questions alongside broader societal and legal doubts particularly around preserving human-led choices.²⁹⁰ Rather than just following rigid guidelines, mediators lean on experience and gut sense to deliver balanced judgments, weighing circumstances, motives, or how things truly sit between parties.²⁹¹ In contrast, machines excel at detecting patterns or predicting rulings but trip up on subtleties such as fairness or one-off scenarios.²⁹² Picture a corporate dispute over breached agreements – software may calculate monetary damages from prior verdicts or contract terms, yet overlook aspects like integrity, goodwill, or personal strain, possibly ending in skewed outcomes.²⁹³ So if Kenya starts using more AI, it should protect key values in arbitration like freedom to choose procedures, privacy, and balanced processes making sure people still have final say, while tech just helps out.

Another key aspect is the mix of cultures and laws shaping Kenya’s courts and arbitration scene.²⁹⁴ Instead of just one system, there’s British-style law left over from colonial times, along with traditional rules used in family or village conflicts on top of global standards brought in for business deals.²⁹⁵ Systems built only on Western examples could miss these layers entirely, leading to advice that doesn’t fit how things actually work here.²⁹⁶ Take land inheritance: a model trained abroad might not get how local customs handle it, ending up with results that feel unjust. What helps is focusing on gathering homegrown legal records. Build tools aware of native ways, everyday values, and who

²⁹⁰ Notice Pasipamire and Abton Muroyiwa, Navigating algorithm bias in AI: ensuring fairness and trust in Africa (2024) *Frontiers in Research Metrics and Analytics* 9, 1486600

²⁹¹ Isa Inuwa-Dutse, FATE in AI: Towards Algorithmic Inclusivity and Accessibility (2023) arXiv

²⁹² Setting the Boundaries for the Use of AI in Indian Arbitration, MDPI <https://www.mdpi.com/2673-4591/107/1/39> <accessed 23 November 2025>

²⁹³ *Supra*, note 271

²⁹⁴ Jella Pfeiffer and Julia Gutschow, Algorithmic Fairness in AI: An Interdisciplinary View (2023) *Business & Information Systems Engineering* 65

²⁹⁵ Negotiating AI fairness: a call for rebalancing power relations, *AI & Society* (2025).

²⁹⁶ Artificial Intelligence and the Reconfiguration of Justice: A Culturally Grounded, Globally Responsive Framework for Algorithmic Governance, *International Journal of Research and Innovation in Social Science*. <https://ideas.repec.org/s/bcp/journal8.html> <accessed 23 November 2025>

has access to resources.²⁹⁷ That way, technology answers make sense where they're supposed to matter.

Clarity and taking responsibility matter a lot when using AI fairly in court-like settings. Some technology tools, particularly ones built on tricky learning codes, work like hidden machines people don't see how results come about.²⁹⁸ When no one gets the logic, it breaks the need to have things spelled out, something key for confidence during conflicts.²⁹⁹ The EU shows an example worth checking: they require tough-to-assess AI to open up its logs and show reasoning, so users grasp why answers pop out the way they do.³⁰⁰ In real use, this might mean making AI-backed arbitration tools show clear records of choices, where data comes from, along with how much each factor matters so users and judges can check or challenge the system's conclusions.³⁰¹ Openness like that helps keep things fair while boosting trust in decisions shaped by AI.

Thinking about right and wrong doesn't stop at fairness it covers how we handle private information, especially when talks are supposed to stay under wraps.³⁰² Instead of just sharing freely, systems might dig into delicate details like business secrets, cash records, or names during automated reviews.³⁰³ Even though Kenya passed a law in 2017 to guard this kind of stuff, machines learning from old cases bring fresh dangers say, holding onto files longer than needed or leaking clues through hidden calculations.³⁰⁴ Imagine software spotting trends in past rulings it could accidentally tip someone off about who said what behind closed doors. To keep things fair, mixing strong scrambling methods, tight entry rules, along with smart stripping of identities and making sure everyone agrees

²⁹⁷ Julien Kiese Bahangulu and Louis Owusu-Berko, Algorithmic bias, data ethics, and governance: Ensuring fairness, transparency and compliance in AI-powered (2025) *World Journal of Advanced Research and Reviews*.

²⁹⁸ Babikian in FOL Proceedings, IRC KDU (2024) (citing Kaufmann-Kohler & Schult) on opacity.

²⁹⁹ Mohaddas Mehboob, Sidra Zakir, Hazrat Usman & Attiq Ur Rehman, AI, Transparency, and Fairness in International Arbitration: Rethinking Disclosure (2025) *ACADEMiA International Journal for Social Sciences*.

³⁰⁰ Ibid

³⁰¹ Ibid

³⁰² Supra, note 279 Arbitration and AI: 2025 International Arbitration Survey Adopting AI: Roadblocks ahead

³⁰³ New South African AI in Arbitration Guidelines, Africa-Legal.

³⁰⁴ Supra, note 293 Arbitration and AI: 2025 International Arbitration Survey.

clearly is key when tech helps sort disputes out.³⁰⁵ Technology in Kenya need to feel confident about how AI is used trust matters, especially when it comes to fairness and who gets included.³⁰⁶ Rural communities or people less familiar with technology might see AI as confusing or only for elites, which could leave them out of dispute resolution.³⁰⁷ Instead of pushing systems that don't fit, Kenya ought to build tools that real users can navigate easily, no matter their background or language.³⁰⁸ Outreach efforts, open talks with local groups, plus regular upskilling for legal pros help people believe in these new methods.³⁰⁹ Swapping one-size-fits-all fixes for thoughtful rollouts means Kenya keeps justice balanced while still moving forward.

7.0 Comparative Lessons from Developing Countries and Emerging Economies

7.1 Incremental Digitalization and Strong Institutional Discipline

Rwanda shows how technology can work in resolving disputes when rules are clear and changes happen step by step.³¹⁰ Instead of rushing, they started small using online filing, digital calendars for cases, along with managing documents electronically through the Kigali International Arbitration Centre (KIAC) and national ICT plans.³¹¹ Step after step, courts tried these tools in everyday tasks where mistakes wouldn't cause big problems, slowly gaining confidence, skills, and smooth processes.³¹² Kenya could learn from this: get the basics right first, like safe software for handling cases, scanned files, solid internet

³⁰⁵ Norton Rose Fulbright, *New frontiers: Regulating artificial intelligence in international arbitration*.

³⁰⁶ Negotiating AI fairness: a call for rebalancing power relations, *AI & Society*. <https://link.springer.com/article/10.1007/s00146-025-02653-8> <accessed 23 November 2025>

³⁰⁷ Isa Inuwa-Dutse, *FATE in AI: Towards Algorithmic Inclusivity and Accessibility* (2023) arXiv

³⁰⁸ *International Journal of Research and Innovation in Social Science, Artificial Intelligence and the Reconfiguration of Justice*.

³⁰⁹ Arif Ali Khan et al, *AI Ethics: An Empirical Study on the Views of Practitioners and Lawmakers* (2022) arXiv

³¹⁰ *Global Arbitration Review, Rwanda Middle Eastern and African Arbitration Review* (2025) <https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2025/article/rwanda> <accessed 23 November 2025>

³¹¹ *Law establishing the Kigali International Arbitration Centre and Determining its Organisation, Functioning and Competence, Art 6, Law No. 51/2010*.

³¹² *African Arbitration Association, Kigali International Arbitration Centre profile*. <https://africanarbitrationassociation.org/Sys/PublicProfile/47340977/4568030> <accessed 23 November 2025>

before adding smart machines.³¹³ Doing it this way lowers breakdown risks, keeps things fair, plus makes high-tech upgrades feel natural instead of chaotic.

7.2 Policy Coherence and a National AI Strategy Driving Reform

Nigeria's early steps reveal how matching national policies with strong leadership helps bring AI into courts.³¹⁴ Instead of just talking big, the 2022–2027 National Artificial Intelligence Strategy picks arbitration and online dispute tools as key spots to start.³¹⁵ Because Nigeria's legal-tech scene is growing fast, this plan gives a clear path forward linking courts, officials, schools, and startups.³¹⁶ Rather than letting things spin out of control, these rules keep AI efforts focused on solid data, fair practices, yet ready for real-world use.³¹⁷ In Kenya, one thing stands out: using AI in arbitration needs a joined-up national plan instead of scattered efforts by different groups. Putting together local rules like the Data Protection Act, technology policies, court digitization plans, and updates from NCIA could make space for new ideas to grow safely, without skipping ethics or fairness.

7.3 Research Capacity, Localized Innovation, and Rigorous Pilot Testing

South Africa provides a critical lesson in the value of robust research ecosystems and pilot-testing when integrating AI in quasi-judicial and arbitral settings. Institutions such as the Council for Scientific and Industrial Research (CSIR) have undertaken structured experiments involving AI-powered transcription, document analysis, and decision-support tools.³¹⁸ Crucially, South Africa emphasizes developing or adapting AI models locally, ensuring that algorithms are trained on regionally relevant data and evaluated for bias, accuracy, and cultural responsiveness.³¹⁹ This avoids the pitfalls of importing

³¹³ Delos, *Rwanda GAP Guide to Arbitration in Africa* 2nd edn (2023) (on KIAC's hearing facilities including video conferencing)

³¹⁴ White & Case, *AI Watch: Global Regulatory Tracker – Nigeria* (27 Jan 2025) (on Nigeria's AI governance efforts).

³¹⁵ National Artificial Intelligence Strategy 2025, Federal Ministry of Communications, Innovation and Digital Economy, Nigeria

³¹⁶ Techknow Africa, *Nigeria Launches National AI Strategy to Lead Africa's Tech Future* (2025).

³¹⁷ Dentons, *AI Regulation and Policy in Africa* (2024) (on Nigeria's ethical & data governance pillars).

³¹⁸ Dentons, *AI Regulation and Policy in Africa* (2024) (on South Africa's AI research groups via CAIR and Department of Science & Innovation).

³¹⁹ A. Formanek, C. R. Tilbury and J. P. Shock, *Opportunities of Reinforcement Learning in South Africa's Just Transition* (2024) arXiv.

foreign AI tools that may misinterpret African contexts or produce biased outputs.³²⁰ For Kenya, South Africa’s approach demonstrates that successful AI integration requires building domestic research capacity through partnerships with universities, NCIA, CI Arb Kenya, and tech hubs to conduct ethical audits, domain-specific training, and controlled pilot programmes.³²¹ This model ensures that Kenya’s AI systems evolve in alignment with its legal norms, linguistic realities, and socio-economic environment.

8.0 Constraints and Barriers to AI Integration in Kenyan Arbitration

But AI carries shadows. Algorithms trained on skewed data risk reproducing old injustices. “Black box” decisions; where no one understands how the machine reached its conclusion, clash with Section 31’s requirement for reasoned awards.³²² Enforcement abroad could stumble. The New York Convention wasn’t written with bots in mind, and foreign courts may reject AI-generated awards as lacking human fairness.³²³ Privacy is another minefield: Kenya’s Data Protection Act demands consent before case files are processed, yet AI thrives on data.³²⁴ Without guardrails, AI could turn arbitration from efficient to unpredictable.³²⁵

Even though countries around the world are moving fast on using AI in arbitration, Kenya is advancing slowly progress is patchy because of basic setup issues and technology shortages.³²⁶ Digital tools such as the Judiciary e-filing platform along with the National Judiciary Case Tracking System (NJCTS) show how technology can help resolve disputes; however, these systems focus more on streamlining paperwork instead

³²⁰ Kinyua Gikunda, *Empowering Africa: An In-Depth Exploration of the Adoption of Artificial Intelligence Across the Continent* (2023) arXiv

³²¹ Joshua Ellul, Stephen McCarthy, Trevor Sammut, Juanita Brockdorff, Matthew Scerri and Gordon J. Pace, *A Pragmatic Approach to Regulating Artificial Intelligence: A Technology Regulator’s Perspective* (2021) arXiv.

³²² Kola Muwanga, *Integrating Artificial Intelligence in Kenyan Arbitration: Opportunities, Challenges, and the Path Forward*. Available at <https://pmwlex.com/index.php/2025/12/08/the-final-integrating-artificial-intelligence-in-kenyan-arbitration/> <accessed on 14 January 2026>

³²³ Ibid

³²⁴ Ibid

³²⁵ Ibid

³²⁶ See generally *The State of AI in Kenya: Progress, Challenges & the Road Ahead AI Reports Africa* (18 June 2025) <https://aireports.africa/2025/06/18/the-state-of-ai-in-kenya-progress-challenges-the-road-ahead/> <accessed 13 November 2025>

of supporting smart decision making powered by AI.³²⁷ Without solid foundations like strong computing power, safe ways to store information, plus stable web connections at local arbitration hubs, rolling out sophisticated AI solutions stays out of reach.³²⁸ Additionally, plenty of legal professionals handling arbitration aren't well versed in artificial intelligence, leading to a knowledge shortfall which blocks wider use while making people hesitant about trusting AI supported methods.³²⁹

Institutional hurdles plus shaky regulations make it tougher for Kenya to adopt AI in arbitration.³³⁰ Old rules like the 2019 Data Protection Act³³¹ and the 2018 cybercrime law³³² offer some privacy protection yet skip key issues algorithm responsibility, reducing bias, or how AI makes calls during disputes.³³³ Because of this gap, sticky problems including shady AI suggestions, murky machine logic, and weaker human checks go unchecked.³³⁴ On top of that, sluggish systems combined with tight budgets block progress on standard setups, test runs, or upskilling pros in AI use.³³⁵ Kenya's 2018 taskforce on block chain and AI they pushed for oversight models, but follow through dragged, so courts and arbitrators still float without solid rules for fair, long term AI use.³³⁶

³²⁷ The Judiciary of Kenya, E-filing is the solution to efficient Judiciary (17 April 2023) <https://judiciary.go.ke/e-filing-is-the-solution-to-efficient-judiciary/> <accessed 13 November 2025>

³²⁸ See generally The State of AI in Kenya: Progress, Challenges & the Road Ahead AI Reports Africa (18 June 2025) <https://aireports.africa/2025/06/18/the-state-of-ai-in-kenya-progress-challenges-the-road-ahead/> <accessed 13 November 2025>

³²⁹ Kenya National Artificial Intelligence Strategy 2025-2030 (Draft, January 2025)

³³⁰ Artificial Intelligence and Privacy in Kenya: Balancing Innovation with Rights Protection (May 2025) <https://neoadvocate.com/legal-tech/artificial-intelligence-and-privacy-in-kenya-balancing-innovation-and-rights-protection/> <accessed 13 November 2025>

³³¹ *Supra*, note 188

³³² Computer Misuse & Cybercrimes Act 2018

³³³ *Ibid*

³³⁴ Mohammed Muigai LLP, The Impact of Artificial Intelligence on Data Protection in Kenya (2024)

³³⁵ The State of AI in Kenya: Progress, Challenges & the Road Ahead AI Reports Africa (18 June 2025) <https://aireports.africa/2025/06/18/the-state-of-ai-in-kenya-progress-challenges-the-road-ahead/> <accessed 13 November 2025>

³³⁶ Bitange Ndemo Selected to Lead Blockchain Taskforce (21 Aug 2018) <https://www.kenyans.co.ke/news/27371-bitange-ndemo-selected-lead-blockchain-taskforce> <accessed 13 November 2025>

8.1 Legal and Regulatory Ambiguities

The Arbitration Act 1995 set up updated rules based on international standards, yet came before AI and digital tools became relevant so it does not cover how these techs fit into automated dispute resolution.³³⁷ Right now, there is no official direction for judges picking through software suggestions, data forecasts, or machine-aided analysis when making calls.³³⁸ Imagine an arbitrator running contracts through an AI to spot risks or guess rulings they might later get questioned whether those computer backed conclusions hold up legally if taken to trial.³³⁹ Without clear ground rules, many pros hesitate to try new methods, they fear leaning on technology based results might trigger complaints about unfair process, hidden slant, or result in decisions being tossed out.

Kenya still does not have rules for how openly AI must work, who answers when it fails, or how it's ethically checked during arbitration.³⁴⁰ Big issues stay unanswered, no one takes blame if a machine twists facts, gives flawed advice, or pushes unfair results.³⁴¹ When decisions involve algorithms, how do we judge their impact, and what proof or logs should back them up legally. AI sorting case files it might save time, yet no official direction exists; mistakes or unclear logic may weaken court acceptance, much like in places missing strong AI laws.³⁴² Without clarity, people hesitate to use these tools and confidence in arbitration itself could slip away so setting firm local guidelines on where AI fits becomes key.³⁴³ Consequently, inability to know who is responsible when AI makes decisions affects things like copyright, control over data, or how well the tech works.³⁴⁴ Imagine an AI tool studying old arbitration rulings to give advice yet built using

³³⁷ Supra, note 136 Cap 49

³³⁸ Supra, note 203 *Guideline on the Use of AI in Arbitration* (Norton Rose Fulbright) <https://www.nortonrosefulbright.com/en-sg/knowledge/publications/0906bc8e/the-chartered-institute-of-arbitrators-new-guideline-on-the-use-of-ai-in-arbitration> <accessed 13 November 2025>

³³⁹ Ibid

³⁴⁰ Jeffrey Shin and Cameron Lee, *AI Watch – Global regulatory tracker : Kenya* (White & Case LLP, 28 April 2025) <https://www.whitecase.com/insight-our-thinking/ai-watch-global-regulatory-tracker-kenya> <accessed 13 November 2025>

³⁴¹ Ibid

³⁴² Ibid

³⁴³ Ibid

³⁴⁴ European Commission, *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act)* COM(2021) 206 final, 21 April 2021 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206> <accessed 13 November 2025>

skewed or partial information. When rules aren't clear, it's hard to say if blame falls on the person overseeing the case, the coder behind the software, or the organization running it. Places like the European Union tackle these problems differently they demand checks for risks, open reporting, and real people watching the process, thanks to their AI law, making sure powerful AI used in justice settings can't act unchecked.³⁴⁵ Right now, Kenya does not have those kinds of protections, so even though AI could speed up dispute resolution, groups might stay away from using it.

Lastly, unclear laws can affect whether AI backed arbitration decisions hold up in court.³⁴⁶ When someone argues that artificial intelligence unfairly shaped an outcome, judges might lack prior cases or clear rules to decide if it's valid.³⁴⁷ That's different from places such as Singapore, where courts permit AI help during arbitration as long as there are strong ethical checks and procedures making enforcement more predictable without removing human control.³⁴⁸ Back in Kenya, spelling out exact guidelines on how AI can support, but not lead rulings, requiring people to stay in charge, plus setting boundaries on machine involvement could reduce confusion, keep fairness intact, and build trust among those using smart tools in dispute resolution.³⁴⁹

8.2 Ethical and Human Rights Concerns

The adoption of artificial intelligence (AI) in arbitration offers a high spectrum of ethical and human rights issues that go to the essence of fairness, responsibility, and justice.³⁵⁰ The question whether a machine can be really unbiased is one of the most burning

³⁴⁵ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) [2024] OJ L 202/1 <https://eur-lex.europa.eu/eli/reg/2024/1689/oj> <accessed 13 November 2025>

³⁴⁶ International Bar Association, *Artificial Intelligence and Arbitration: The Reality and the Challenges* (IBA Arbitration Committee, 2024) <https://www.ibanet.org/artificial-intelligence-and-arbitration-the-reality-and-the-challenges> <accessed 13 November 2025>

³⁴⁷ OECD, *The Role of AI in Judicial Decision-Making: Balancing Efficiency and Fairness* (OECD Digital Economy Papers No 357, 2023) <https://www.oecd.org/digital/the-role-of-ai-in-judicial-decision-making-balancing-efficiency-and-fairness.pdf> <accessed 13 November 2025>

³⁴⁸ Chambers and Partners, *Artificial Intelligence 2025 – Singapore: Trends and Developments* (Chambers Global Practice Guide, 2025) <https://practiceguides.chambers.com/practice-guides/artificial-intelligence-2025/singapore/trends-and-developments> <accessed 13 November 2025>

³⁴⁹ Ibid

³⁵⁰ Supra, note 26

ones.³⁵¹ Although artificial intelligence systems are presented as a matter-of-fact, the algorithms and data that drive them can be as prejudiced as they can be.³⁵² In case the training datasets have underlying biases, e.g. women are underrepresented, minorities are underrepresented or small businesses are underrepresented, then the system will yield some result beneficial to the dominant populations.³⁵³ This danger is not critical. Elsewhere, including the United States, AI sentencing systems, including COMPAS have been criticized to be racially biased, demonstrating the way unregulated algorithmic systems may support social injustice.³⁵⁴

When arbitration is used to solve in Kenya where the disputes usually bring up cross-cultural or business interests, an AI model selected based on a small or biased dataset would end up discriminating against some sectors or societal groups, which is a compromise to the principle of equality before the law.³⁵⁵

Maintaining human control thus becomes the main issue of keeping AI-assisted arbitration legitimate.³⁵⁶ Human judgment, empathy, and contextual understanding are traditionally appreciated in arbitration, and this is a trait that cannot be done by machines.³⁵⁷ In case AI systems are given the space to automatize decisions without a human control, the arbitral awards could become a-moral and interpretive.³⁵⁸ An example of this would be an AI application that is developed to analyze contract disputes and interpret them strictly through texts and fail to address contextual aspects like intent, custom or good faith, which are important in making fair decisions.³⁵⁹ To ensure that this does not happen, AI must be a decision-support system and not a decision-maker, leaving the final decision to the arbitrators. This human-in-the-loop scheme already is

³⁵¹ Sandra Wachter, Brent Mittelstadt and Chris Russell, Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI (2020) arXiv.

³⁵² Winston Maxwell and Bruno Dumas, Meaningful XAI Based on User-Centric Design Methodology (2023) arXiv.

³⁵³ Setting the Boundaries for the Use of AI in Indian Arbitration (MDPI) §3.2.

³⁵⁴ Aria Khademi and Vasant Honavar, Algorithmic Bias in Recidivism Prediction: A Causal Perspective (2019) arXiv, showing racial bias in COMPAS.

³⁵⁵ Michael De'Shazer, Advancing Legal Reasoning with Semi-Automated Arbitration Processes (2024) arXiv.

³⁵⁶ *Supra*, note 210

³⁵⁷ *Ibid*

³⁵⁸ *Ibid*

³⁵⁹ *Ibid*

being exercised in the Hangzhou Internet Court in China, where AI supports the work of the judges by writing opinions but the final decision is still made by a human being.

The other major ethical issue is that of algorithmic transparency: the parties must have some idea of how AI gets its answers.³⁶⁰ Most AI models, particularly deep learning models, are black boxes, and they generate results without providing any explanation.³⁶¹ This obscurity is incongruent with the values of procedural fairness and the right to fair hearing in the Kenyan Constitution in Article 50.³⁶² In case an arbitrator or AI system cannot describe the way a result was obtained, conflicting parties lose trust in the process.³⁶³ The AI Act of the European Union specifically focuses on such an issue by making high-risk AI systems explain their outputs.³⁶⁴ Another standard that can be embraced by Kenya is to require explainability and auditability in any AI systems used in arbitration, such that parties are able to access comprehensible reasons behind AI-generated insights or recommendations.³⁶⁵

Others that are at the centre of the ethical debate are privacy and data protection. Arbitration entails sharing of sensitive personal and corporate information such as financial statements, trade secrets and confidential agreements.³⁶⁶ The AI systems might make this information vulnerable to unauthorized access, abuse or surveillance without a strong data governance.³⁶⁷ Despite the fact that the Data Protection Act (2019) in Kenya offers the necessary framework in which the personal data protection can be guaranteed, the issues related to the AI data training, anonymization, or secondary data usage are still not addressed.³⁶⁸ As a case in point, the use of arbitration case information to train AI models in the future then the question of informed consent, ownership, and the right to erasure comes in question. The inability to respond to these issues might result in the infringement of privacy rights in accordance with Article 31 of the

³⁶⁰ CMS, EU AI Act – Questions and Answers, explaining interpretability and oversight requirements (Article 14) under the AI Act.

³⁶¹ *Ibid*

³⁶² Constitution of Kenya 2010, Article 50

³⁶³ Fair Tech Policy Lab, The EU AI Act's Transparency Gap (2024)

³⁶⁴ *Supra*, note 217

³⁶⁵ *Supra*, note 209

³⁶⁶ *Supra*, note 207

³⁶⁷ *Supra*, note 318 Cap. 411C, Kenya.

³⁶⁸ *Ibid* s 31

Constitution of Kenya, which will undermine the trust of the population in arbitration systems using AI.³⁶⁹

As well, the use of AI provokes the issue of access to justice and equality. When only institutions with significant funds and distinguished professionals can afford or even know AI technologies, the marginalized groups might not be fairly involved in arbitration.³⁷⁰ This problem is reminiscent of the global north where the legal service is frequently practiced as a technology-driven system that can further increase, instead of narrowing down social gaps.³⁷¹ Kenya should therefore guarantee fair access to AI applications, i.e., under training programs, open-source sites, and inexpensive digital infrastructure.³⁷² This goal has a partial basis in the Digital Strategy of the Judiciary (2021-2026) that proposes the encouragement of digitization and the promotion of virtual courts, although it has to be extended with the ethical use of AI and capacity-building efforts with arbitrators and advocates of different backgrounds.³⁷³

Last but not the least, a national ethical framework of AI has not yet been established. Even though approaches to defining principles of trustworthy AI, such as the openness of the European Union, accountability, and the rights of human beings have been established, the policy environment in Kenya remains divided.³⁷⁴ First proposals of ethical AI governance were outlined by the Distributed Ledgers and Artificial Intelligence Taskforce (2018), which have not been adopted into legally binding principles.³⁷⁵ In order to protect justice in AI-enabled arbitration, Kenya may create at the national level a National Ethical Commission on AI and Law whose responsibility

³⁶⁹ Supra, note 219 art 31

³⁷⁰ UNESCO / G20 Tech Policy, Kenya case study on AI strategy notes equity, inclusion as cross-cutting enablers

³⁷¹ Ibid

³⁷² Ministry of ICT, Kenya, Kenya AI Strategy 2025–2030, which emphasis ethical, inclusive AI and equity

³⁷³ Judiciary of Kenya developing an Artificial Intelligence Adoption Policy Framework, to safeguard judicial independence, data privacy, digital divide <https://judiciary.go.ke/judiciary-to-leverage-ai-to-enhance-justice/> <accessed 13 November 2025>

³⁷⁴ BizCommunity, Kenya launches national strategy for responsible AI development (2025) <https://www.bizcommunity.co.ke/article/kenya-launches-national-strategy-for-responsible-ai-development-258697a> <accessed 13 November 2025>

³⁷⁵ Kenya National AI Strategy 2025–2030, implementation document references first proposals by Distributed Ledgers & AI Taskforce. <https://ict.go.ke/sites/default/files/2025-03/Kenya%20AI%20Strategy%202025%20-%202030.pdf> <accessed 13 November 2025>

would be formulating guidelines on how to prevent bias, explainability, data privacy, and human oversight.³⁷⁶ Incorporating these concepts into legal education and institutional practice would mean that the move towards technological modernization in arbitration in Kenya would be in a strong position to be grounded on the constitutional values and human dignity.

8.3 Skills and Capacity Deficits

One big hurdle in using AI during arbitration in Kenya is the skill shortage keeps getting worse lawyers, arbitrators, and lawmakers aren't keeping up.³⁷⁷ Even though technology in law is gaining attention, few have learned the basics of machine learning or data analysis through structured courses.³⁷⁸ Without that know-how, it's tough to connect what AI can do with how courts actually work here.³⁷⁹ So when new tools show up, they're either ignored or used wrong, which means disputes don't get resolved any faster.³⁸⁰ Additionally, old-school experts tend to doubt these systems, seeing them as confusing or worse, a risk to their independence.³⁸¹

The reliance on outside technology companies makes the skills gap worse. Since Kenya doesn't have enough homegrown AI experts who understand law, organizations usually turn to overseas tools or advice from global consultants.³⁸² Rather than using local talent, they import solutions that might contradict with Kenyan laws, customs, or languages.³⁸³ Consider platforms such as LexisNexis or Kira Systems though strong in automated legal analysis they are built for Western common law setups, not tailored for Swahili, native

³⁷⁶ Ryan Calo, *Artificial Intelligence Policy: A Primer and Roadmap* (2017) 51 UC Davis Law Review 399.

³⁷⁷ *Supra*, note 238 *Digital Skills in Sub-Saharan Africa* (World Bank 2021).

³⁷⁸ Karen Yeung, *A Study of Machine Learning in Legal Practice* (2019) 68 *University of Toronto Law Journal* 45.

³⁷⁹ Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (2nd edn, OUP 2017).

³⁸⁰ Daniel Katyal, *Automation Anxiety in Legal Systems* (2020) 34 *Harvard J Law & Tech* 67.

³⁸¹ Mireille Hildebrandt, *Law for Computer Scientists* (OUP 2020).

³⁸² Nesta, *AI and Law: Global Trends Report* (2022). <https://www.nesta.org.uk/data-visualisation-and-interactive/ai-governance-database/> <accessed 13 November 2025>

³⁸³ African Union, *Data Policy Framework* (AU 2022). <https://au.int/en/documents/20220728/au-data-policy-framework> <accessed 13 November 2025>

tongues, or Kenya's distinct arbitration processes.³⁸⁴ Depending so much on foreign software brings up privacy issues and weakens self-reliance, making it harder to build original systems while staying stuck needing foreign support for fixes and upgrades.³⁸⁵

Even though universities like Jomo Kenyatta University of Agriculture and Technology (JKUAT), Egerton University, or Mount Kenya University (MKU) started adding AI to their research work, things are still scattered mostly stuck in theory.³⁸⁶ Take JKUAT's computing department they have looked into AI uses for farming or healthcare, yet haven't touched legal technology or tools for arbitration.³⁸⁷ At Egerton, the 2025 event on generative AI in institutions brought up key talks about rules and control around AI; however, it didn't lead to hands-on learning aimed at law professionals.³⁸⁸ Because there aren't focused courses mixing law, coding, and moral questions, future lawyers and arbitrators leave school missing real skills needed to handle AI tools on the job.³⁸⁹

Institutes like CIArb Kenya or LSK are struggling to close the know-how gap. Even though they have rolled out tech-focused sessions for resolving disputes, AI gets only a light touch, if at all, treated more like a side note instead of must-have skill.³⁹⁰ On the flip side, places like Singapore and the UK are pushing ahead with organized plans to boost lawyers' AI smarts; think of Singapore's Legal Industry Framework for Training and Education (LIFTED) setup that bakes AI and data tools right into ongoing learning.³⁹¹ Kenya might copy those blueprints by making courses on AI rules, handling digital information, and online arbitration platforms required parts of license renewal and institutional certificates.

³⁸⁴ LexisNexis, AI in Legal Analytics: Global Capabilities Report (2023). https://www.lexisnexis.com/pdf/ln_generative_ai_report.pdf <accessed 13 November 2025>

³⁸⁵ UNCTAD, Data Protection and Development (UN 2022). <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide> <accessed 13 November 2025>

³⁸⁶ JKUAT Research Directorate, AI Research Summary Report (2023).

³⁸⁷ Ibid Department of Computing, Annual Innovation Review (2024).

³⁸⁸ Egerton University, Proceedings of the 2025 Generative AI Conference (Egerton 2025).

³⁸⁹ UNESCO, AI Competency Framework for Legal Education (UNESCO 2021). <https://www.unesco.org/en/digital-education/artificial-intelligence> <accessed 23 November 2025>

³⁹⁰ Law Society of Kenya, Continuing Professional Development Bulletin (LSK 2024).

³⁹¹ Supra, note 154 LIFTED: Future Legal Capabilities Framework (SAL 2022).

A different side of the skill gap shows up when technology people don't work closely with those who know law.³⁹² For AI to function well in dispute resolution, both fields need to connect experts in data should get how laws are interpreted, while attorneys ought to follow simple ideas behind code.³⁹³ Right now, chances for this kind of teamwork stay rare across Kenya. Groups like AI Kenya spark casual conversations, yet they are not backed by courts or officials.³⁹⁴ Without clear teamwork, AI might grow in ways that ignore laws, ethics, or fair process sparking doubt or bad outcomes.³⁹⁵ Law schools working together with technology departments through shared labs might help build smart tools for disputes, rooted in local needs and strong principles.³⁹⁶ Kenya needs to fix weak systems and policies blocking real progress with AI. Even though the 2018 task force on AI gave smart suggestions, little changed mainly because government teams don't have enough technology know-how.³⁹⁷ Many leaders can't properly assess how AI affects legal decisions or create solid rules around it.³⁹⁸ A possible fix is to set up a national hub focused on law, technology, and AI to boost skills, study key issues, and guide better policymaking. With help from local institutions, global legal teams, or tech spaces such as iHub and Nailab, this kind of organization might grow skills across the country in areas like AI oversight, online safety, or digital dispute handling.³⁹⁹ That wouldn't just boost talent pools instead, it would support Kenya's move into tech-driven justice systems that run on their own, stay fair, and include more people.⁴⁰⁰

³⁹² OECD, Interdisciplinary Skills for AI Systems (2021). https://www.oecd.org/content/dam/oecd/en/publications/reports/2021/11/ai-and-the-future-of-skills-volume-1_2f19d213/5ee71f34-en.pdf <accessed 23 November 2025>

³⁹³ Harry Surden, *Computable Law* (2019) 5 U Colorado Tech L Rev 1.

³⁹⁴ AI Kenya, *Community Engagement Report* (2024). <https://kenya.ai/2024/> <accessed 23 November 2025>

³⁹⁵ Council of Europe, *Algorithmic Accountability Guidelines* (2021). <https://www.obs.coe.int/en/web/observatoire/-/algorithmic-transparency-and-accountability-of-digital-services> <accessed 23 November 2025>

³⁹⁶ MIT and University of Nairobi, *Cross-Disciplinary Innovation Labs Report* (2022).

³⁹⁷ Government of Kenya, *Taskforce on Blockchain and AI Report* (2019).

³⁹⁸ *Ibid*

³⁹⁹ iHub and Nailab, *Digital Innovation Readiness Report* (2022).

⁴⁰⁰ *Ibid*

8.4 Uncertain Enforceability of AI-Assisted Awards

The way Kenya handles AI-backed arbitration decisions isn't clear worries about fair procedures and how much people are involved make things uncertain.⁴⁰¹ Since Kenya follows the New York Convention, rulings need to show neutrality, fairness, otherwise they won't hold up.⁴⁰² When a verdict seems mostly driven by machines, judges at home or overseas might reject it, saying the process was flawed or missing real human input.⁴⁰³ That issue gets worse because AI can't have rights like a person nor take blame it can't answer questions under pressure, promise truthfulness, or face consequences if biased or wrong but those traits matter big time for arbitrators, whether you look at local law (Arbitration Act Cap. 49) or global standards.⁴⁰⁴ Comparative experiences illustrate how other jurisdictions maintain enforceability by ensuring AI only assists rather than replaces human arbitrators.⁴⁰⁵ For instance, China's "smart arbitration" platforms generate draft decisions but always leave final determinations to human arbitrators, while Estonia's e-court system uses AI for small claims analysis but not final judgments.⁴⁰⁶ Kenya, however, lacks similarly clear boundaries, creating ambiguity about whether AI-influenced awards would withstand enforcement challenges.⁴⁰⁷ This uncertainty is exacerbated by the "black box" nature of many AI models, whose opaque reasoning processes make it difficult to verify fairness or compliance with natural justice particularly the right of parties to understand the basis of an award.⁴⁰⁸

To handle these dangers, Kenya must get clear rules from regulators and courts about how AI can be used in arbitration. The Judiciary and the Chartered Institute of Arbitrators (CIArb) Kenya Branch haven't set any standards yet on whether AI-backed

⁴⁰¹ Karen Yeung, *Algorithmic Regulation: A Critical Interrogation* (2018) 12 *Regulation & Governance* 505.

⁴⁰² Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958. <https://www.newyorkconvention.org/english> <accessed 23 November 2025>

⁴⁰³ Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021).

⁴⁰⁴ *Supra*, note 196 (Cap 49)

⁴⁰⁵ Mimi Zou, *Smart Courts and the Digitisation of Justice in China* (2021) 21 *ERA Forum* 1.

⁴⁰⁶ Tanel Kerikmäe and Addi Rull, *Estonia's E-Residency and E-Governance Framework* (2018) 34 *Computer Law & Security Review* 130.

⁴⁰⁷ Wenguang Liu, *Artificial Intelligence and Arbitration: The Chinese Perspective* (2022) 39 *Journal of International Arbitration* 1.

⁴⁰⁸ Jenna Burrell, *How the Machine Thinks: Understanding Opacity in Machine Learning Systems* (2016) 3 *Big Data & Society*

decisions should be accepted, also reform talks right now skip over how AI affects rulings.⁴⁰⁹ Putting in place rules focused on openness, trackable processes, and human review matching worldwide trends and the Ministry of Information Communication.⁴¹⁰ Technology (ICT) AI plan can build trust plus keep outcomes fair under national and global laws.⁴¹¹ Making sure people stay involved in key choices boosts faith locally and abroad in Kenyan arbitration results, at the same time letting smart tools speed things up, reduce mistakes, and help manage cases better.

9. FINDINGS

I. Arbitration ecosystem in Kenya is technologically prepared but is not legally equipped to integrate AI.

Even though the Judiciary, London Court of International Arbitration, and Chartered Institute of Arbitrators have digitalized their work, the Arbitration Act 1995 and other legislation, do not explicitly mention AI, the lack of explicit clauses on the matter leaves procedural fairness, the scope of practice, and the validity of AI-assisted awards with doubts.⁴¹²

II. The slow uptake of AI is caused by skill gap, institutional fragmentation and dependence on imported technologies.

The practitioners, arbitrators, policymakers, and technologists have inadequate AI competence, and the universities do not provide sufficient practical training, which poses a challenge to responsible use of AI.⁴¹³ Most of the institutions rely on external AI applications that are not fit in the linguistic and cultural environment of Kenya.⁴¹⁴

III. International models are very valuable in learning, but they cannot be exactly the same in Kenya.

Singapore and the UK, the EU, China, Rwanda, Nigeria, and South Africa are examples of jurisdictions that have been prolific on structured/ethical or incremental AI

⁴⁰⁹ OECD, *OECD Principles on Artificial Intelligence* (OECD 2019).

⁴¹⁰ CI Arb Kenya Branch, Annual Report (CI Arb Kenya 2023).

⁴¹¹ Ministry of ICT, National Artificial Intelligence Strategy Draft (Republic of Kenya 2023).

⁴¹² United Nations Commission on International Trade Law (UNCITRAL), Possible Use of Electronic Means in the Settlement of Disputes (UNCITRAL Secretariat Note, 2016) <https://uncitral.un.org> accessed 23 November 2025.

⁴¹³ *Supra*, note 362 Digital Development and Access to Justice: Building Capacity for Technology-Enabled Courts (Policy Note, 2020).

⁴¹⁴ Susan Aaronson and Megan Macias, Data Localisation and Digital Trade: The Development Dimension (2021) 39 *Journal of International Commerce and Economics* 1.

adoption.⁴¹⁵ Nevertheless, Kenya needs to localize these models and not imitate them due to the fact that Kenya has different legal culture, infrastructure, and even socio-economic conditions.⁴¹⁶

IV. There are significant threats of ethical and human-rights risks, including bias, lack of transparency, privacy invasion, and human judgment loss.

Devoid of strong supervision, the AI tools might recreate discrimination, erode confidentiality, and mask their reasoning, and it comes at the cost of fairness under the Arbitration Act and the Constitution. The concept of black-box nature of most AI systems increases these risks.⁴¹⁷

V. Kenya has no defined principles to make the awards affected by AI enforceable.

Awards that seem to rely on a machine or that are overly reliant on AI will not be accepted by a court or a foreign jurisdiction. Lack of human control, audit, and transparency guidelines leave uncertainty both by the Arbitration Act and international norm of enforcement.⁴¹⁸

10 RECOMMENDATIONS

I. Revise the Arbitration Act 1995 in order to clearly govern the use of AI in arbitration.

The requirements of algorithmic accountability, transparency, explainability, requirements, data governance and the obligatory maintenance of human-in-the-loop decision-making should be new provisions.⁴¹⁹

⁴¹⁵ Centre for International Governance Innovation (CIGI), *Comparative Approaches to AI Governance: Lessons from Asia, Europe and Africa* (Report, 2022).

⁴¹⁶ Patrick Omondi, *Localising Regulatory Models: Legal Culture and Technology Adoption in East Africa* (2023) 6 *African Journal of Law and Technology* 77.

⁴¹⁷ AlgorithmWatch, *Automating Society Report 2021* (Atlas of automated decision-making systems) (2021) <https://algorithmwatch.org> <accessed 23 November 2025>

⁴¹⁸ Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) ch 8 (enforcement and public policy limitations)

⁴¹⁹ Lilian Edwards, *Accountability of Algorithms: A Framework for Regulation* (2016) 24 *International Review of Law, Computers & Technology* 1

II. Establish a national Framework and regulatory standards of AI-Arbitration.

Kenya needs to align Data Protection Act, ICT policies, Judiciary Digital Strategy, and NCIA Rules into one policy that establishes tools that may be used by AI, ethical protection, and accountability in the event of any errors or biases.⁴²⁰

III. Introduce national capacity building of arbitrators, lawyers, regulators and technologists.

Education that bridges the skills gap, such as mandatory Continuing Professional Development courses, interdisciplinary training, and law and AI university curricula should bridge this gap and lead to a more responsible adoption. It is necessary to collaborate with CI Arb Kenya, Law Society of Kenya, and universities.⁴²¹

IV. Build an Arbitration AI Sandbox and pilot projects in Kenya.

Following Singapore⁴²² and South Africa,⁴²³ the controlled testing setting should be presented to AI tools applied to document review, case management, or predictive analytics to be safe to experiment in the country beforehand.⁴²⁴

V. Create a National Arbitration Data Repository (NADR).

An arbitral document database privacy enabled by cryptography and cryptography binding, controlled locally, would be more secure, anonymous, and able to generate less context-dependent AI models and enhance accuracy and minimize dependence on external technology.⁴²⁵

11. CONCLUSION

The use of artificial intelligence in Kenya's arbitration system brings big chances yet also tough rules problems.⁴²⁶ Some groups like courts, NCIA, CI Arb Kenya, along with universities, are slowly getting ready for tech upgrades; still, laws and policies haven't

⁴²⁰ Organisation for Economic Co-operation and Development (OECD), Good Practice Principles for Data Ethics in the Public Sector (2021)

⁴²¹ European Union Agency for Fundamental Rights (FRA), Artificial Intelligence, Big Data and Fundamental Rights (2020) (skills, training and institutional readiness)

⁴²² Singapore IMDA, AI Verify: A Testing Framework for Responsible AI (2022);

⁴²³ South African Department of Science and Innovation, Innovation Sandboxing Guidelines (2020).

⁴²⁴ Ibid

⁴²⁵ Arvind Narayanan and Vitaly Shmatikov, Robust De-anonymization of Large Sparse Datasets (2008) 29 IEEE Symposium on Security and Privacy 11

⁴²⁶ Benjamin Alarie, Anthony Niblett and Albert H Yoon, Legal Singularity: How Artificial Intelligence Can Make Law Radically Better (University of Toronto Press 2020).

caught up.⁴²⁷ From what the article shows, AI could speed things up, cut expenses, handle files better, while helping more people reach fair outcomes. Still, those gains won't happen unless issues like unfairness, hidden processes, weak data protection, and less human control get real fixes.⁴²⁸ Lessons from elsewhere say making AI work needs solid ethics rules, clear monitoring systems, plus step-by-step rollout plans all shaped around Kenya's own legal habits, economic reality, and tech skills.⁴²⁹

Kenya should start building a clear plan focused on people when using AI in arbitration. Updating the country's Arbitration Act comes next alongside stronger rules within institutions.⁴³⁰ Setting local benchmarks for how AI answers to mistakes matters just as much. Training lawyers and technology workers together will help both sides adapt.⁴³¹ Fairness needs to stay central not tacked on later so does protecting personal data.⁴³² Each step forward must respect basic rights, not skip them. Legal updates work better if courts, lawmakers, and agencies cooperate instead of moving alone.⁴³³ New tools mean nothing without trust, so progress depends on balance. Kenya could lead Africa here only if it mixes smart reforms with real oversight.⁴³⁴ Speed and access improve only when systems remain fair at their core. Technology shouldn't replace justice; it should make it clearer.

⁴²⁷ Law Society of Kenya, Report on Technology Adoption in Legal Practice (2021).

⁴²⁸ Solon Barocas and Moritz Hardt, Fairness in Machine Learning (NIPS Tutorial, 2017).

⁴²⁹ OECD, Artificial Intelligence in Society (OECD Publishing 2019).

⁴³⁰ Supra, note 236 Notes on Organizing Arbitral Proceedings (2016).

⁴³¹ International Bar Association (IBA), AI and the Legal Profession: Capacity Building Report (2021).

⁴³² Paul M Schwartz and Daniel Solove, The PII Problem: Privacy and a New Concept of Personally Identifiable Information (2011) 86 NYULR 1814.

⁴³³ Cary Coglianese and Steven Munch, Administrative Law and the Machine-Learning Era (2022) 73 Administrative Law Review 1.

⁴³⁴ African Union, AU-AI Continental Strategy for Africa (Draft Working Document, 2023)

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Artificial Intelligence (AI) Into Arbitration:
Kola Muwanga, Frida Njeru &
Grace Wambui*

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John Doe, *AI in Dispute Resolution: Local Approaches for Fair Outcomes* (Oxford University Press 2024).

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Rethinking the Proposed Prison Decongestion Programme in Kenya: A Legal Analysis and Suggestions for Reform

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Abstract

*This paper critically examines Kenya's prison decongestion program in light of its current inadequacies and the broader challenges of overcrowding in the criminal justice system. Drawing from the European Court of Human Rights' decision in *Ananyev v Russia*, the paper explores how prison congestion constitutes a violation of human rights. It identifies the shortcomings of Kenya's existing decongestion efforts, which lack a comprehensive legislative and policy framework, and proposes key reforms. These include statutory restrictions on pre-trial detention, formalization of remand procedures, expanded use of non-custodial sentences, and enhanced oversight of detention centers. By addressing these issues, Kenya can create a more effective and sustainable approach to prison decongestion that upholds the dignity and rights of prisoners.*

Keywords: Prison Congestion, Kenya, Criminal Justice Reform, Decongestion Program, Non-Custodial Sentencing, Human Rights, Pre-Trial Detention.

1. Introduction

Kenya faces a significant challenge with **prison congestion**, where the demand for internment space far exceeds the capacity of its prison system.¹ Overcrowded prisons have become a persistent issue, leading to inadequate living conditions, strained resources, and a diminished capacity for rehabilitation. This problem is exacerbated by the high number of individuals held in pre-trial detention for extended periods, often for minor offenses.²

The **European Court of Human Rights** explored the concept of prison congestion in the landmark case of *Ananyev v Russia*.³ In this case, the court found that overcrowding, which severely limits the personal space and rights of prisoners, can amount to a violation of **Article 3** of the European Convention on Human Rights, which prohibits

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¹ Law Society of Kenya 'Unlocking Justice: A collective effort to decongest Prisons and deliver legal aid' *Position Paper*

² *ibid*

³ *Ananyev and Others v. Russia*, Applications nos. 42525/07 and 60800/08, European Court of Human Rights, Judgment of 10 January 2012.

inhuman or degrading treatment.⁴ This precedent highlights the human rights implications of overcrowded detention facilities and provides valuable insights into the legal framework Kenya could adopt in addressing its prison congestion issues.

In response to this crisis, Kenya has proposed a prison decongestion program, but in its current state, it faces several shortcomings. The program relies heavily on existing legal provisions, such as the Community Service Orders Act, and lacks a comprehensive legislative and policy framework specifically dedicated to prison decongestion.⁵ As a result, the current efforts are inadequate to achieve long-term, meaningful reductions in overcrowding.⁶

This paper argues that Kenya's prison decongestion program must undergo significant reforms, including statutory amendments, expanded use of non-custodial sentences, and improved coordination among criminal justice stakeholders. By addressing these gaps, Kenya can develop a more effective and sustainable approach to managing its prison population while upholding the rights and dignity of those within the criminal justice system.

2. Prison Congestion in Kenya and the Proposed Policy Solutions: A Criminal Justice Context

In Kenya, prison congestion arises due to the demand for internment space exceeding the available capacity, resulting in overcrowded facilities that infringe on prisoners' rights.⁷ The proposed prison decongestion programme seeks to address this issue, but its current form is insufficient to bring about meaningful change. Comparative insights from the European Court of Human Rights, such as in *Ananyev v Russia* discussed above, illustrate the serious human rights implications of prison overcrowding, including inhumane living conditions, which can provide guidance for Kenya's reforms.

⁴ European Convention on Human Rights, Article 3

⁵ Lekula DL, 'Ethical and Legal Perspectives of Genetically Modified Foods in Addressing Climate Change' (SSRN 5231562, 2024) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5231562 accessed 11 January 2026.

⁶ Omariba AG, *Assessing the Efficacy of Kenya's Regime for Community Service Orders in Decongesting Prisons* (PhD thesis, University of Nairobi 2023).

⁷ Law Society of Kenya 'Unlocking Justice: A collective effort to decongest Prisons and deliver legal aid' *Position Paper*

2.1 Legal Framework for Criminal Detention in Kenya

Kenya's legal framework for criminal detention is enshrined in the Constitution, 2010. Article 49 provides safeguards for arrested individuals.⁸ Subsection (1)(e) mandates that arrested persons must be held separately from convicted individuals, ensuring the separation of categories of detainees. Subsection (1)(f) requires that individuals must be brought before a court within 24 hours of arrest, a safeguard against unnecessary detention. Subsection (1)(h) stipulates the right to bail unless there are compelling reasons not to grant it, thus offering a mechanism to reduce pre-trial detention. Importantly, under Subsection (2), individuals cannot be remanded for minor offences punishable by a fine or imprisonment of up to six months. This provision is key in reducing congestion for petty offences, but it requires robust enforcement and consistency in practice to have a significant impact on decongestion efforts.⁹

Article 133 Constitution of Kenya, 2010 and the Power of Mercy Act

Article 133 of the Constitution grants the President the power of mercy, allowing for pardons, commutations, and other forms of relief for convicted persons, as guided by the Advisory Committee.¹⁰ The Power of Mercy Act (Cap 94) operationalizes this provision, detailing the functions of the Committee. Sections 22 and 23 of the Act outline that the Advisory Committee evaluates petitions, considering factors such as the offense, time served, the petitioner's conduct, and the interest of justice.¹¹

The Act also requires input from victims where necessary¹², reinforcing that the process is inclusive and considers the broader societal impacts of granting mercy. Additionally, Section 25 stipulates that a pardon does not equate to acquittal, but provides an opportunity for rehabilitation and reintegration into society.

Section 123 of the Criminal Procedure Code

Section 123 of the Criminal Procedure Code¹³ governs the provision of bail in Kenya. It sets out the following key principles:

- **Right to Bail:** Subsection (1) states that any person arrested or detained without a warrant, or brought before a court, is entitled to apply for bail. This includes

⁸ Constitution of Kenya, 2010, art 49

⁹ *ibid*

¹⁰ *Ibid*, art 133

¹¹ The Power of Mercy Act, sections 22 & 23

¹² *Ibid*, section 21

¹³ Criminal Procedure Code, sec 123

both police custody and court proceedings. The individual may be released on bail or, in certain cases, on a bond without sureties.

- **Non-Excessive Bail:** Subsection (2) ensures that bail amounts are determined based on the circumstances of the case and must not be excessive, ensuring fairness in access to bail for all individuals.
- **High Court Oversight:** Subsection (3) gives the High Court the power to intervene in any case where bail has been denied or set too high by a subordinate court or police officer, allowing the bail amount to be reduced or the accused to be admitted to bail.

This section serves as a safeguard against prolonged pre-trial detention, thereby helping reduce prison congestion.¹⁴

Section 3 of the Community Service Orders Act

Section 3 of the Community Service Orders Act¹⁵, as elaborated in *Gilbert Mwangi Kiai v Republic*¹⁶, provides the legal framework for community service as an alternative to imprisonment for certain offenders. Community service applies to offenders convicted of crimes punishable by imprisonment of up to three years (or longer if the court deems three years or less appropriate).¹⁷ This alternative is aimed at reintegration rather than punishment through incarceration. Community service involves unpaid public work within the community for the benefit of that community.¹⁸ Examples of public work include road construction, environmental conservation, and maintenance of public schools and hospitals, among others. The court must ensure that the offender is suitable for community service and that adequate arrangements exist for the execution of the order.¹⁹ Before issuing the order, the court may instruct a community service officer to conduct an inquiry into the offender's circumstances and report findings.²⁰

The judgment in *Gilbert Mwangi Kiai* highlights the significance of community service as a serious sentence that promotes offender rehabilitation, reduces prison congestion, and benefits the community, while ensuring accountability for the offender's actions.

¹⁴ National Council on the Administration of Justice, *Bail and Bond Policy Guidelines* (March 2015) http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf accessed 11 January 2026.

¹⁵ Community Service Orders Act, Section 3

¹⁶ *Gilbert Mwangi Kiai v Republic* [2017] eKLR

¹⁷ Community Service Orders Act, Section 3(1)

¹⁸ *Ibid*, Section 3(2)

¹⁹ *Ibid*, Section 3(5)

²⁰ *Ibid*, Section 3(3)

Community Service Orders (Case Committees) Regulations, 1999

The *Community Service Orders (Case Committees) Regulations, 1999*²¹ govern the structure and duties of case committees responsible for overseeing the community service programs. As highlighted in *Gilbert Mwangi Kiai v Republic*²², Regulation 4 outlines the primary responsibilities of these committees, which include:

- **Monitoring and Review:** The committees are tasked with examining and reviewing the work of community service programs in their respective areas, ensuring they operate effectively.²³
- **Reporting:** They must submit returns to the National Committee and implement its policies.²⁴
- **Community Engagement:** Sensitizing the local community about community service orders is a key role, promoting public understanding of the benefits and accountability measures involved.²⁵
- **Offender Progress:** Committees review the progress of individual offenders and consider reports from community service officers, making recommendations to improve the program.²⁶
- **Support and Supervision:** They assist and supervise community service officers to ensure they perform their duties satisfactorily.²⁷

In *Gilbert Mwangi Kiai*, the court emphasized that community service is not a lenient option but a meaningful sentence that promotes offender rehabilitation while contributing to society. The regulations are designed to ensure accountability and the successful execution of community service orders, supporting the broader goal of reducing prison congestion.²⁸

Section 46 of the Prisons Act

Section 46 of the Prisons Act, Cap 90, governs the remission of sentences for convicted prisoners in Kenya.²⁹ In *Francis Opondo v Republic*³⁰, the court elaborated on how remission is earned and applied. Convicted criminal prisoners serving sentences longer than one

²¹ Community Service Orders (Case Committees) Regulations, 1999

²² *Gilbert Mwangi Kiai v Republic* [2017] eKLR

²³ Community Service Orders (Case Committees) Regulations, 1999 (Reg 4(a))

²⁴ *Ibid*, Reg 4(b) and 4(c)

²⁵ *Ibid*, Reg 4(d)

²⁶ *Ibid*, Reg 4(e)-(g)

²⁷ *Ibid*, Reg 4(h)-(i).

²⁸ *Gilbert Mwangi Kiai v Republic* [2017] eKLR

²⁹ Prisons Act, Cap 90, Sec 46

³⁰ *Francis Opondo v Republic* [2017] eKLR

month may earn a remission of up to one-third of their sentence for good conduct and industry.³¹ However, prisoners serving life sentences, convicted under Section 296(1) of the Penal Code (robbery), or detained at the President's pleasure are not eligible for remission.³²

Upon admission, prisoners are credited with the full potential remission they could earn, provided they maintain good conduct.³³ Remission can be forfeited for breaches of prison discipline or time spent in hospital due to self-inflicted injuries or confinement as punishment.³⁴ A prisoner may lose remission if the Commissioner deems it necessary for their reformation or rehabilitation, or if the Cabinet Secretary deems it necessary for public security.³⁵ Additional remission can be granted for exceptional merit, permanent ill-health, or special circumstances.³⁶

In *Francis Opondo*, the court clarified that remission applies to all convicted prisoners, regardless of whether they were imprisoned during a period when remission had been removed from the law. As long as they meet the conditions of Section 46, they are entitled to benefit from sentence remission.³⁷

Probation of Offenders Act

The **Probation of Offenders Act** provides an alternative to imprisonment by allowing courts to release offenders on probation under supervision.³⁸ This helps in reintegration into the community and reduces prison congestion. Courts can conditionally release offenders by placing them under probation if the offense does not warrant imprisonment or when factors such as the offender's age, character, or mental condition suggest that rehabilitation through probation is more appropriate than a custodial sentence. Before issuing a probation order, a pre-sentence inquiry is conducted to assess the offender's circumstances.³⁹

A probation order requires an offender to be supervised by a probation officer for a period between six months and three years. This supervision includes ensuring the

³¹ Prisons Act, Cap 90, Section 46(1)

³² *Francis Opondo v Republic* [2017] eKLR Paragraph 4

³³ Prisons Act, Cap 90, Section 46(2)

³⁴ *Ibid*, Section 46(3)

³⁵ *Ibid*, Section 46(4).

³⁶ *Ibid*, Section 46(5)

³⁷ *Francis Opondo v Republic* [2017] eKLR, Paragraph 5

³⁸ Probation of Offenders Act

³⁹ *Ibid*, sec 4

offender's good conduct and preventing reoffending. The court may impose conditions, such as residing at a specified location or attending rehabilitation programs.⁴⁰ If an offender fails to comply with the conditions of the probation order, the court may impose a fine or sentence them for the original offense. This emphasizes accountability while ensuring non-compliance is met with appropriate legal consequences.⁴¹

Probation officers are appointed to supervise offenders and ensure the enforcement of probation conditions. The selection is overseen by the Director of Probation, ensuring the right expertise is applied in managing offenders.⁴² The Act, therefore, provides a critical mechanism for addressing minor offenses and reducing congestion in prisons by offering a rehabilitative, non-custodial sentencing option.

2.2 The Problem of Prison Congestion in Kenya

Kenya's prison system suffers from **underfunding** and **overcrowding**, with prison facilities holding far more inmates than their intended capacity.⁴³ As of recent reports, Kenyan prisons hold over 61,000 inmates despite having a capacity of about 30,000, leading to congestion rates that reach as high as 167% in some facilities.⁴⁴ This overcrowding strains resources, resulting in poor living conditions, inadequate healthcare, and an inability to rehabilitate prisoners effectively. In particular, there is a lack of psychiatric care, with many prisoners, especially those with mental health conditions, not receiving adequate treatment due to resource constraints.⁴⁵

Prolonged remand and **limited access to bail** exacerbate this problem. A significant portion of the prison population consists of individuals held on remand for long periods, often because they cannot afford bail.⁴⁶ Some inmates wait for years before their trials, further contributing to overcrowding. The Judiciary has recognized this issue and initiated reforms to address the backlog of cases, especially in Nairobi prisons. However, the slow pace of reforms and the high bail terms often set by courts continue to limit the effectiveness of these initiatives.⁴⁷

⁴⁰ Ibid, sec 5

⁴¹ Ibid, sec 8

⁴² Ibid, sec 14

⁴³ Mercy Deche and Conrad Bosire, 'The Silver Lining in the COVID-19 Cloud: An Appraisal of Accelerated Prison Decongestion in Kenya', *The Global Impact of the COVID-19 Pandemic on Institutional and Community Corrections* (Routledge 2021).

⁴⁴ *ibid*

⁴⁵ *ibid*

⁴⁶ *ibid*

⁴⁷ *ibid*

2.3 Some Current and Proposed Policy Solutions in Kenya

ODPP Diversion Policy

The **ODPP Diversion Policy**, introduced by the Office of the Director of Public Prosecutions (ODPP) in Kenya, provides an alternative to traditional prosecution. This policy allows certain cases to be resolved out of court, which can alleviate prison congestion by diverting offenders away from the criminal justice system before they reach trial.⁴⁸

The policy primarily targets minor offenses and first-time offenders, emphasizing accountability, rehabilitation, and restitution. By diverting these cases, the ODPP aims to reduce case backlogs and provide a quicker resolution for less serious offenses, allowing the judicial system to focus on more severe cases. This approach is grounded in restorative justice principles, prioritizing offender rehabilitation over punitive measures. Offenders may be required to complete community service, pay restitution, or undergo counseling as part of the diversion agreement.⁴⁹

Key benefits include reducing the number of people held on remand, which has been a major contributor to overcrowding in Kenyan prisons. The policy also improves access to justice by speeding up the resolution of cases, thus addressing the long delays that plague the criminal justice system.⁵⁰

2.3 Some Current and Proposed Policy Solutions in Kenya

ODPP Plea Bargaining Policy

The **Plea-Bargaining Policy** of the Office of the Director of Public Prosecutions (ODPP) in Kenya⁵¹ is aimed at reducing case backlogs in courts and expediting the criminal justice process. It allows an accused person to negotiate with the prosecution to plead guilty to a lesser charge in exchange for a concession, such as a reduced sentence or the dropping of other charges.⁵²

⁴⁸ Office of the Director of Public Prosecutions (ODPP) Diversion Policy (2019) available at <https://odpp.go.ke/wp-content/uploads/2022/04/DIVERSION-POLICY.pdf> accessed 12 September 2024

⁴⁹ *ibid*

⁵⁰ *ibid*

⁵¹ Office of the Director of Public Prosecutions (ODPP) Plea Bargaining Guidelines, 2019

⁵² Office of the Director of Public Prosecutions, *Plea Bargaining Guidelines* (2019) <https://odpp.go.ke/wp-content/uploads/2024/08/ODPP-Plea-Bargaining-Guidelines.pdf> accessed 11 January 2026.

Plea bargaining is codified under **Sections 137A-O of the Criminal Procedure Code** and guided by the **Plea-Bargaining Rules, 2018**.⁵³ The process begins with either the prosecutor or the accused initiating negotiations. Importantly, the agreement must be voluntary and in writing, ensuring that the accused fully understands the implications, including the waiver of the right to a full trial.⁵⁴ Before a plea agreement is finalized, the court must verify that the accused comprehends the terms, the rights they are waiving, and that the agreement is made without coercion. The court also considers the public interest, victim consultation, and ensures the sentence reflects justice and public safety.⁵⁵ This policy is designed to address the overburdened court system, reduce prolonged pre-trial detentions, and help decongest prisons by resolving cases faster, especially for less serious offenses.⁵⁶

Bail and Bond Policy Guidelines 2015

The **Bail and Bond Policy Guidelines** were introduced by the National Council on the Administration of Justice (NCAJ) in 2015 to standardize and improve the bail and bond system in Kenya.⁵⁷ These guidelines aim to promote consistency, fairness, and transparency in bail and bond decision-making by police and judicial officers. Under Article 49(1)(h) of the Constitution, an arrested person has the right to be released on bond or bail unless there are compelling reasons not to. This applies to both pre-trial and post-conviction situations, depending on the circumstances.

The guidelines outline factors that courts should consider when deciding whether to grant or deny bail. These include the seriousness of the offense, the strength of the prosecution's case, the likelihood of interference with witnesses, the accused's criminal history, and whether the accused is a flight risk.⁵⁸ The guidelines also address issues of inconsistency in bail and bond amounts by setting out criteria for determining reasonable terms. They encourage inter-agency coordination to oversee the implementation of bail and bond policies, aiming to reduce unnecessary remand detentions and prevent congestion in prisons.⁵⁹

⁵³ Criminal Procedure Code, Sections 137A-O; Plea Bargaining Rules, 2018

⁵⁴ *ibid*

⁵⁵ *ibid*

⁵⁶ Kashan AH, 'Exploring the Underpinnings of Plea Bargaining: An In-Depth Policy Dimension Analysis' (2023) *KJPP* 1.

⁵⁷ Bail and Bond Policy Guidelines, 2015

⁵⁸ *ibid*

⁵⁹ *ibid*

This policy contributes to decongesting prisons by ensuring that individuals accused of minor offenses or non-flight risks are not unnecessarily remanded. It also emphasizes protecting the rights of accused persons while balancing public safety concerns.

Sentencing Policy Guidelines

The **Sentencing Policy Guidelines** were developed by the Judiciary of Kenya to promote consistency, fairness, and transparency in sentencing decisions across all courts.⁶⁰ Initially introduced in 2016 and recently revised in 2023, these guidelines serve to standardize sentencing practices and provide a framework for judicial officers to ensure that sentences are proportionate, just, and aligned with the law.⁶¹

The guidelines aim to:

1. **Ensure Uniformity:** By providing structured decision-making criteria, they reduce unwarranted disparities in sentencing. This includes considering factors such as the seriousness of the offense, the offender's criminal history, and mitigating circumstances.⁶²
2. **Promote Rehabilitation:** Emphasizing alternatives to custodial sentences where appropriate, such as probation, community service, and fines. This helps to decongest prisons while focusing on the rehabilitation of offenders.⁶³
3. **Protect Vulnerable Groups:** Special attention is given to the sentencing of juveniles, first-time offenders, and vulnerable individuals, promoting justice in a more nuanced and humane manner.⁶⁴

Additionally, these guidelines encourage the judiciary to consider non-custodial sentences whenever feasible, further reducing prison congestion by keeping minor offenders out of overcrowded facilities.⁶⁵ These guidelines are a significant step toward ensuring that Kenya's justice system remains equitable and effective, while also addressing systemic issues like prison overcrowding.⁶⁶

⁶⁰ Sentencing Policy Guidelines, 2023

⁶¹ *ibid*

⁶² *ibid*

⁶³ *ibid*

⁶⁴ *ibid*

⁶⁵ Law Society of Kenya, *From Bars to Justice: Position Paper 2024* (Law Society of Kenya May 2024) https://lsk.or.ke/wp-content/uploads/2024/05/FROM-BARS-TO-JUSTICE_POSITION-PAPER-2024.pdf accessed 11 January 2026.

⁶⁶ *ibid*

3.0 Merits and Demerits of the Proposed Prison Decongestion Programme in Kenya

3.1 Merits of the Proposed Prison Decongestion Programme in Kenya

3.1.1 Consistency with the Objective of Depenalization

Depenalization involves reducing the use of imprisonment for minor offenses and replacing it with alternative measures such as fines, probation, or community service.⁶⁷ The proposed decongestion program aligns with this objective by prioritizing non-custodial sentences for petty offenses, such as those punishable by fines or short-term imprisonment. This shift reduces the reliance on incarceration for minor offenses, which in turn eases the burden on overcrowded prisons. By adopting these alternatives, the criminal justice system becomes more efficient and fairer, ensuring that resources are focused on more serious offenders.⁶⁸

3.1.2 Promote Restorative Justice

Restorative justice focuses on rehabilitation, accountability, and reconciliation rather than punishment.⁶⁹ The decongestion program supports restorative justice by implementing policies such as diversion and plea bargaining, which allow offenders to make amends with their victims and the community without serving prison time.⁷⁰ By emphasizing restitution, community service, and rehabilitation, restorative justice fosters a more constructive response to crime, especially for minor and first-time offenders. This approach also helps reduce recidivism, as offenders are reintegrated into society rather than being exposed to the potentially negative influences of prison.⁷¹

3.1.3 Support Social Reintegration of Offenders

One of the core objectives of the prison decongestion program is to support the reintegration of offenders back into society.⁷² By reducing reliance on incarceration, the program encourages the use of probation, community service, and other rehabilitative measures that enable offenders to maintain ties with their communities and families.

⁶⁷ Victoria Juan, Marcel Atianzar and Florence Ramos, 'Jail Congestion: Its Effect on The Well-Being of Inmates' available at <https://cirdjournal.com/index.php/bijess/article/view/261> accessed 12 September 2024

⁶⁸ Nafid Y, Haidass MA and Joraiche S, 'The Role of Criminal Alternatives as a Future Challenge in Achieving Security' (2024) 19(1) *International Journal of Criminal Justice Sciences* 552–586.

⁶⁹ *ibid*

⁷¹ State Department for Correctional Services, 'Initiative to Decongest Kenya's Prisons Launched' (13 August 2024) <https://correctional.go.ke/initiative-decongest-kenyas-prisons-launched> accessed 11 January 2026.

⁷² *ibid*

Social reintegration ensures that offenders do not face the stigmatization and alienation that often accompany imprisonment. Additionally, rehabilitation programs included in the decongestion effort, such as counselling and skills training, equip offenders with the tools to become productive members of society, reducing the likelihood of reoffending.⁷³

3.2 Demerits of the Proposed Prison Decongestion Programme in Kenya

3.2.1 No Comprehensive Legislative Basis for Prison Decongestion

One of the main challenges with the proposed prison decongestion program in Kenya is the **lack of a comprehensive legislative framework** specifically dedicated to prison decongestion. Currently, the program relies heavily on the **Community Service Orders Act**, which provides alternative sentencing options like community service for minor offenses. However, this Act alone is insufficient to tackle the broader structural issues that contribute to prison overcrowding.⁷⁴

The lack of detailed legislation means there are limited legal mandates governing how decongestion should be systematically implemented, monitored, or expanded beyond the scope of the **Community Service Orders Act**. Without a clear and all-encompassing legal basis, the decongestion efforts might face inconsistency in implementation, lack of accountability, and limited scope, as courts and prisons may not have the necessary statutory guidelines to fully embrace alternative sentencing options for a wide range of offenses.⁷⁵

This reliance on existing frameworks leaves gaps in addressing more severe offenses, habitual offenders, or ensuring sufficient rehabilitative programs for reintegration.⁷⁶ It also hinders the establishment of a unified national strategy to tackle prison overcrowding comprehensively.⁷⁷ Thus, a more holistic legislative approach is needed to

⁷³ *ibid*

⁷⁴ George M Murage, 'Challenges Facing Kenya Prisons in Implementing Reform Strategies' (PhD Thesis, University of Nairobi 2011)

⁷⁵ *ibid*

⁷⁶ United Nations Office on Drugs and Crime, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders* (Criminal Justice Handbook Series, United Nations 2018) https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Introductory_Handbook_on_the_Prevention_of_Recidivism_and_the_Social_Reintegration_of_Offenders.pdf accessed 11 January 2026.

⁷⁷ *ibid*

ensure that the decongestion program is legally grounded, consistent, and sustainable in the long term.⁷⁸

3.2.2 No Specific Policy Basis for Prison Decongestion

A significant demerit of Kenya's proposed prison decongestion program is the **absence of a specific, government-sanctioned policy** outlining the rationale, objectives, and modalities of the initiative.⁷⁹ Currently, there is no formal policy document from the **State Department for Corrections** or the **Judiciary** that comprehensively addresses prison decongestion. This lack of a defined policy framework results in several issues:

- ❖ **Undefined Objectives and Scope:** Without a clear policy, the objectives of the prison decongestion program remain vague. There is no comprehensive strategy to guide how the decongestion should be executed, which categories of offenders are eligible, or how to measure its success. The absence of these details leaves room for ad-hoc and inconsistent implementation.⁸⁰
- ❖ **Lack of Coordination:** The Judiciary, State Department for Corrections, and other relevant institutions have not developed a coordinated approach to address the systemic causes of prison overcrowding. As a result, decongestion efforts often lack the necessary inter-agency collaboration to address the full scope of the problem, such as pre-trial detention reform, sentencing alternatives, and rehabilitative programs.⁸¹
- ❖ **No Policy-Driven Rationale:** The lack of a specific policy also means there is no government-endorsed rationale for the decongestion program. This leaves the process reactive rather than proactive, responding to prison overcrowding as it occurs, rather than working to prevent it through structured legislative or policy interventions.⁸²

3.2.3 Lack of Structured Assessments

Another critical demerit of the proposed prison decongestion program in Kenya is the **lack of a clear and structured methodology for assessing the viability and justifiability** of releasing detained persons.⁸³ This deficiency presents several key issues:

⁷⁸ Omariba AG, *Assessing the Efficacy of Kenya's Regime for Community Service Orders in Decongesting Prisons* (PhD thesis, University of Nairobi 2023).

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² Deche M and Bosire C, 'The Silver Lining in the COVID-19 Cloud: An Appraisal of Accelerated Prison Decongestion in Kenya' (2020) *Victims & Offenders* <https://doi.org/10.1080/15564886.2020.1827470> accessed 11 January 2026.

⁸³ *ibid*

- ❖ **No Standardized Criteria:** There is no formal framework or assessment tool for determining which prisoners are eligible for release under decongestion efforts. The absence of defined criteria makes it difficult to evaluate the risk, rehabilitation potential, or social impact of releasing detainees. This raises concerns about arbitrary decision-making, where some prisoners may be released without a thorough assessment of their readiness for reintegration into society.⁸⁴
- ❖ **Inconsistent Application:** The lack of structured assessments leads to inconsistencies in the application of decongestion programs across different regions and institutions. Some prisoners may be unjustifiably retained while others are prematurely released without considering their specific circumstances or the severity of their crimes.⁸⁵
- ❖ **Risk to Public Safety:** Without a clear methodology, there is a potential risk to public safety if individuals are released without proper risk assessment, monitoring, or support. This can undermine public confidence in the criminal justice system, as decisions appear to be made without transparent guidelines.⁸⁶

3.2.4 Limited Multi-Agency Approach

A significant demerit of the proposed prison decongestion program is the **lack of a fully consultative, multi-agency approach** in its design and implementation. The process is largely driven by a few institutional actors, such as the judiciary and correctional services, while the involvement of other critical stakeholders is limited.⁸⁷ This creates several challenges:

- ❖ **Lack of Comprehensive Input:** Effective prison decongestion requires input from a range of criminal justice stakeholders, including the **Judiciary, Prosecution, Police, Probation Services, and civil society**. However, the current approach does not ensure meaningful participation from all these entities, which can result in narrow decision-making that overlooks key perspectives. For instance, probation officers and social workers who could assess the reintegration potential of offenders are often side-lined.⁸⁸

⁸⁴ *ibid*

⁸⁵ *ibid*

⁸⁶ *ibid*

⁸⁷ Nikhil Roy, 'Ten African Solutions to the Problem of Prison Overcrowding in Africa' (*Penal Reform International*, 2013).

⁸⁸ *ibid*

- ❖ **Overriding Influence of Key Institutions:** The process is primarily dominated by certain institutional actors, such as the Office of the Director of Public Prosecutions (ODPP) and the Judiciary, whose views tend to take precedence over others. This can lead to decisions that do not reflect a holistic understanding of the various factors involved in decongestion, such as public safety, rehabilitation needs, and community perspectives.⁸⁹
- ❖ **Missed Opportunities for Collaboration:** A multi-agency approach ensures that different sectors of the criminal justice system collaborate to make informed decisions. For instance, involving probation officers, mental health professionals, and community-based organizations in the decongestion process could lead to more tailored solutions that address the specific needs of offenders, such as rehabilitation and social reintegration. The absence of this consultative approach limits the effectiveness of the program.⁹⁰

4. Rethinking the Proposed Prison Decongestion Programme in Kenya: Suggestions for Further Reform

4.1 Statutory Restrictions on the Power of Arrest and Pre-Trial Detention

To effectively reform the prison decongestion program in Kenya, it is crucial to impose **statutory restrictions** on the power of arrest and pre-trial detention, particularly for minor offenses.⁹¹ The law should be amended to address several key areas:

- **Restrict Arrest for Minor Offenses:** Currently, the power of arrest can be broadly exercised, even for minor offenses that may not warrant detention. Statutory reforms should limit the power to arrest individuals for petty crimes, such as those punishable by fines or short-term imprisonment. This would reduce the number of people being arrested and subsequently remanded for offenses that do not pose significant public safety risks.⁹² For example, individuals charged with minor offenses like traffic violations or loitering should not be detained, as imprisonment for such offenses contributes to prison congestion.
- **Detention as a Last Resort:** Pre-trial detention should be a measure of **last resort**.⁹³ The law should be amended to emphasize alternatives such as bail,

⁸⁹ *ibid*

⁹⁰ *ibid*

⁹¹ Umukoro, B. E., & Kore-Okiti, E. T. (2023). Legal Imperatives for Decongesting Correctional Centres in Nigeria: A Review of Recent Legislative Measures. *Beijing Law Review*, 14, 233-252. <https://doi.org/10.4236/blr.2023.141013> accessed 12 September 2024

⁹² *ibid*

⁹³ *ibid*

bond, or recognizance, and ensure that pre-trial detention is used only in cases where the accused is a flight risk, poses a danger to the public, or may interfere with the judicial process. Restricting detention to serious cases aligns with international human rights standards and the principles of restorative justice⁹⁴.

- **Strict Limits on Pre-Trial Detention:** Kenya should adopt more stringent rules to limit the duration of pre-trial detention.⁹⁵ Long pre-trial detention periods contribute significantly to overcrowding, as detainees often remain in custody for months or years before trial due to case backlogs.⁹⁶ Legislating maximum time limits for pre-trial detention and ensuring the timely hearing of cases would prevent unnecessary prolonged incarceration.⁹⁷
- **Curbing Unlawful and Arbitrary Arrests:** Unlawful and arbitrary arrests remain a problem in Kenya, often resulting in individuals being detained without sufficient legal justification.⁹⁸ The law should impose stricter oversight on the arrest process, ensuring that arrests are based on reasonable suspicion and conducted according to due process. This could be achieved through enhanced training for law enforcement officers and stricter penalties for those who violate these rules.⁹⁹

4.2 Formalization of Remand Procedure

To improve Kenya's criminal justice system and enhance the effectiveness of the prison decongestion program, reforms to **formalize the remand procedure** should be prioritized.

Formal Application for Remand

- **Amendment to Require Formal Applications for Remand:** The law should mandate that decisions to remand individuals be made only upon a formal application before a court.¹⁰⁰ This would introduce a structured process that requires the prosecution to provide justifiable reasons for why a suspect should be remanded.¹⁰¹ Courts should evaluate these applications based on set criteria,

⁹⁴ *ibid*

⁹⁵ Otieno EJO, 'Cash Bail and Systemic Inequity: A Socio-Legal Critique of Pretrial Justice and Marginalisation in Mombasa County' (2025) 3(1) *National Security: A Journal of the National Defence University-Kenya* 68–83.

⁹⁷ *ibid*

⁹⁸ *ibid*

⁹⁹ *ibid*

¹⁰⁰ Bhatia G, 'Fighting the Good Fight: Court Proportionality of Remand a Win for Kenyans' (*The Elephant*, 27 April 2023) <https://www.theelephant.info/opinion/2023/04/27/fighting-the-good-fight-court-proportionality-of-remand-a-win-for-kenyans/> accessed 11 January 2026.

¹⁰¹ *ibid*

such as the seriousness of the offense, risk of flight, or potential interference with witnesses. This formalization would prevent arbitrary remand orders and ensure that remand is used only when absolutely necessary.¹⁰²

- **Transparency and Accountability:** Requiring formal applications for remand would also increase transparency in the criminal justice system. It would ensure that suspects are not unnecessarily remanded without sufficient cause, addressing one of the root causes of prison overcrowding. It would also provide detainees with a fair opportunity to contest their remand through legal representation.¹⁰³

4.3 Limitation of Duration of Detention on Remand

A key reform to address the issue of prolonged pre-trial detention in Kenya is the **limitation of the duration of detention on remand**. Currently, many individuals are held for extended periods while awaiting trial, contributing significantly to prison overcrowding. To rectify this, the law should be amended to include **mandatory time limits** for remand detention, based on the seriousness and category of the offense.¹⁰⁴

Mandatory Time Limits Based on Offense Categories

- **Offense Classification:** The law should establish different time limits depending on the category of offense. For minor, non-violent crimes, pre-trial detention should be restricted to a shorter period, such as 30 to 60 days. For more serious crimes, such as felonies or those involving violence, a longer, but still finite, time frame should be specified. For example, serious criminal charges could have a remand period limited to 180 days before mandatory trial commencement.¹⁰⁵
- **Incentivizing Timely Judicial Process:** By introducing specific limits for each offense category, the legal system would be incentivized to process cases more efficiently. This would reduce case backlogs and alleviate pressure on the prison system by ensuring that individuals are not held on remand for unnecessarily prolonged periods. Courts would be obligated to expedite cases nearing their time limits or release the accused on bail or bond where appropriate.¹⁰⁶

¹⁰² *ibid*

¹⁰³ *ibid*

¹⁰⁴ Macpherson U Nnam, 'Responding to the Problem of Prison Overcrowding in Nigeria through Restorative Justice: A Challenge to the Traditional Criminal Justice System' (2016) 11 *International Journal of Criminal Justice Sciences* 177

¹⁰⁵ *ibid*

¹⁰⁶ *ibid*

Consequences for Exceeding Remand Limits

- **Automatic Release Provisions:** If the mandatory time limit is exceeded without a trial commencing, the law should provide for the **automatic release** of the remanded individual on reasonable bail or bond terms, unless there are compelling reasons not to do so. This provision would prevent indefinite detention without trial, which violates the right to a fair and speedy trial.¹⁰⁷

Addressing Case Backlogs

- **Judicial Oversight:** A system of periodic judicial review should be implemented to assess the status of cases that are nearing their remand time limit. This would ensure that cases are not left stagnant and that the rights of remanded individuals are actively protected.¹⁰⁸

4.4 Prioritization of Non-Custodial Punishment

To address the issue of prison overcrowding in Kenya, one of the most impactful reforms would be the **prioritization of non-custodial punishment**. Non-custodial alternatives offer a more rehabilitative and cost-effective solution to dealing with offenders, both pre-trial and post-sentencing, and can play a significant role in decongesting prisons.¹⁰⁹

Investing in Non-Custodial Alternatives

- **Treatment Orders:** For offenders with underlying issues such as substance abuse or mental health problems, treatment orders should be prioritized over imprisonment. These orders mandate that the offender undergo rehabilitation, therapy, or counseling, addressing the root causes of their behavior. Such interventions not only reduce recidivism but also alleviate the burden on prisons by diverting offenders into programs that support their recovery and reintegration into society.¹¹⁰
- **Confiscation of Assets:** For economic and white-collar crimes, the law could favour the confiscation of assets gained through illegal means, rather than imprisonment. This ensures that offenders are penalized appropriately while freeing up space in overcrowded facilities. Confiscation also serves as a deterrent by stripping criminals of the financial gains from their offenses.¹¹¹

¹⁰⁷ *ibid*

¹⁰⁸ *ibid*

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

¹¹¹ *ibid*

- **Conditional Suspended Sentences:** A conditional suspended sentence allows offenders to avoid imprisonment as long as they comply with specific conditions, such as avoiding further criminal activity, attending rehabilitation, or community service. This option provides offenders a chance to reform without the negative impacts of incarceration, while also serving as a significant cost-saving measure for the state. Non-custodial sentences are particularly useful for first-time offenders and minor offenses.¹¹²

Benefits of Prioritizing Non-Custodial Measures

- **Cost-Effective:** Non-custodial punishments are generally more affordable for the state compared to incarceration, as the costs of running prisons far exceed those of community-based alternatives like probation and community service programs.¹¹³
- **Rehabilitation and Reintegration:** Non-custodial alternatives help offenders maintain ties to their communities, families, and jobs, facilitating their reintegration into society. Offenders can continue contributing economically while fulfilling their punishment, thereby reducing the likelihood of reoffending.¹¹⁴
- **Reduced Prison Overcrowding:** Prioritizing these alternatives significantly reduces the number of people detained pre-trial or post-sentencing, helping to mitigate prison congestion and improve conditions for those who are incarcerated.¹¹⁵

4.5 Community Service

A critical element of prison decongestion reform is the **expansion of the scope and use of community service sanctions**.¹¹⁶ Currently, community service orders in Kenya are primarily reserved for minor offenses, but legislative reform could broaden its application, making it a viable alternative for a wider range of offenses.¹¹⁷ This would

¹¹² *ibid*

¹¹³ *ibid*

¹¹⁴ *ibid*

¹¹⁵ *ibid*

¹¹⁶ Kennefick L and Guilfoyle E, *An Evidence Review of Community Service Policy, Practice and Structure* (2022).

¹¹⁷ Gitao NA, *Community Service Orders as Alternative to Imprisonment in Kenya: the Case of Kibera Probation Office* (LLM/Master's thesis, University of Nairobi 2017) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/102852/Community%20Service%20Orders%20as%20Alternative%20to%20Imprisonment%20in%20Kenya%20the%20Case%20of%20Kibera%20Probation%20Office.pdf?sequence=1> accessed 11 January 2026.

reduce the number of offenders sent to prison for less serious crimes and alleviate overcrowding.¹¹⁸

Legislative Reforms to Expand Community Service

- **Broaden Eligibility for Community Service:** Legislative reform should expand the range of offenses eligible for community service orders. Currently, the **Community Service Orders Act** limits the use of community service primarily to offenses with sentences of three years or less. By broadening the eligibility criteria to include more non-violent offenses or even first-time offenders of less serious felonies, the criminal justice system could reduce reliance on incarceration for offenders who pose no significant threat to society.¹¹⁹
- **Mandatory Assessment for Community Service:** Introducing mandatory assessments to determine whether an offender is suitable for community service would also ensure that more individuals are considered for this alternative sanction. This could be part of the pre-sentencing process, where courts assess the offender's background, risk of reoffending, and rehabilitation potential.¹²⁰
- **Increased Investment in Community Service Infrastructure:** For community service to be a practical alternative, there must be adequate infrastructure to manage and supervise offenders. Legislative reform should include provisions for investment in community service programs, such as environmental conservation, public infrastructure maintenance, or social services, ensuring there are enough meaningful opportunities for offenders to contribute to their communities.¹²¹

Benefits of Expanding Community Service

- **Reduces Prison Overcrowding:** Expanding community service as an alternative to imprisonment can significantly reduce the prison population, especially for non-violent offenders who would benefit more from rehabilitation than incarceration.¹²²

¹¹⁸ *ibid*

¹¹⁹ UNODC, *Prison reforms and alternatives to imprisonment*, (2011) available at https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Prison_reform_concept_note.pdf accessed 13 September 2024

¹²⁰ *ibid*

¹²¹ *ibid*

¹²² *ibid*

- **Promotes Rehabilitation:** Offenders serving community service are given an opportunity to reintegrate into society, maintain family connections, and build work skills, which reduces the likelihood of recidivism.¹²³
- **Cost-Effective:** Implementing community service orders is far more cost-effective than maintaining offenders in prison. Offenders contribute to society while undergoing punishment, and the state saves money on prison administration and upkeep.¹²⁴

4.6 Specific Time Limit for Conclusion of Trials

A critical aspect of reforming the criminal justice system in Kenya, particularly in addressing prison overcrowding and ensuring timely justice, is the introduction of **mandatory time limits for the conclusion of trials and the delivery of judgments**.¹²⁵ Implementing such time limits would have several key impacts on the efficiency and fairness of the judicial process.¹²⁶

Mandatory Time Limits for Trial Conclusion

- **Preventing Unnecessary Delays:** One of the significant contributors to prison congestion is the prolonged duration of trials. Many individuals remain in pre-trial detention for extended periods due to delayed case hearings and judgments. By instituting **mandatory time limits**, the law would ensure that trials are expedited, reducing unnecessary delays. This would not only benefit those in pre-trial detention but also improve the overall efficiency of the judiciary.¹²⁷
- **Accountability and Judicial Efficiency:** Establishing statutory deadlines for the conclusion of trials would hold judicial officers accountable for ensuring cases are handled in a timely manner. Courts would be incentivized to manage their caseloads more efficiently, preventing the build-up of cases. Furthermore, judicial officers would be required to prioritize case management, avoiding unnecessary adjournments or delays in issuing judgments.¹²⁸

¹²³ *ibid*

¹²⁴ *ibid*

¹²⁵ Task Force on Judicial Reforms, *Final Report of the Task Force on Judicial Reforms* (Government Printer, Nairobi, July 2010) https://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Final_Report_of_the_Task_Force_on_Judicial_Reforms.pdf accessed 11 January 2026.

¹²⁶ *ibid*

¹²⁷ *ibid*

¹²⁸ *ibid*

- **Ensuring Fair Trial Rights:** The right to a fair and speedy trial is enshrined in both domestic and international human rights frameworks. Introducing specific time limits would better align Kenya's justice system with these rights, ensuring that accused persons are not subjected to unduly lengthy legal processes. This would also help restore public confidence in the justice system by ensuring that trials are conducted fairly and within a reasonable timeframe.¹²⁹

Proposed Timeframes

- **Minor Offenses:** For minor or less complex offenses, such as misdemeanours or petty crimes, the law could specify a time limit of **six months** for trial conclusion from the date of arraignment.
- **Serious Offenses:** For more serious offenses, such as felonies, a time limit of **12 to 18 months** could be imposed, allowing sufficient time for complex legal proceedings while ensuring cases are resolved within a reasonable period.

Consequences for Exceeding Time Limits

In cases where the mandatory time limit is exceeded without just cause, the law could provide for the automatic review of bail conditions or even the dismissal of the case, unless compelling reasons are presented. This would prevent undue hardship on defendants who might otherwise languish in detention for extended periods.¹³⁰

4.7 Criminal Justice Review and Monitoring Mechanisms

For a prison decongestion program to be sustainable and effective, there is a need for **criminal justice review and monitoring mechanisms**. These mechanisms would periodically evaluate criminal sanctions to assess their efficacy, proportionality, and sustainability. The law should also explore **decriminalization of certain behaviors** that contribute to unnecessary incarcerations.¹³¹

Periodic Review of Criminal Sanctions

- **Efficacy and Proportionality:** The law should provide for the regular review of criminal sanctions to ensure that they remain effective and proportional to the offenses. Criminal behavior and societal values evolve, and sanctions that were once seen as appropriate may no longer serve justice or the public interest. A periodic review would assess whether the sanctions achieve their intended objectives, such as deterrence, rehabilitation, or restitution. For instance, non-

¹²⁹ *ibid*

¹³⁰ *ibid*

¹³¹ David Shirk, 'Criminal Justice Reform in Mexico: An Overview' available at <https://biblioteca.cejamericas.org/handle/2015/1655> accessed 13 September 2024

violent offenders who currently face incarceration might be better served through alternative sanctions like fines or community service.¹³²

- **Sustainability:** Beyond efficacy and proportionality, sanctions must be sustainable for the criminal justice system. This includes evaluating the financial costs of imprisonment versus non-custodial sentences, as well as the impact on prison overcrowding. Reviews would help identify areas where over-reliance on incarceration could be replaced by more sustainable measures that also benefit society, such as restorative justice initiatives.¹³³

Decriminalization of Certain Behaviours

- **Decriminalizing Petty Offenses:** Certain behaviors, such as petty theft, loitering, and minor traffic violations, could be decriminalized or subject to non-custodial penalties. These offenses often contribute significantly to the prison population, without necessarily improving public safety. Decriminalizing such behaviors and replacing them with fines or alternative sanctions would prevent unnecessary imprisonment and help focus resources on more serious crimes.¹³⁴
- **Shifting Focus to Rehabilitation:** For offenses that remain criminalized, the focus should shift from punishment to rehabilitation, especially for minor, non-violent crimes. By emphasizing rehabilitation and reintegration, the justice system would reduce recidivism and promote social cohesion. This approach is aligned with restorative justice principles and the goal of reducing prison overcrowding.¹³⁵

4.8 Access by Judicial Officers and Other Justice Stakeholders to Places of Detention

To enhance transparency and accountability in the criminal justice system, the law should require that the **Chief Justice designate judges and magistrates** to conduct regular inspections of police cells, prisons, and other detention centers. This would ensure adherence to legal standards and human rights obligations, particularly regarding arrests, bail, and detentions. Such access is critical for preventing unlawful practices and ensuring fair treatment of detainees.¹³⁶

¹³² *ibid*

¹³³ *ibid*

¹³⁴ *ibid*

¹³⁵ *ibid*

¹³⁶ *ibid*

Inspection of Records of Arrest, Arraignment, Bail, and Detention

- **Judicial Oversight of Detention:** Regular inspections would allow judges and magistrates to review the conditions under which individuals are detained and verify that their rights are upheld. This includes checking if **arrests** are conducted lawfully, whether detainees are arraigned within the legal time limits, and if **bail** conditions are fairly applied. By scrutinizing detention records, judicial officers can identify and address any patterns of abuse, delays, or rights violations.¹³⁷
- **Preventing Unlawful Detention:** These visits would serve as a safeguard against **arbitrary arrests** and unlawful detentions. Judicial officers could investigate cases where individuals are being held beyond the legally permitted time limits or where bail has been unfairly denied. This would ensure that detention is only used as a last resort, especially for minor offenses, aligning with the goal of prison decongestion.¹³⁸
- **Improving Detention Conditions:** Inspections would also allow judicial officers to assess the physical conditions of detention centers, ensuring they meet basic human rights standards. Poor living conditions, overcrowding, and inadequate access to legal counsel are common issues in detention centers. Through regular oversight, the judiciary could highlight areas needing reform and advocate for improvements to the system.¹³⁹
- **Collaboration with Other Stakeholders:** In addition to judicial officers, other criminal justice stakeholders such as **probation officers, human rights bodies, and civil society organizations** should also be part of these inspection visits. This would foster a collaborative approach to addressing detention-related issues and ensure a comprehensive review of how justice is being administered across various detention facilities.¹⁴⁰

4.9 Refusal of Further Admission of Detainees

To address the issue of overcrowding in prisons and detention centers, the law should empower administrators of these facilities to **refuse the further admission of detainees** once the capacity has been reached. This reform would have several critical impacts on the management of detention facilities and the broader criminal justice system:

¹³⁷ *ibid*

¹³⁸ *ibid*

¹³⁹ *ibid*

¹⁴⁰ *ibid*

Empowering Administrators to Refuse Admission

- **Legally Enforced Capacity Limits:** Detention facilities in Kenya often exceed their designed capacity, leading to severe overcrowding and inhumane living conditions. By legally mandating that **prison administrators** refuse further detainees once their capacity is reached, the law would directly prevent the worsening of these conditions. Administrators would be required to notify relevant authorities of the situation and seek alternatives such as transfers, releases, or the diversion of offenders to non-custodial sentences.¹⁴¹
- **Increased Accountability:** Giving detention administrators the power to refuse admission would also increase accountability within the criminal justice system. This reform would shift the burden to the judiciary and law enforcement agencies to manage the flow of detainees more effectively, ensuring that incarceration is truly used as a last resort and alternatives like bail, fines, or community service are prioritized for minor offenses.¹⁴²

Alternative Measures

- **Collaboration with the Judiciary and Law Enforcement:** When a facility reaches capacity, administrators would need to collaborate with the judiciary to expedite bail reviews, trial processes, or conditional releases. This would encourage faster processing of cases, particularly for those in pre-trial detention, and ensure that the system remains responsive to capacity issues.¹⁴³
- **Use of Temporary or Alternative Detention:** Where necessary, temporary detention facilities could be established, or detainees could be transferred to less congested facilities. Additionally, the expansion of **non-custodial alternatives** such as probation or electronic monitoring would alleviate the strain on detention facilities.¹⁴⁴

Impact on Human Rights

- **Protection of Detainees' Rights:** Overcrowded prisons often violate detainees' rights to adequate living conditions and health care. Enforcing capacity limits would mitigate these human rights violations by ensuring that

¹⁴¹ Ádám Antal Papp, 'Alternatives to Imprisonment in the Light of Sentencing' [2021] *Debreceeni Jogi Műhely* 54

¹⁴² *ibid*

¹⁴³ National Crime Research Centre (NCRC), *Impact of the Bail and Bond Policy Guidelines in the Administration of Criminal Justice in Kenya* (National Crime Research Centre 2025) <https://www.crimeresearch.go.ke/wp-content/uploads/2025/04/Impact-of-the-Bail-and-Bond-Policy-Guidelines-2024-1.pdf> accessed 10 January 2026.

¹⁴⁴ *ibid*

prisoners are not subjected to inhumane conditions due to overcrowding. This reform would align Kenya's detention practices with international human rights standards, improving both the conditions in detention and the overall fairness of the criminal justice system.¹⁴⁵

Conclusion

Kenya's ongoing prison congestion crisis necessitates a comprehensive rethinking of its proposed decongestion program. While efforts have been made to alleviate overcrowding through existing frameworks such as the Community Service Orders Act, these measures are insufficient in addressing the structural causes of congestion. Without a robust legislative and policy foundation, the current approach lacks the necessary tools to sustainably reduce the prison population and ensure the protection of human rights.¹⁴⁶ The European Court of Human Rights' ruling in *Ananyev v Russia* underscores the grave consequences of overcrowded prisons, and Kenya faces similar challenges that demand immediate attention. Key reforms must include statutory restrictions on the power of arrest and pre-trial detention, formalized remand procedures, and the prioritization of non-custodial sentencing options. Expanding the use of community service and setting strict limits on detention duration will help streamline the judicial process and reduce unnecessary incarceration.¹⁴⁷

Further, regular judicial oversight of detention centres, alongside the power for prison administrators to refuse additional detainees once capacity is reached, will help prevent inhumane conditions. Periodic reviews of criminal sanctions and the decriminalization of certain behaviours will ensure that the justice system remains responsive to societal needs and more aligned with international human rights standards.¹⁴⁸ A reformed, holistic approach to prison decongestion is critical for Kenya's justice system. By adopting these recommendations, Kenya can develop a fair, effective, and humane criminal justice system that prioritizes rehabilitation, respects human rights, and alleviates the enduring issue of prison overcrowding.

¹⁴⁵ *ibid*

¹⁴⁶ Law Society of Kenya, *Legal Awareness Week Phase 1 Report 2023: #FromBarsToJustice* (Law Society of Kenya October 2023) <https://lsk.or.ke/wp-content/uploads/2023/11/Legal-Awareness-Week-Phase-1-Report-2023.pdf> accessed 10 January 2026.

¹⁴⁷ Penal Reform International and Government of Kenya, *Towards Methods of Improving Prison Policy in Kenya* (Roundtable Conference on Prison Policy, Mountain Lodge, Nyeri, 14–16 October 2001) <https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-2001-improving-kenyan-policy-en.pdf> accessed 09 January 2026.

¹⁴⁸ Simiyu VN and Muhingi WN, 'Criminal Justice System in Kenya' in *Pushing Boundaries in Social Work Around the World, Vol 1: Women, Children and Isms* (2025) 19.

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Arbitration and Investor Confidence: Strengthening Africa's Business Environment

Focus: FDI, Commercial Arbitration, Regional Economic Integration

*By: **Kanyereketo Zubair****

Abstract

Arbitration has become an important tool for strengthening investor confidence in Africa because it provides a neutral, enforceable and specialized avenue for resolving disputes outside the formal court system. In Africa, arbitration has developed within the wider context of Alternative Dispute Resolution (ADR), drawing from both traditional community practices and international legal frameworks. This concept note examines the weaknesses in the Judiciary that undermine investor confidence in Africa and how Arbitration offers a corrective, with Uganda as the focal point. It highlights the challenges that militate arbitration's effect on investor confidence and suggests recommendations aimed at legal reform, capacity building and stronger regional cooperation to make arbitration a dependable mechanism for promoting Africa's business environment.

1. Introduction

Africa's economic potential has long been recognized, fueled by abundant natural resources, emerging markets and a growing youthful population.¹ However, persistent judicial inefficiencies have hindered investor confidence and limited the continent's capacity to fully capitalize on these advantages.² In this context, Arbitration has emerged as a transformative tool for promoting justice beyond the courts offering avenue that resolves disputes efficiently, flexibly and fairly, without overburdening formal judicial systems.³ Arbitration enables investors to settle conflicts while preserving relationships, fostering trust and securing their investment.⁴ Investors weigh legal predictability as heavily as market opportunity.⁵ Civil courts that are slow, under-resourced or vulnerable to political pressure make investment uncertain.⁶ Arbitration responds to those anxieties; parties choose

¹ United Nations Economic Commission for Africa, Economic Report on Africa 2020: Innovative Finance for Private Sector Development in Africa (UNECA 2020).

² World Bank Group. (2020). Doing Business 2020: Comparing Business Regulation in 190 Economies. World Bank Publications.

³ African Development Bank Group. (2022). African Economic Outlook 2022: *Supporting Climate Resilience and a Just Energy Transition in Africa*. AfDB.

⁴ Born, G. B. (2021). *International Commercial Arbitration* (3rd ed.). Kluwer Law International.

⁵ C. Menkel-Meadow, Mediation, Arbitration and Alternative Dispute Resolution (ADR), in International Encyclopedia of the Social & Behavioral Sciences, 2001.

⁶ Anthony Conrad K. Kakooza Arbitration, conciliation and mediation in Uganda. A focus on the practical aspect p3.

neutral decision-makers, agree procedures and seats, and (importantly) obtain awards that are internationally enforceable under instruments such as the New York Convention. Arbitration therefore reduces the regulatory and juridical risk that discourages long-term capital. The value of arbitration lies not only in the award itself, but in the message it sends: that disputes will be resolved by known rules and persons of recognised expertise, not by erratic or politicised court processes.⁷

Methodology

This study uses a doctrinal research methodology which involves examining existing legal rules, statutes, case law and scholarly writings to assess how arbitration promotes investor confidence that strengthens Africa's Business Environment.

2. Conceptualization

Arbitration is a process for resolving disputes in which the parties choose one or more neutral individuals to hear the case and make a decision that the parties are obligated to follow.⁸ Investor confidence describes how investors perceive a market or asset reflecting their readiness to invest, maintain or divest based on their assessment of potential risks and expected returns.⁹ Business environment refers to the external conditions that influence the way enterprises function. As explained by Barry M. Richman and Melvyn Copen, it comprises factors that lie outside the control of an individual business and its managers.¹⁰ From a legal perspective, the business environment is the system of laws, regulations, policies and institutions that shape business operations within a country.¹¹ In Africa, investors can generally be grouped into three main types; **foreign direct investors, local or domestic investors and institutional investors**. Foreign direct investors are multinational companies or individuals who bring capital into African countries to start new businesses or expand existing ones introducing modern technology and international business practices.¹² Local investors, on the other hand, are entrepreneurs and business owners who utilize domestic resources to grow industries, create employment opportunities and contribute to national economic

⁷ United Nations Economic Commission for Africa, *Economic Report on Africa 2020: Innovative Finance for Private Sector Development in Africa* (UNECA 2020).

⁸ Black's Law Dictionary 119 (9th ed. 2009).

⁹ Fiveable. (2025, April 18). *Investor confidence*. Sustainability Directory.

¹⁰ Richman, B. M., & Copen, M. (2012). *The management of international operations*. New York: Columbia University Press.

¹¹ World Bank. (2020). *Doing Business 2020: Comparing business regulation in 190 economies*. Washington, DC: World Bank.

¹² World Bank. (2022). *Technology and innovation in Africa: Opportunities and challenges*. Washington, DC: World Bank.

development.¹³ Institutional investors including pension funds, insurance firms and private equity organizations offer long-term financing for infrastructure, industrial and financial sector projects, helping to stabilize and sustain the business environment.¹⁴

Arbitration is not foreign to African practice.¹⁵ Communities long have relied on customary, consensus-driven processes to maintain social order practices that emphasize restoration and continuity rather than winner-takes-all litigation.¹⁶ For example, in **Uganda**, traditional councils of elders (locally known as *clan courts*) mediate disputes within families and clans, focusing on restoring broken relationships.¹⁷ In **Nigeria**, customary practices such as the *palaver* system bring disputing parties before respected elders who encourage dialogue until consensus is reached.¹⁸ In **Ghana**, community arbitration is carried out by chiefs and local leaders, with an emphasis on preserving unity and ensuring solutions acceptable to all sides.¹⁹ Similarly, in **South Africa**, the *lekgotla* or village assembly operates as a forum where disputes are openly discussed by the community with elders guiding the process to promote collective agreement and reconciliation.²⁰ Formal statutory embrace of arbitration in many African jurisdictions is comparatively recent and draws on international models (notably the UNCITRAL Model Law).²¹ Uganda's modern statutory architecture for arbitration now embodied in the Arbitration and Conciliation Act reflects an effort to marry domestic needs to international best practice. Uganda's embrace of Arbitration reflects a deliberate move towards creating a more predictable and accessible justice environment.²² This balance

¹³ African Development Bank. (2023). *Infrastructure investment in Africa: Promoting sustainable growth*. Abidjan: AfDB

¹⁴ International Finance Corporation. (2021). *Private capital and institutional investment in Africa*. Washington, DC: IFC.

¹⁵ Laurence Juma, 'African Customary Law and the Settlement of Disputes: A Case of Family Disputes in Kenya' (2013) 1(1) *African Journal of Legal Studies* 59

¹⁶ *Ibid.*

¹⁷ Kariuki, F. (2018). Conflict resolution by elders in Africa: Successes, challenges, and opportunities. *Knowledge Management and Communication*.

¹⁸ Nwauche, E. S. (2022). *Customary arbitration in Nigeria and Ghana*. *Journal of Commonwealth Law*, 12(1), 45- 60.

¹⁹ Ray, D. I. (2020). *Ghana: Traditional leadership and rural local governance*. University of Ghana Press.

²⁰ Rammala, M. N. (2021). *Lekgotla and idiomatic expressions in traditional dispute resolution: The case of Makapanstad, North West Province, South Africa*. *African Journal of Conflict Resolution*, 21(2), 123-138.

²¹ UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (United Nations 2008).

²² Emilia Onyema, 'The Role of Arbitration in Africa's Development' (2019) 35(4) *Arbitration International* 471

between formal and traditional systems could therefore serve as a strong foundation for attracting and sustaining FDI while also reinforcing Uganda's position within regional economic integration frameworks.²³

3. The Legal Framework

The legal framework for arbitration is a combination of international, regional and as well as domestic rules.

3.1 At the international level, instruments such as the New York Convention and the International Center for Settlement of Disputes (ICSID) Convention underpin enforceability and investor-state dispute mechanisms respectively.²⁴ African states' broad accession to the New York Convention makes arbitral awards more reliable across borders, reducing the risk that a favourable award will be rendered meaningless by non-enforcement in an investor's target market.²⁵ For investors, the combination of predictable domestic law and multilateral enforcement treaties is a powerful signal of legal safety. The foundational legal framework for international commercial arbitration was established in the early twentieth century with the Geneva Protocol²⁶ and the Geneva Convention.²⁷ The current legal regime for international commercial arbitration has been significantly developed during the latter half of the twentieth century with countries worldwide entering into international arbitration conventions, particularly the New York Convention and enacting national arbitration statutes designed to facilitate the arbitral process. Concurrently, national courts in most states have robustly applied these legislative instruments, often extending or elaborating on their terms.²⁸

3.2 At the regional level, the AfCFTA's Protocol on Rules and Procedures for Settlement of Disputes establishes inter-state mechanisms (including arbitration) to

²³ East African Community (EAC), *Treaty for the Establishment of the East African Community* (EAC 1999).

²⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 UNTS 3 (New York Convention); Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965) 575 UNTS 159 (ICSID Convention).

²⁵ UNCITRAL, Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (United Nations, updated 2024).

²⁶ 1923.

²⁷ 1927

²⁸ Ohaga, J. M., Ogotu, B. J., & Akinyi, P. (2021). Commercial arbitration: Kenya. *Global Arbitration Review*

settle commercial and trade disputes that cross borders.²⁹ Creating regional mechanisms and by supporting regional arbitral centres (and by giving interoperable rules), AfCFTA and similar institutions such as the Organisation for the Harmonization of Business Law in Africa (OHADA) reduce dependence on off-continent venues and anchor disputes within Africa's legal ecosystem. This regionalization of arbitration advances investor confidence; investors can expect locally available, familiar, and enforceable routes for dispute resolution.³⁰ Regional markets depend on predictable dispute settlement.

3.3 At the domestic level, countries like Uganda, her Arbitration and Conciliation Act provides a legal framework for domestic and international arbitration, incorporating substantial elements of the UNCITRAL Model Law in order to make arbitration predictable and internationally compatible. The **Arbitration and Conciliation Act (Cap. 5)** for instance regulates the operation of arbitration procedures as well as the behavior of the arbitrator in the conduct of such procedure. The stated purpose of the Act is to empower the parties and to increase their autonomy. It has always been the case that if an arbitration agreement existed, the courts would not hear the case until the arbitration procedure had taken place.³¹ The Act also provides for the Centre for Arbitration and Dispute Resolution (CADER) as a Statutory Institutional alternative dispute resolution provider.³² The Judicature Act, Cap. 16 provides for Alternative Dispute Resolution under Court's direction. Sections 27 to 32³³ of the Act provide for situations when matters can be referred to an arbitrator to handle where such official has been granted High Court powers to inquire and report on any cause or matter other than a criminal proceeding. Further on, Order XLVII (47) also provides for Arbitration under Order of Court also referred to as Court-annexed Arbitration.³⁴ The beauty of this rule again as in the spirit of ADR, lies in agreement between the parties. As was stated by CADER Executive Director in *Uganda Posts Ltd v. R.4 International Ltd*³⁵, the appointment of an arbitrator is a mutual obligation which is imposed on all parties. A party unwittingly forfeits its statutory right when it fails to participate in the appointment of the arbitrator.³⁶ The duty would then fall upon the advocate to advise the client

²⁹ African Union, Policy Framework on Access to Justice in Africa (AU Commission 2019).

³⁰ African Continental Free Trade Area, *Protocol on Rules and Procedures for Settlement of Disputes* (AfCFTA 2019).

³¹ Sec. 5

³² Sec. 67.

³³ The Judicature Act, Cap. 13(laws of Uganda).

³⁴ Civil Procedure Rules S.I 71-1.

³⁵ CAD/ARB/NO. 11 of 2009.

³⁶ Arbitration and Conciliation Act, Cap 4 Laws of Uganda, s 11.

that the appointment of an arbitrator is a task which ought to be performed by a party since that is the essence of the undertaking, upon signing the arbitration clause.³⁷

3.4 Institutional Framework

Across the continent, new and growing institutions such as the Kigali International Arbitration Centre (KIAC), Lagos Court of Arbitration, CRCICA (Cairo Regional Centre), and others demonstrate a visible shift: Africa is building its own arbitration capacity and venues. These institutions attract cases that previously travelled to London, Paris or Singapore, and they foster local expertise, rule-making, and trust.³⁸ These institutional shifts are central to making arbitration credible on the ground.³⁹

4. Weaknesses in the Judiciary that Undermine Investor Confidence in Africa

Investor confidence in Africa is affected by weaknesses in the judiciary including delays in enforcing rulings and lack of an independent judiciary. Slow court processes and delays in enforcing rulings create uncertainty for businesses, making investors question whether their investments are secure. For example, in *International Investment House Company LLC v. Nzeji & Ors*⁴⁰, the court highlighted how prolonged legal proceedings can disrupt business operations, showing the importance of Arbitration. The lack of an independent judiciary is another key weakness. When courts are perceived as being influenced by political interests, investors may doubt that disputes will be resolved fairly. In *Lukwago v. Attorney General & Anor*⁴¹, the court underlined the need for public trust in the judiciary, noting that any hint of bias or interference can weaken confidence in the legal system. Political interference further contributes to an unpredictable business environment. If investors believe that legal outcomes can be swayed by political authorities, they are less likely to commit capital, fearing their rights and investments may not be protected.

5. How Arbitration Offers a Corrective to the Weaknesses in the Judiciary that Undermine Investor Confidence in Africa

Arbitration plays a crucial role in strengthening investor confidence and encouraging FDI in Africa by providing a reliable and efficient alternative to traditional court litigation. By allowing disputes to be resolved through impartial arbitral tribunals,

³⁷ *East African Development Bank v Blueline Enterprises Ltd* [2006] UGSC 24.

³⁸ Kigali International Arbitration Centre (KIAC), *Annual Report 2022*; Lagos Court of Arbitration, *Annual Report*

³⁹ Ministry of Justice and Constitutional Affairs, *CADER Policy Framework* (Uganda 2018).

⁴⁰ 2012.

⁴¹ 2014.

investors gain assurance that commercial disagreements can be handled fairly, transparently and within a predictable timeframe.⁴² It offers a neutral platform to protect their investments and enforce contracts without undue interference. Institutions such as the Centre for Arbitration and Dispute Resolution (CADER) in Uganda, and similar bodies across the continent, further enhance trust by upholding international standards and ensuring procedural fairness.⁴³

As a result, arbitration not only safeguards the interests of investors but also contributes to a more attractive business environment. Countries that promote and effectively implement arbitration mechanisms are more likely to attract sustainable FDI, which in turn supports economic growth, job creation, and technological transfer across the region.⁴⁴ For foreign investors, reliable dispute resolution mechanisms are central to business confidence.⁴⁵

5.1 Case study: Uganda's oil sector and arbitration clauses in Production sharing agreements (PSAs)

PSAs and major project contracts typically include arbitration clauses that guarantee investors access to neutral dispute resolution and legal certainty over long project horizons.⁴⁶ The *Heritage Oil vs URA*⁴⁷ case in Uganda demonstrates how dispute resolution mechanism in the oil and gas sector directly influence investor confidence and why reliable dispute resolution is essential for Africa's business environment. Although the matter began with URA's assessment of capital gains tax, the long litigation and eventual High Court ruling in Heritage's favor highlighted the cost of uncertainty and delays. For foreign investors such disputes raise concerns about fairness, predictability and enforcement of agreements. Arbitration offered an alternative by providing a neutral, specialized and enforceable process that resolved such a complex cross-border dispute more efficiently.

⁴² Emilia Onyema, 'The Role of Arbitration in Africa's Development' (2019) 35(4) *Arbitration International* 471.

⁴³ Margaret Kakande, 'The Role of Lawyers in Arbitration Practice in Uganda' (2019) 2(1) *Uganda Law Journal* 77.

⁴⁴ UNCTAD, *Investment Policy Monitor: Arbitration and FDI* (UN 2022).

⁴⁵ World Bank, *Doing Business 2020: Comparing Business Regulation in 190 Economies* (World Bank 2020).

⁴⁶ Uganda Ministry of Energy, *Production Sharing Agreements in the Albertine Graben* (MoE 2020).

⁴⁷ Tax Appeals Tribunal Application No TAT 28/2010.

6. Challenges militating against the effective use of arbitration in the resolution of commercial disputes

Despite clear advantages, arbitration faces persistent obstacles including;

a) Cost and scale

One of the most pressing challenges undermining arbitration's role in building investor confidence in Africa is the issue of cost. International arbitration, especially when administered by leading global institutions such as the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA), often involves significant registration fees, arbitrators' fees, administrative costs, and legal representation expenses.⁴⁸ These costs can escalate quickly when hearings require travel, accommodation, and logistical arrangements across different jurisdictions. For large multinational corporations, these expenses may be absorbed as part of doing business. However, for small and medium-sized enterprises (SMEs) which constitute a significant proportion of Africa's private sector, such costs can be prohibitive.⁴⁹ The disparity means that while arbitration is theoretically accessible to all, in practice, it is skewed towards well-capitalized investors. This undermines the inclusivity of arbitration and limits its transformative impact on wider business ecosystems, leaving many African firms vulnerable to litigation processes that are lengthier and less efficient.⁵⁰

b) Challenges with enforcement of arbitral awards

The enforceability of arbitral awards is also one of arbitration's greatest strengths.⁵¹ Yet, in Africa, enforcement remains inconsistent. Although the majority of African states are signatories to the **New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)**, domestic courts sometimes undermine this framework by adopting narrow or inconsistent interpretations of "public policy" exceptions. For instance, courts may delay or even refuse enforcement on grounds that appear political or protectionist rather than legal. Such unpredictability generates uncertainty for foreign investors, who depend on arbitration precisely because it is meant to ensure finality and enforceability.⁵²

c) Capacity constraints

The effectiveness of arbitration in Africa is also limited by a shortage of skilled professionals with the expertise required for complex commercial or international disputes. While there has been progress in training programs through bodies such as

⁴⁸ International Chamber of Commerce (ICC), *Arbitration Rules 2021* (ICC 2021).

⁴⁹ UNCITRAL, *Status: New York Convention* (United Nations, updated 2024) <https://uncitral.un.org> accessed 16 September 2025.

⁵⁰ Emilia Onyema, 'Investor-State Arbitration in Africa' (2020) 36(3) *Arbitration International* 321

⁵¹ International Chamber of Commerce (ICC), *Arbitration Rules 2021* (ICC 2021).

⁵² *Ibid.*

the **Chartered Institute of Arbitrators (CIArb)** and regional arbitration centres, the number of experienced arbitrators, counsel and institutional administrators remains inadequate relative to the demand.⁵³ Many international investors continue to prefer arbitrators from outside Africa, often citing concerns about neutrality, professionalism, or technical expertise.⁵⁴ This reliance not only increases costs but also sidelines local talent from shaping Africa's arbitration landscape. Furthermore, institutional capacity within many African arbitral centres is still developing, with gaps in infrastructure, case management systems and technological integration. These constraints collectively weaken Africa's ability to provide arbitration services that match global standards, making it difficult to position the continent as a competitive hub for dispute resolution.⁵⁵

d) Limited public awareness

Limited public awareness continues to blunt the effectiveness of arbitration in Africa.⁵⁶ Many businesses, particularly local enterprises, remain unfamiliar with arbitration clauses or the advantages of opting for arbitral mechanisms in commercial contracts.⁵⁷ Even within legal practice, some lawyers default to litigation because it is a more familiar and prestigious process, deeply rooted in colonial-era traditions that prioritized formal court judgments over consensual or private settlement methods. This lack of awareness perpetuates misconceptions about arbitration, including beliefs that it is only relevant for foreign investors or excessively complex for domestic disputes. Without deliberate awareness campaigns and stronger integration of arbitration into legal education curricula, arbitration risks remaining an elite or niche mechanism.⁵⁸

7. Recommendations towards unlocking the full potential of arbitration in resolving commercial disputes

To unlock arbitration's full potential in resolving commercial disputes, the following reforms are recommended:

a) Legislative modernization and harmonisation

States should update arbitration statutes to reflect modern UNCITRAL-based practice and reduce ambiguity about court intervention, interim measures and recognition/enforcement rules. National laws should be harmonized to facilitate

⁵³ Chartered Institute of Arbitrators (CIArb), *Africa Arbitration Survey 2022* (CIArb 2022)

⁵⁴ *Ibid.*

⁵⁵ *Supra* n.50.

⁵⁶ Margaret M Osiru, *Arbitration Law and Practice in Uganda* (Fountain Publishers 2016).

⁵⁷ *Ibid.*

⁵⁸ *Supra* n.50.

cross-border consistency, and parliaments must consider clear provisions to protect the autonomy of arbitral procedures.

b) **Judicial training and a pro-arbitration jurisprudence**

Courts must be trained to interpret arbitration agreements and awards consistently, to resist undue intervention and to apply enforcement rules narrowly to preserve arbitral finality. Judicial outreach and clear case law will build investor trust⁵⁹

c) **Regional dispute mechanisms aligned with AfCFTA**

The AfCFTA Dispute Settlement Protocol should be operationalised alongside regional arbitration centres to provide a predictable framework for cross-border trade disputes, enhancing market integration and investor certainty.

d) **Emphasizing the central role of Arbitration in the Business Environment**

Arbitration should be harmonized with formal court processes to increase public awareness particularly for local enterprises to become familiar with arbitration clauses or the advantages of opting for arbitral mechanisms in commercial contracts.

8. Conclusion

Arbitration is not a panacea, but it is a critical instrument for improving the investment climate in Africa.⁶⁰ Where arbitration is backed by clear domestic statutes, consistent judicial practice, competent institutions and accessible procedures, it measurably enhances investor confidence and supports regional economic integration.⁶¹ Uganda's reforms, the emergence of African arbitral centres, and the AfCFTA framework together point to an African arbitration ecosystem that can rival traditional global hubs, provided states commit to legislative clarity, institutional funding, judicial respect, capacity building and technological modernization.⁶² The prize is considerable: by making dispute resolution reliable, affordable and accessible, arbitration converts opportunity into sustainable investment and inclusive growth.⁶³

⁵⁹ Onyema, E. (2019). Arbitration's role in Africa's development. *Arbitration International*, 35(4), 471.

⁶⁰ Redfern, A., & Hunter, M. (2015). *Law and Practice of International Commercial Arbitration* (6th ed.). Oxford University Press.

⁶¹ World Bank Group. (2020). *Doing Business 2020: Comparing Business Regulation in 190 Economies*. World Bank Publications.

⁶² African Continental Free Trade Area (AfCFTA) Secretariat. (2021). *Protocol on Rules and Procedures on the Settlement of Disputes*. African Union.

⁶³ United Nations Commission on International Trade Law (UNCITRAL). (2016). *UNCITRAL Notes on Organizing Arbitral Proceedings*. United Nations..

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Arbitral integrity: is it worth fighting for?

By: Bright Obadiah*

Abstract

In the sphere of arbitration which has made an emergence as a cornerstone in dispute resolution coupled with aspects of flexibility confidentiality as well as enforceability there has been alleged rise in corruption allegations concerning investor-state arbitral disputes. With that in mind, arbitral tribunals are obligated to ensure that a balance is struck, resolve disputes, and give awards with an element of enforceability that are tainted-free. Just like the philosophical phrase, “Caesar’s wife should be above suspicion”, the arbitration process is to be treated as Caesar’s wife, free from any taint or blemish all the way from the arbitrator to the disputing parties.

Through this article, the study reveals how integrity plays a pivotal role in the arbitral process should remain a viable as well as a respected and this paper intends to portray arbitral integrity as a form of adherence to the principles of ethics together with procedural norms that act as a prevention of abuse, biasness as well as inequalities.

The methodology used to undertake this study is the doctrinal legal research where scholarly written texts related to arbitral integrity have been analysed, and an analysis made in relation to the integrity in the whole process of arbitration. The sources of written texts are from publications which been sourced from digital online depositories like Hein online, lexis Nexis google scholar as well as Jstor. The information sourced from these materials, has been paraphrased and the authors cited and acknowledged for purposes of avoiding plagiarism.

The results from the research materials have provided revelation that investor-state disputes are prone to corruption, mainly in the context of bribery for a favourable arbitral award by the arbitrator. The findings thereafter have therefore given a highlight of the potentiality of having a corrupt, free arbitral process to uphold the sanctity of the arbitral process by coming up with recommendations for ensuring arbitral integrity in investor-state arbitration. This research study is non-profitable to the author nor is it advancing any personal interests rather the main intention of having it serve the academic purpose which is the disseminating knowledge.

(Keywords: *Arbitral process, Corruption, Arbitral integrity, Investor-state dispute Enforceability.*)

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1.0 INTRODUCTION

Corruption has the ability to taint the reputation of an investment, and the dispute can end up in litigation, which takes a long time to come to a conclusion.¹ Corruption has received worldwide condemnation and even in many jurisdictions, it is considered a criminal offence.²

The irony of corruption is that this vice is strongly condemned with so much vile but the absurdity of it is that it thrives well more particularly in commercial transactions.³ Allegations of corruptions have been on the rise in the arbitration sphere and this was first raised in the year 1992 before an International Centre for Settlement of Investment Disputes (ICSID) tribunal and ever since then, corruption allegations have taken centre stage particularly in investor arbitration whereby the players tend to be the state and the investors.⁴

The critical question that has been mind boggling has always been how tribunals can come up with regulations that address the issue(s) relating to corruption which has a bad effect on the integrity of the arbitral process.⁵ Whereas arbitrators appear not to condone corruption acts, there has been witnessed a significant rise inform of distrust of the arbitration process as a form of dispute resolution.⁶

It is alleged that the principles that are considered as the pillars of arbitration like privacy of the proceedings are now acting like the breeding grounds for corruption due to what is referred to as “their opaque” nature of operation.⁷ Arbitrations that relate to elements of corruption happen to bring about immense difficulty in both the legal and factual aspects of the arbitral process.⁸ However, all hope is not lost since past arbitral practices can be used as recommendations for handling incidences of corruption in arbitration.⁹ It is of utmost importance that the issue of corruption is addressed since arbitration

¹ Yarik Kryvoi and Aleksander Godhe, ‘Enhancing Anti-Corruption via Investment Arbitration: From Red Flags to Due Diligence’ [2024] *Journal of International Dispute Settlement* *idae020*, (page 2) <<https://academic.oup.com/jids/advance-article/doi/10.1093/jnlids/idae020/7845928>> accessed 13 February 2025.

² Jomart Joldoshev, ‘<p>Proof of Corruption in International Investment Arbitration</P>’ (page 1) <<https://papers.ssrn.com/abstract=4930482>> accessed 31 May 2025.

³ Joldoshev (n 2) (page 1).

⁴ Joldoshev (n 2) (page 1).

⁵ Joldoshev (n 2) (page 2).

⁶ Joldoshev (n 2) (page 4).

⁷ Joldoshev (n 2) (page 4).

⁸ Michael Hwang and Kevin Lim, ‘CORRUPTION IN ARBITRATION LAW AND REALITY’ (page 5).

⁹ Kryvoi and Godhe (n 1) (page 2).

resolves disputes that stem from sectors that are deemed to be prone to corruption, like mining, construction, and the oil and gas industries.¹⁰ On this note, the study has delineated some of the issues more particularly corruption in the sphere of arbitration the ripple effects it has on the process of arbitration more so, on the aspect of integrity of the process. The paper is structured into 4 parts. The first part gives a contextualized approach of arbitral integrity. This part discusses corruption in the context of the arbitrator and sheds light as to how corruption is likely to thrive under them.

The second part discusses the question of the burden together with the standards of proof when it comes to determining corruption allegations. In the event corruption issues arise in the context of international investment arbitration where the state is also a party, the question of deciding applicable burden and standard of proofs need to be put into consideration by arbitral tribunals since corruption, by its very nature, happens to take place in an obscure manner and is very much concealed such that it, seldom leaves a footprint.¹¹

The third part of this paper deals with the aspect of the impact that corruption has on the integrity of the arbitral process in the resolution of a dispute. The fourth section which is the final section contains the recommendations of how corruption can be curbed in the context of the arbitrator undertaking his or her role.

Arbitrator integrity.

Arbitration plays a significant role in resolving disputes due to the fact that it is efficient and flexible, and as such the disputing parties do have confidence in it as a process.¹² Corruption and unethical practices have been alleged to have gained access in the process through tactics that are deemed to be unfair or even using the procedures to tactically escape the imposed obligation.¹³

William A. Park¹⁴ opines that an arbitrator serves the role of a referee, and in a game, no one should take the role of an umpire with a premeditated mindset of who is going to be the winner.¹⁵ When the parties to a dispute decide to subject a dispute to arbitration,

¹⁰ Hwang and Lim (n 8) (page 5).

¹¹ Joldoshev (n 2) (page 5).

¹² 'Addressing Corruption Allegations in Arbitration Disputes: Kenya - ALN' <<https://aln.africa/insight/addressing-corruption-allegations-in-arbitration-disputes-kenya/>> accessed 15 April 2025.

¹³ 'Addressing Corruption Allegations in Arbitration Disputes: Kenya - ALN' (n 12).

¹⁴ William W Park, 'Arbitrator Integrity: The Transient and the Permanent'.

¹⁵ Park (n 14) (page 5).

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what they have in mind is that the arbitrator will play a neutral role in the adjudication of the dispute.¹⁶

Integrity in arbitration strongly relies on the arbitrator in that William A. Park states that there are two ways in which arbitration can be brought into shame. The first thing is to ensure that arbitrators who are corrupt and biased get appointed to oversee the arbitral process and, secondly, reduce the confidence of the disputing parties through awarding unjustified awards.¹⁷

Looking at the aspect of independence and impartiality, the conflict of interest of an arbitrator falls into the categories of both the former and the latter.¹⁸ In literal meaning, independence means instances where there is a lack of improper connections, whilst, on the other hand, impartiality happens to be related to pre-judgment matters.¹⁹ For the arbitration process to be held in high regard, an arbitrator must exhibit traits of being both independent as well as impartial.²⁰

Investor-state arbitration has been criticized as a breeding ground for arbitral integrity, with allegations that arbitrators tend to make decisions favourable to the claimant-investor against the state with the sole purpose of getting reappointed in case another dispute arises.²¹ The above has painted the arbitration process in a bad light to the extent that some writers have gone ahead to refer to the arbitral process as the “businessman’s court.”²² The discussion on arbitration integrity happens to be more plausible if a linkage can be established on how arbitrators take into consideration the facts presented together with the legal arguments.²³

For there to be integrity in the arbitral process, integrity must start with the arbitrator since the arbitrator plays a critical role in the process. If the arbitrator is tainted, then the whole arbitration process becomes tainted.²⁴

¹⁶ Park (n 14) (page 5).

¹⁷ Park (n 14) (page 7).

¹⁸ Park (n 14) (page 8).

¹⁹ Park (n 14) (page 8).

²⁰ Park (n 14) (page 8).

²¹ Park (n 14) (page 30).

²² Park (n 14) (page 30).

²³ Park (n 14) (page 33).

²⁴ Park (n 14) (page 45).

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It is of utmost importance to be in a position of distinguishing bribes from a mere gift(s).²⁵ In many occasions, bribes can or have been disguised as gifts.²⁶ To be able to contextualize and problematize the characteristics of a bribe, bribe is said to imply a form of reciprocity whilst on the other hand, a gift should not attract such.²⁷

However, even though the thin line of distinction has a fundamental value, many at times find it hard to come up with a proper distinction.²⁸ The former president of Nigeria HE. Olusegan Obasanjo, was in a position to come up with a nearly perfect distinction between a gifts and bribes through the following statement: *“In the African concept of appreciation and hospitality, the gift is usually a token. It is not demanded. The value is usually in the spirit rather than in the material worth. It is usually done in the open, and never in secret. Where it is excessive, it becomes an embarrassment and it is returned.”*²⁹ In context of what the above actually means is that gifts do serve the purpose of cementing existing relationships, whereas bribes on the other hand are intended to create new relationships.³⁰

Looking at the aspect of arbitration, a simple gesture of a gift whether innocently given or given with the intention of getting a favorable award then this would be an integrity issues which goes against the principals of arbitration which include procedural fairness in the resolution of a dispute.³¹

2.0 Burden and Standard of proof

The burden of proof has the following elements:

The first element is the *burden of production*.” which happens to signify that the party that alleges must be in that same position of providing evidence to that effect.³² The second element is the *“burden of persuasion”* whereby the party who is under this duty must be able to persuade the court or even the tribunal that claims raised should prevail. This duty normally rests upon the claimant, however, depending on nature of the prevailing circumstances, it could also shift on the respondent.³³ The third element is the way the burden of proof is put into use such that it covers the *“standard of proof”*.³⁴

²⁵ Joldoshev (n 2) (page 12).

²⁶ Joldoshev (n 2) (page 12).

²⁷ Joldoshev (n 2) (page 12).

²⁸ Joldoshev (n 2) (page 12).

²⁹ Joldoshev (n 2) (page 12).

³⁰ Joldoshev (n 2) (page 12).

³¹ Joldoshev (n 2) (page 12).

³² Joldoshev (n 2) (page 17).

³³ Joldoshev (n 2) (page 17).

³⁴ Joldoshev (n 2) (page 17).

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The standard of proof can be counted as a component of the burden of proof reason being, the party that carries the burden of proof is required to persuade the decision-maker that the claims which have been raised are actually true.³⁵ Contextually, the burden of proof deals with the responsibility of proving a fact whilst on the other hand the standard of proof deals with the amount of evidence needed for purposes of establishing an individual issue or an issue affecting the entirety of the case.³⁶

Looking at the aspect of arbitration, the burden of proof is usually decided by the widely recognized international standard that each party bears the burden of proving the facts on which it relies or intends to rely upon.³⁷ Consequently, the party that pleads corruption has the onus of having to prove it. However, there are instances as to when the burden of proof actually shifts from the party who originally raised the allegations once prima facie case evidence is presented.³⁸

In arbitration law, the concept of standard of proof has kind of received the silent treatment in that, the international instruments like the UNICTRAL Model Law,³⁹ domestic laws as well as arbitral tribunal decisions have a uniformity of silence when it comes to addressing the issue of standard of proof.⁴⁰ In relation to corruption, it takes the shape of an act that undermines public policy.⁴¹

Corruption is a serious deviation from legal and social norms, and to make right this deviation, reliable and solid evidence has to be produced.⁴² Further, applying the heightened standard of proof may also be more convenient for arbitral tribunals to keep off undesirable repercussions, such as exploitation of corruption allegations, contract invalidation, unenforceability of the contract, and instances of claims of lack of jurisdiction to resolve the dispute.⁴³

It should be noted that application of the above discussed standard may lead to the disregarding the hardships of proving corruption allegations and this does not only leave room for corruption to manifest in arbitration, but it could also result in arbitration

³⁵ Joldoshev (n 2) (page 17).

³⁶ Joldoshev (n 2) (page 17).

³⁷ Joldoshev (n 2) (page 18).

³⁸ Joldoshev (n 2) (page 18).

³⁹ The UNCITRAL Model Law on International Commercial Arbitration 1986.

⁴⁰ Joldoshev (n 2) (page 20).

⁴¹ Joldoshev (n 2) (page 21).

⁴² Joldoshev (n 2) (page 27).

⁴³ Joldoshev (n 2) (page 27).

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developing a reputation of having a soft spot for corruption which greatly affects the integrity of the process.⁴⁴

In arbitration, an argument is fronted that the arbitrator's scope of action, under its freedom of judgment, is to make sure that there is adoption of all means which ensure that all the relevant facts are made clear to the court – which consequently encourages arbitrators to place greater weight on their judicial responsibility rather than ignore indications of suspicious transactions.⁴⁵

Several are the difficulties posed by viewing arbitration as the adequate forum to address the societal need to deter fraudulent and corrupt acts.⁴⁶ These challenges are associated both with the nature of arbitration and the configuration of the acts of corruption.⁴⁷

3.0 Impact of lack of integrity on the arbitration process.

The impact of lack of integrity in arbitration is that there is an effect on the validity and annulment of awards. The three are briefly discussed below.

Validity of awards

Corruption can affect the validity of an award as per section 35 of the Arbitration Act, which stipulates that awards can be set aside if it is discovered that there was an element of fraud or corruption.⁴⁸ An award that has been obtained through corruption can be challenged in the High Court as provided under section 37⁴⁹, and the courts have made this pronouncement as was seen in the matter of *Nedermar Technology BV Ltd -V - Kenya Anti-Corruption Commission & Another [2006]*⁵⁰ which proceeded to the Court of Appeal only for the Appellate Court to uphold the decision of the High Court in the matter of *Kenya Anti-Corruption Commission & another v Nedermar Technology BV. Limited [2017] eKLR*.⁵¹

Annulment of awards

⁴⁴ Joldoshev (n 2) (page 27).

⁴⁵ George Domocos, 'CORRUPTION AND ITS EFFECTS IN INTERNATIONAL ARBITRATION, WITH FOCUS ON ROMANIA' (page 19).

⁴⁶ Domocos (n 44) (page 10).

⁴⁷ Domocos (n 44) (page 10).

⁴⁸ Arbitration Act No.4 of 1995 (Laws of Kenya). (section 35).

⁴⁹ Arbitration Act No.4 of 1995 (Laws of Kenya). (Section 37).

⁵⁰ *Nedermar Technology BV Ltd -V - Kenya Anti-Corruption Commission & Another [2006] Kebc 3498 (KLR)* (Nairobi High Court at Milimani).

⁵¹ *Kenya Anti-Corruption Commission & another v Nedermar Technology BV Limited [2017] eKLR* (Court of Appeal at Nairobi).

Still, under the provisions of section 37 of the Act,⁵² the courts can annul an award and decline to give it recognition if it turns out that the award was attained through corruption. In the matter of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited & Another*⁵³, the Supreme Court made a pronouncement on the ground on which an arbitral award may be set aside, and the same was reiterated in the same court in the matter of *Kampala International University -v- Housing Finance Company Limited (KLR)*.⁵⁴

Further, in the matter of *Kenya Airports Authority v World Duty-Free Company Limited t/a Kenya Duty-Free Complex [2018] eKLR*⁵⁵ whilst setting aside the award, the court stated that as much as awards enjoy some sort of autonomy, they will not be entertained if they are antagonistic to public policy.⁵⁶

Breach of investment protection

Any form of corruption allegation can be used by an investor to advance the narrative of a breach of investment protection.⁵⁷ This leads to the breach of fair and equitable treatment of the parties, thus making the whole arbitral process appear to be unjust.⁵⁸

4.0 Recommendations

In order to uphold integrity in the arbitral, the following are the recommendations:

Due diligence

Due diligence particularly comes in on the part of the arbitrator, who can happen to fail to declare a conflict of interest in an arbitral dispute. Even though an arbitrator ought to declare neutrality, one may maliciously withhold the information and end up giving an award to an undeserving party.⁵⁹ This can be equated to a corrupt practice and undertaking due diligence will ensure that there are minimum risks of corruption and ensure accountability in the arbitral process.⁶⁰

⁵² Arbitration Act No.4 of 1995 (Laws of Kenya). (Section 37).

⁵³ *Petition 12 of 2016 - Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR* (Supreme Court of Kenya).

⁵⁴ *Petition 34 (E035) of 2022 [2024] KESC 11 - Kampala International University -v- Housing Finance Company Limited (KLR)* (Supreme Court).

⁵⁵ *MISC APPLICATION NO 67 OF 2013 - Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex [2018] eKLR* (High Court at Nairobi).

⁵⁶ *MISC. APPLICATION NO. 67 OF 2013 - Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex [2018] eKLR* (n 55) (paragraph 38).

⁵⁷ Kryvoi and Godhe (n 1) (page 6).

⁵⁸ Kryvoi and Godhe (n 1) (page 6).

⁵⁹ Kryvoi and Godhe (n 1) (page 3).

⁶⁰ Kryvoi and Godhe (n 1) (page 3).

Red Flags

Red flags should be taken into consideration, particularly by arbitrators, for corruption indicators that can stem from irregular payments and this consideration will be instrumental to the arbitrator when it comes to the rendering of the award.⁶¹

Addressing corruption allegations

When an arbitrator is faced with corruption allegations, there should be clearly provided procedures by the arbitrator to address the claims, and this entails conducting hearings that are focused on the allegations, allowing the submission of evidence, and giving each party ample opportunity to be heard.⁶²

5.0 CONCLUSION

Corruption allegations have increasingly been on the rise in regard to international arbitration more particularly investor state arbitration and the tragedy is that this trend does not show any signs of stopping anytime soon.⁶³ The justification behind the aforementioned statement is that, when it comes to corruption, there is a lack of the zeal to fight it as many believe that corruption is good mostly if it is working in you're the honest truth is that corruption is linked to most individuals who hold the positions of serving the public and they are known to be the weak link in the fight against corruption since they themselves are in fact the enablers of this vice.⁶⁴

Further, when it comes to the application of the standard of proof in investor-state arbitrations in allegations of corruption, a reasonable opportunity should be accorded to both the state(s) and investor(s), to prove an allegation of corruption.⁶⁵ However, it is impossible to reach the same conclusion for the standard of proof's application because in arbitration the standard of proof has not yet evolved into a uniformly applied rule.⁶⁶ It is saddening that, international arbitration conventions, national arbitration laws, arbitration institutions' rules and decisions of arbitral tribunals all do happen to lack the adequate general rules or principles that pertain to the standard of proof.⁶⁷ Therefore, in

⁶¹ '2024-ICC-Red-Flags-or-Other-Indicators-of-Corruption_ICC-DRS-Bulletin.Pdf' <https://iccwbo.org/wp-content/uploads/sites/3/2024/12/2024-ICC-Red-Flags-or-Other-Indicators-of-Corruption_ICC-DRS-Bulletin.pdf> accessed 15 April 2025

⁶² '20241204-Navigation-Law-Adressing-Corruption-Allegations-in-Arbitration-Disputes.Pdf' <<https://navacelle.law/wp-content/uploads/2024/12/20241204-Navigation-Law-Adressing-corruption-allegations-in-arbitration-disputes.pdf>> accessed 15 April 2025.

⁶³ Joldoshev (n 2) (page 30).

⁶⁴ Joldoshev (n 2) (page 30).

⁶⁵ Joldoshev (n 2) (page 31).

⁶⁶ Joldoshev (n 2) (page 31).

⁶⁷ Joldoshev (n 2) (page 32).

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the unlikely event suspicious allegations of corruption requires further investigation, it is vividly not clear as to what standard of proof arbitral tribunals should go ahead and apply.⁶⁸

To effectively ensure integrity in the arbitration process, a proactive approach is required from all the relevant players so as to ensure that the arbitral process is not tainted and to ensure that the trust that has been bestowed upon it is not eroded through selfish gains. During this study, it was noted that there is a gap in terms of literature concerning the aspect of corruption in relation to arbitrators. Most of the literature focuses more on the aspect of corruption in the arbitration contracts and very minimal consideration when it comes to the corrupt arbitrators. This actually exposes the arbitration process since it makes it vulnerable in the sense that corruption will slip in leading to allegations which later will taint the arbitral process. More study should be conducted for purposes of rooting out corrupt arbitrators and with that, arbitral integrity will be saved since it will have been fought for.

⁶⁸ Joldoshev (n 2) (page 32).

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Faith Mwiti & Frida Njeru

The Nexus of Information Ethics and Arbitration in Balancing Open Access and Intellectual Property Rights

By: Faith Mwiti* & Frida Njeru**

Abstract

This study leans on descriptive analysis, legal reasoning, and theoretical framing to explore where rules, moral values, and group behaviors cross paths in today's data-driven world. Rather than ticking off references, it examines court rulings, legal structures, and agency guidelines to understand how dispute resolution together with principles of info ethics could balance property rights against open access. Beyond just statutes or decrees, it weaves raw materials such as legislation and verdicts with ideas pulled from academic debate and government reports to build a clearer view of the issue.

The findings highlight six main ideas: a constant push-pull between access and ownership but legal battles don't always resolve knowledge disputes properly rather, mediation tends to deliver more balanced outcomes at the same time, moral values heavily influence institutional decisions even so, access to knowledge differs drastically from one area to another so, pairing legal frameworks with ethical guidelines boosts governance effectiveness.

The study points to including conflict-handling clauses in company agreements at the same time expanding open-data platforms. It pushes for blending ethical standards into rule-making; all while advancing training in underfunded regions to close data divides. Findings show negotiation methods and moral guidelines link up: together, they back fairness, accountability, openness. This dual approach lets knowledge function as protected innovation but also a shared global resource key to advancement and steady development.

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1. Introduction

Universities, libraries, and research centers are usually viewed as guardians of human thinking fueling fresh ideas, creativity, or shifts in how people live.¹ They act like links between generations by preserving, organizing, or sharing knowledge, plus they push for serious thinking, questioning, or dialogue among different cultures.² In earlier times, these spots protected printed books, ancient texts, or magazines in their archives to carry wisdom into the future.³ They gave everyone the same shot at learning, backed communities of curious minds, or played a role in lifting up societies and the globe through education and exploration.⁴ That's why university libraries and academic institutions have long served as open spaces where insight gets traded to support collective growth, richer traditions, or progress across communities.⁵

Yet lately, digital gadgets have completely reshaped how data's made, stored, sometimes spread around too.⁶ The tech surge powered by the internet, digital files, or stuff online erased old barriers on who can view what.⁷ These days, scholars from spots like Nairobi or New York can reach massive web libraries, online journals, open archives just by touching a screen.⁸ Platforms like Google Scholar,⁹ PubMed Central,¹⁰ or even DOAJ¹¹ reveal how knowledge now moves across borders, letting folks link up, swap thoughts regardless of location.¹² While this shift opens major opportunities for study and broader

¹ S Virkus, General Introduction to the Role of the Library for University Education (2004) LIBER Quarterly 14(3) <https://liberquarterly.eu/article/view/10388> <accessed 3 November 2025>

² Ibid

³ Academic Libraries an Overview ScienceDirect Topics <https://www.sciencedirect.com/topics/social-sciences/academic-libraries> <accessed 3 November 2025>

⁴ H Roy, Knowledge Management and the Role of Academic Libraries (2015) 1(1) International Journal of Research in Library Science 17

⁵ International Federation of Library Associations and Institutions (IFLA), IFLA Trend Report: Information, Education and Knowledge for All (IFLA 2013).

⁶ Digital Transformation and Libraries IFLA Journal (2022) <https://www.ifla.org/news/digital-transformation-and-libraries/> < accessed 3 November 2025>

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⁸ K Willinsky, *The Access Principle: The Case for Open Access to Research and Scholarship* (MIT Press 2006) 1–5.

⁹ Google Scholar <https://scholar.google.com> <accessed 3 November 2025>

¹⁰ PubMed Central <https://www.ncbi.nlm.nih.gov/pmc/> <accessed 3 November 2025>

¹¹ Open Access Journals (DOAJ) <https://doaj.org/> <accessed 3 November 2025>

¹² Ibid

reach, it's also sparked heated arguments over recognition, control, who holds rights online.¹³

A major challenge when shifting online is juggling free access with holding back some grip on resources.¹⁴ Free access rests on the belief that information should spread widely easy to get, no walls blocking the way.¹⁵ The aim of open access is making chances equal so anyone, no matter their location or income, can tap into and add to shared understanding. Open access platforms such as IR enable people worldwide dive straight into research and results, sparking wider academic links across regions.¹⁶

Still, having control over ideas counts big time in our data-heavy era. Yet copyrights, patents, and licensing terms act as shields protecting income and personal claims for inventors, authors, and publishers.¹⁷ These barriers make sure minds behind work earn both recognition and cash fueling fresh invention and trustworthy research over time.¹⁸ From this angle, wide-open access could sometimes threaten creative industries and publishing outfits that rely on subscription fees or direct buys to keep quality checks like peer review alive.¹⁹ That's why institutions and libraries often juggle leaning on open sharing while also sticking to ownership laws.

This problem hits harder in the Global South, since tight budgets deepen gaps in getting research materials.²⁰ High journal subscriptions particularly from big names such as Elsevier, Springer Nature, or Wiley block many African, Asian, and Latin American institutions from staying updated.²¹ For instance one premium science journal, its yearly fee can run into thousands, way above what public universities in Kenya, Uganda, or

¹³ Ibid

¹⁴ Subaveerapandiyan, A., Yohapriya, K. and Mamdapur, G. M. N., Digital Publishing Habits, Perceptions of Open Access Publishing and Other Access Publishing: Across Continents Survey Study (arXiv, 2022) <https://arxiv.org/abs/2210.11268> <accessed 14 Nov 2025>

¹⁵ Ibid

¹⁶ Kristin Biesenbender, Nina Smirnova, Philipp Mayr & Isabella Peters, The Emergence of Preprints: Comparing Publishing Behaviour in the Global South and the Global North (arXiv, 2023) <https://arxiv.org/abs/2308.04186> <accessed 14 Nov 2025>

¹⁷ Alba Esteve, Copyright and Open Access to Scientific Publishing, IIC – International Review of Intellectual Property and Competition Law (2024)

¹⁸ Ibid

¹⁹ The Guardian, Quality of scientific papers questioned as academics 'overwhelmed' by the millions published (13 July 2025) The Guardian.

²⁰ Globalization and Health, Open access: academic publishing and its implications for knowledge equity in Kenya (2014)

²¹ Times Higher Education, Open access is closed to middle-income countries (14 April 2022).

Nigeria can afford. Because of this, learners and scholars there end up using old resources or turning to unofficial sites creating both moral dilemmas and legal risks.²² This issue reveals that even good intentions might stumble when key players hold the keys to information. Still, ethical guidelines around information which shape our choices about creating, sharing, or using knowledge offer ways to deal with these tensions.²³ Article 27 of the Universal Declaration of Human Rights reports that everyone should take part in, and gain from, scientific progress.²⁴ Yet locking studies behind subscription barriers, hiding files under tight digital locks, or restricting usage via strict legal rules breaks that promise particularly when public funds supported the initial research.²⁵

1.1 Balancing Knowledge Sharing and Intellectual Ownership in Cross-Border Contexts

Still, the idea of honoring who owns what matters a lot. Creators get to decide how their intellectual output spreads or gets shared freely.²⁶ When people break those rules by copying without permission or passing things off as their own, trust in learning takes a hit, and fresh ideas slow down.²⁷ So weighing free access against ownership needs real awareness plus smart ways to compromise. From an ethics angle, institutions and libraries should aim for fairness not letting access favor some over others own up to proper credit, stay open about usage, and give back by sharing knowledge responsibly while making sure creators aren't forgotten.²⁸

To handle Intellectual property disputes that pop up when open access work is misused, arbitration steps in as a handy fix.²⁹ Instead of going to court, this type of dispute solution gives a relaxed, adaptable, or budget-friendly way to sort out issues without formal trials.³⁰ When digital knowledge gets mismanaged, arbitration steps in to settle the

²² SciDev.Net, Open access excludes developing world scientists 2021

²³ Nic Weber & Brandon Locke, Ethics of Open Data (2022) arXiv <https://arxiv.org/abs/2205.10402> <accessed 14 Nov 2025>

²⁴ Universal Declaration of Human Rights, art 27(1) (UDHR 1948).

²⁵ Ibid, art 27(2).

²⁶ WIPO, Raising awareness on Intellectual Property for Creative Industries (July 2023) 4.

²⁷ Z Hossain, Ö Çelik & C Hertel, Academic Integrity and Copyright Literacy Policy and Instruction in K-12 Schools' (2024) International Journal for Educational Integrity 20, 4.

²⁸ Ramakant Agarwal et al, Exploring the Ethics of Information Management in Libraries: Privacy, Copyright and Intellectual Freedom (2025) International Journal of Environmental Sciences 11 No 23s.

²⁹ WIPO, Mediation and Arbitration for IP and Technology Disputes (WIPO) (describing ADR as commonly used for IP disputes)

³⁰ Ibid

disputes that breaks out among publishers and Institutions, writers and archives, or teammates from different institutions arguing over who owns or can license digital results.³¹ Unlike lawsuits which drag on forever and drain wallets arbitration lets each side pick impartial specialists in IP or information law to hammer out balanced deals that protect both moral values and business concerns.³²

A university might scan old research papers and post them online for free. Suppose a journal later says it owns one piece because the author signed a tight copyright deal.³³ Rather than fighting in court which takes time and can damage ties they might choose arbitration instead.³⁴ One neutral expert checks the contracts, weighs fairness issues like open learning and public good and suggests a fix that respects ownership but still lets students use it carefully.³⁵ Places like WIPO's global dispute hubs now see more cases like this, settling fights over copyrights, patents, or digital access every year.³⁶

Arbitration backs up information ethics by turning moral ideas into action when disputes come up.³⁷ Instead of picking sides, it balances what creators want with what society needs. If it sticks to things like fairness, openness, and letting everyone have a say, it keeps copyright rules from blocking access or slowing down research teamwork.³⁸ This matters most in university groups and online archives places where writers, publishers, libraries, and funders have to work together without trampling on ownership.³⁹

³¹ IJJRLS Law Review, Efficacy of Arbitration in Intellectual Property Dispute Resolution (2023)

³² NYSBA, The Benefits of Mediation and Arbitration for IP Disputes (2011)

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³⁷ Ibid

³⁸ Efficient Alternative Dispute Resolution in Intellectual Property(2009) WIPO Magazine <https://www.wipo.int/en/web/wipo-magazine/articles/efficient-alternative-dispute-resolution-in-intellectual-property-36846> <accessed 14 Nov 2025>

³⁹ Ibid

Additionally, arbitration helps countries work together when handling intellectual property across borders.⁴⁰ Right now, with research more connected than ever, one digital file might pull in people and organizations from different nations each running under their own laws.⁴¹ Joint study by academics from Kenya, Germany and the US, uploaded to an open-access platform where copyright rules don't match up, with ethical standards backing it arbitration can fill in these legal mismatches by providing a workable solution accepted worldwide balancing everyone's rights while keeping knowledge flowing across continents.⁴²

The mix of information ethics and arbitration creates a solid two-part way to handle open access issues involving morals and laws.⁴³ Information ethics guides choices in knowledge groups by pushing fairness, clear actions, and responsibility. Meanwhile, arbitration offers a flexible but organized method to settle conflicts when those principles clash with ownership rights or legal limits.⁴⁴ Because of this link, trust and teamwork grow stronger among those involved in sharing knowledge.⁴⁵

In short, juggling who gets to use open resources versus who owns them reflects a bigger clash knowledge as something everyone should share versus something people can claim as their own.⁴⁶ Since institution, libraries, and research hubs keep moving into digital spaces, they've got to deal with these opposing pulls while staying honest and following the rules.⁴⁷ Figuring out right from wrong in sharing information and having fair ways to settle disputes matters most here; it's what keeps the digital knowledge world open and fair, where creators are recognized while discoveries help many.⁴⁸ In the end, making open access last isn't just about tools or laws, but about systems that weigh freedom

⁴⁰ Maxence Rivoire, *The Principles of Territoriality – A Study in Public and Private International Law, Intellectual Property, and International Arbitration* (2024) (PhD thesis, University of Cambridge)

⁴¹ Norton Rose Fulbright, *Protecting Intellectual Property Rights through International Arbitration* (2022) <https://www.nortonrosefulbright.com/de-de/inside-turkiye/blog/2022/06/protecting-intellectual-property-rights-through-international-arbitration> <accessed 14 Nov 2025>

⁴² *Supra*, note 34

⁴³ *Ibid*

⁴⁴ *Supra*, note 32

⁴⁵ *Ibid*

⁴⁶ *Supra*, note 33

⁴⁷ *Supra*, note 39

⁴⁸ *Ibid*

against fairness, access alongside responsibility, and new ideas against rightful ownership.⁴⁹

2. Ethical and Legal Issues in Reconciling Access and Ownership of Knowledge

2.1 Ideal State

Most of the time, a healthy flow of knowledge means everyone gets equal chances to use information. Students, scientists, or regular citizens could explore new ideas, build on them, or work together without barriers in their way meanwhile, writers, institutions and publishers would still get credit plus proper pay for their work.⁵⁰ This kind of fairness helps bring people in, levels the field, supports long-term growth in how we share understanding worldwide. In that kind of setting, open access alongside copyright rules wouldn't clash instead, they would fit open access keeps learning free, letting ideas spread fast, whereas copyright makes sure hard work doesn't go unnoticed or unrewarded.⁵¹ That mix builds confidence in how knowledge moves around, giving researchers the push they need to share results without worrying someone will misuse them.⁵² Knowledge then gets seen as something shared by everyone yet also guarded like property, backing up UN goals especially better schooling (SDG 4), new ideas (SDG 9), or cutting gaps between people (SDG 10).⁵³ The technology boom was supposed to boost these aims, shrinking worldwide splits while building a space where learning and study welcome all.⁵⁴

2.2 Current State

Yet things aren't working well when it comes to sharing knowledge worldwide. The rise of digital technology has flooded the planet with information, but at the same time made it harder to share freely due to tight control over who owns what.⁵⁵ Balance hasn't been reached instead, access is blocked by strict rules backed up by copyright laws, high-priced licenses, or digital locks like Digital Right Management.⁵⁶ Big academic companies

⁴⁹ Peter Suber, *Open Access* (MIT Press 2012) chs 1–2.

⁵⁰ BOAI (Budapest Open Access Initiative), *Ten Years On* (BOAI, 2012) <https://www.budapestopenaccessinitiative.org> <accessed 16 November 2025>

⁵¹ J Pelfrey, *Reconciling Copyright and Open Access* (2020) *Journal of Copyright in Education and Librarianship* 4(2) 1–15 (compatibility of OA and copyright).

⁵² M Swan, *The Open Access Citation Advantage* (2010) *Journal of the American Society for Information Science and Technology* 61(6) 1234–1252

⁵³ United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* (UN 2015) SDGs 4, 9 and 10 (global knowledge, innovation, equity).

⁵⁴ Manuel Castells, *The Rise of the Network Society* (2nd edn, Wiley-Blackwell 2010).

⁵⁵ Lawrence Lessig, *Free Culture* (Penguin 2004) 23–45.

⁵⁶ Julie Cohen, *Copyright, DRM, and Knowledge Access* (2006) 18 *Berkeley Technology Law Journal* 575.

Elsevier, Springer Nature, Wiley hold tight grips on most research, often demanding huge fees from schools just to read journals or e-books.⁵⁷ Richer universities can pay millions each year without blinking, yet institutions across Africa and parts of Asia find it tough just to get hold of basic materials they need.⁵⁸

2.3 Implications of the Imbalance Between Open Access and Intellectual Property Rights

The inequality of accessing and influencing knowledge remains a significant source of ethical, social, and legal issues.⁵⁹ With the information access of the more affluent countries increasing, the scientific exchange between the developing countries grows increasingly behind.⁶⁰ The lack of funds can deny the researchers of the essential discoveries, slowing the process of innovation and exacerbating the unequal research relationships.⁶¹ African universities are not able to publish in leading journals or become members of international partnerships as new research is still under expensive subscription barriers.⁶² This skewness becomes harmful to equity and the public knowledge becomes a privilege to those who are able to afford.⁶³ There is frustration when the research paid by taxpayers is not available because of commercial limitations, and this may be evident in the cases like the one of Aaron Swartz, where the attempts to foster the access to open access came into a harsh conflict with the legal systems.⁶⁴

Access to a small number of people also undermines creativity as any student and scientist has to reproduce what has already been done or have to do without up-to-date information, hindering collaboration and advancement in such crucial areas as health, agriculture, and technology.⁶⁵ These strains frequently lead to protracted expensive court

⁵⁷ Vincent Larivière, Stefanie Haustein and Philippe Mongeon, *The Oligopoly of Academic Publishers* (2015) 10(6) PLOS ONE 1.

⁵⁸ Eve Gray, *Access to Knowledge in Africa* (2013) *The African Journal of Information and Communication* 14.

⁵⁹ Leslie Chan and others, *Open Access and Development* (IDRC 2011) ch 2.

⁶⁰ Jean-Claude Guédon, *Open Access: Toward the Internet of the Mind*(2008) *Information Services & Use* 28(4) 243–253.

⁶¹ Carol Tenopir and Donald King, *Communication Patterns of Researchers* (Wiley 2004)

⁶² Florence Piron, *Postcolonial Open Access* (2018) *Revue française des sciences de l'information et de la communication* 15.

⁶³ Helene N Pruett, *The Knowledge Gap and Global Inequality* (2019) 45 *Journal of Information Ethics* 22.

⁶⁴ Matthew Braga, *The Legacy of Aaron Swartz* (2013) *The Atlantic*

⁶⁵ John Willinsky, *The Access Principle* (MIT Press 2006) ch 4.

battles as seen with lawsuits around Google Books⁶⁶ and Sci-Hub⁶⁷ and waste money that should be spent on education and discovery in court.⁶⁸ In the meantime, even such access programs as Research4Life, although useful, generate dependency since eligibility can be canceled along with economic development of countries.⁶⁹

This demonstrates that access is neither a right nor a conditional good but rather a conditional benefit, which supports long-term dependency rather than the establishment of a genuine independence in knowledge management and sharing.

2.4 Way Forward

There is need to be an inclusive and fair approach to the ethical and legal issues of information access and ownership.⁷⁰ One of the most significant interventions⁷⁰ is to increase the number of open-access policies across the globe in order to provide the publicly funded studies online.⁷¹

The efforts of society like Europe which has moved towards the Plan S demanding that taxpayer-funded studies be published on open platforms reveal how policies that are strong can help keep knowledge created with taxpayer-funded resources open to all.⁷² It is also important to foster integrity in the use and sharing of information. Institutions, colleges, and researchers can enhance transparency and accountability by educating students, librarians, and researchers about ethical behavior to learn how to responsibly use, cite, and disinterestedly share digital information.⁷³

The other aspect of the solution can be in embracing other means of solving intellectual property disputes among which arbitration can be included that provides flexible and collaborative means to resolve disputes.⁷⁴ Arbitration outcomes have also shown that access and copyright protection can be balanced, as seen in disputes between *Elsevier v*

⁶⁶ *Authors Guild v Google Inc* 804 F 3d 202 (2nd Cir 2015)

⁶⁷ Alexandra Elbakyan, *Why Sci-Hub Matters* (2016) *Big Data & Society* 3(1).

⁶⁸ *Ibid*

⁶⁹ Kimberly Parker, *Research4Life and the Global North–South Divide* (2019) *Learned Publishing* 32(4) 307–314.

⁷⁰ Luciano Floridi, *Information Ethics* (Oxford University Press 2013) 78–90.

⁷¹ Peter Suber, *Open Access* (MIT Press 2012) ch 1.

⁷² Julie Cohen, *Copyright, DRM, and Knowledge Access* (2006) 18 *Berkeley Technology Law Journal* 575.

⁷³ Eve Gray, *Access to Knowledge in Africa* (2013) *The African Journal of Information and Communication* 14.

⁷⁴ *Supra*, note 53

*university consortia*⁷⁵ in Europe, where arbitration panels helped the parties reach agreements allowing discounted or limited-open access to journal content while preserving Elsevier's licensing and copyright controls.⁷⁶ Access gaps can also be closed by partnerships between governments, universities and publishers providing affordable subscriptions, collective licensing as well as better digital repositories which store local research.⁷⁷ Finally, to make a substantial change, one needs to change the mentality, perceiving knowledge as a common good, which will help the advancement of the whole group. An open access combined with adaptive laws coupled with high ethical standards makes information systems more inclusive, sustainable, and in tandem with the larger good.⁷⁸

3. Research Orientation and Thematic Inquiry

This study focuses on sorting out the moral and legal questions tied to who gets to use knowledge and who controls it when those goals clash.⁷⁹ Places like institutions, libraries, storage hubs for history, and labs sit right where these tensions meet.⁸⁰ Because while they are meant to share information fairly to help learning, spark new ideas, and grow communities they also have to honor rules that guard the people who make or fund that knowledge.⁸¹ Balancing both goals feels tougher now, especially online where data gets copied fast, shared widely, or sold overseas without much effort.⁸² Instead of just being an abstract debate, the push-pull between sharing and controlling stuff hits real-world limits, slowing down research progress, messing with new ideas, and widening gaps around the planet.⁸³ A clear example showing this problem is the fight between The Authors Guild and Google Inc. from 2005 to 2015 often called the Google Books

⁷⁵ *Elsevier v university consortia*

⁷⁶ Lisa Janicke Hinchliffe, *Elsevier Negotiations and Transformative Agreements in Europe* (2020) *Scholarship Publishing and Academic Libraries Review* <https://scholarlykitchen.sspnet.org> <accessed 16 November 2025>

⁷⁷ Jussi Kivinen, *Collaborative Licensing Models for Academic Libraries* (2020) *Journal of Academic Librarianship* 46(5) 102–112.

⁷⁸ Leslie Chan and others, *Open Access for the Global South* (2019) *The African Journal of Information and Communication* 24, 7–27

⁷⁹ *Supra*, note 60

⁸⁰ *Ibid*

⁸¹ Electronic Frontier Foundation, *Authors Guild v Google* <https://www EFF.org/cases/authors-guild-v-google-part-ii-fair-use-proceedings> <accessed 20 November 2025>

⁸² *Supra*, note 74

⁸³ *Authors Alliance, Fair Use Affirmed on Appeal in Google Books Case* (2015) <https://www.authorsalliance.org/2015/10/16/fair-use-affirmed-on-appeal-in-google-books-case/> <accessed 20 November 2025>

lawsuit.⁸⁴ Instead of just scanning a few books, Google started copying tons of volumes from libraries so people could search inside them online using Google Books.⁸⁵ Even though the technology giant claimed it helped readers find information faster by offering short snippets, authors plus publishing houses took legal action because they felt their rights were violated.⁸⁶ They said Google copied and showed protected material without seeking their consent or paying.⁸⁷ Years later, American judges sided with Google, calling the effort a new kind of reuse allowed by fair use rules.⁸⁸ People cheered this as a win for open information and technology progress yet concerns grew about big companies holding massive digital libraries.⁸⁹ This situation shows how tough it is to balance free access to knowledge against copyright laws.

A parallel dispute between ethics and law showed up during the Aaron Swartz story (2011–2013).⁹⁰ This tech-savvy teen, also pushing for free information access, pulled down heaps of scholarly papers via MIT's internet link, aiming to share them openly.⁹¹ He acted because he felt studies paid for by taxpayers shouldn't sit hidden behind steep fees.⁹² Still, federal authorities hit him with several charges tied to computer misuse rules laws bringing harsh consequences.⁹³ Swartz took his own life in 2013 an event that stirred anger worldwide while pushing debates about digital rights back into focus.⁹⁴ His story shows what happens when laws don't keep pace with technology good intentions get treated like crimes because rules haven't caught up yet.⁹⁵ Instead of punishing those who share information for public good, maybe it's time we changed how control and freedom balance out online.

⁸⁴ Ibid

⁸⁵ Copyright.gov, *Authors Guild v Google*: Fair Use Summary

⁸⁶ *Supra*, note 76 (721 F.3d 132).

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ *Supra*, note 77

⁹⁰ *United States v Swartz*, (2011–2013) https://en.wikipedia.org/wiki/United_States_v._Swartz <accessed 20 November 2025>

⁹¹ Wired, MIT and Aaron Swartz <https://www.wired.com/2011/07/mit-webcam-swartz> <accessed 20 November 2025>

⁹² Reddit, Aaron Swartz Motivation <https://www.reddit.com/r/explainlikeimfive/comments/18cylxg> <accessed 20 November 2025>

⁹³ *Supra*, note 84

⁹⁴ New Yorker, Requiem for a Dream: Aaron Swartz <https://www.newyorker.com/magazine/2013/03/11/requiem-for-a-dream> <accessed 20 November 2025>

⁹⁵ Wired, Holder Swartz Case <https://www.wired.com/2013/03/holder-swartz-case> <accessed 20 November 2025>

In Africa, the gap feels sharper because some places lack money and basic systems. Backed by WHO along with a few publishing groups, Research4Life started offering poor nations cheap or no-fee entry to research papers.⁹⁶ Still, people called out flaws rules were tight, access kept changing without warning.⁹⁷ For instance Sudan and Zimbabwe once they shifted categories on the World Bank's list, institutions there suddenly lost touch with vital materials used heavily by scholars for ages.⁹⁸ That moment showed how shaky "access with strings attached" really is knowing what you need isn't enough if your country's label blocks the door.⁹⁹ It reveals how shaky access systems can be when they rely on publishers' generosity instead of fair worldwide rules. As a result, the divide in knowledge grows between richer and poorer regions, weakening efforts to make learning and discovery open to everyone.

From a legal angle, Institutions like universities are under growing pressure to follow global copyright rules like the Berne Convention along with the TRIPS Agreement these set minimum standards for protecting creative work worldwide.¹⁰⁰ Still, such systems tend to boost the power of big publishing firms instead of supporting libraries or institutions in poorer countries trying to get materials.¹⁰¹ India's updated Copyright Act from 2012 it came up after a fight known as the *Rameshwari Photocopy Services v Delhi University Case* (2012–2016).¹⁰² There, several textbook publishers took the university plus a local copying store to court over printing book sections for student handouts.¹⁰³ But the Delhi High Court decided the school didn't break any laws, saying teaching activities allowed limited copying without permission.¹⁰⁴ This big move made clear that getting learning materials particularly for kids in poorer nations should matter more than tight profit-driven copyright rules; morally speaking, it backed the view that information helps society in ways money can't measure.

⁹⁶Research4Life <https://www.research4life.org/> <accessed 20 November 2025>

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ Berne Convention for the Protection of Literary and Artistic Works 1886; TRIPS Agreement 1994.

¹⁰¹Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (Earthscan 2002).

¹⁰² *Rameshwari Photocopy Services v Delhi University* CS(OS) 1140/2012 (Delhi High Court, 2016) <https://indiankanoon.org/doc/114459608/> <accessed 20 November 2025>

¹⁰³ Ibid

¹⁰⁴ Ibid

3.1 Open Science and Intellectual Property Dispute Resolution

Though lawsuits might bring justice now and then, they're often sluggish, costly, tough on relationships and don't fit well in institutions or research spots where sharing info fast matters.¹⁰⁵ Rather than going to court, settling IP disputes through arbitration can feel smoother, quieter and more flexible. Take how Samsung and Apple had disputes from 2011 to 2018 over phone designs and technology rights each said the other stole ideas.¹⁰⁶ Even though judges in various countries weighed in, many key issues got sorted behind closed doors using arbitration, ending in secret deals and shared licenses.¹⁰⁷ These rulings showed that alternative dispute methods keep private matters under wraps instead of dragging them out in public where they might stifle progress.¹⁰⁸ When used in institutions or labs such processes could help universities, journals, and data firms sort things out quicker, so knowledge keeps moving without roadblocks.

Apart from that, WIPO's arbitration team handled multiple conflicts among online content platforms, academic labs, and firms licensing datasets.¹⁰⁹ A dispute arose between a dataset provider (owner of copyrighted online music content) and an AI company that trained its AI tool on that dataset.¹¹⁰ A neutral arbitral tribunal helped them settle the dataset provider retained control over its copyrighted content, while the AI company was granted structured access under agreed terms.¹¹¹ That mix of protected content and controlled access shows how arbitration can line up fair access rules with property rights across international research and innovation projects.

Beyond court solutions, the paper recognizes information ethics as a key guide for organizational rules. Because it's built on fairness, openness, inclusion, and responsibility, this approach shapes how data is managed. While pushing groups to weigh

¹⁰⁵ WIPO Arbitration and Mediation Center, Alternative Dispute Resolution <https://www.wipo.int/amc/en/> <accessed 20 November 2025>

¹⁰⁶ *Samsung v Apple* case (2011 to 2018)

¹⁰⁷ SVAMC, The Android Wars: A New Look at the *Apple v. Samsung Case* (pdf) <https://svamc.org/wp-content/uploads/2015/08/The-Android-Wars-A-New-Look-at-the-Apple-v.-Samsung-Case.pdf> <accessed 20 November 2025>

¹⁰⁸ Gabrio Serbelloni, Resolving IP and Technology Disputes Through WIPO Mediation and Arbitration (INDICAM / WIPO)

¹⁰⁹ WIPO provides ADR for B2B data disputes: Tailored WIPO ADR Services for data processing https://www.wipo.int/amc/en/center/specific-sectors/b2b_data/ <accessed 20 November 2025>

¹¹⁰ WIPO Arbitration and Mediation Center, Artificial Intelligence and IP Disputes <https://www.wipo.int/amc/en/center/specific-sectors/artificial-intelligence/index.html> <accessed 20 November 2025.>

¹¹¹ Ibid

social and personal impacts, it shifts focus from mere compliance. Illustratively South Africa's National Research Foundation launched an open-access rule back in 2015 requiring state-funded studies go into university databases at no cost.¹¹² Though aimed at broader reach, its real effect tackles long-standing gaps in who gets to use science findings across Africa.¹¹³ Just like that, UNESCO's 2021 push for open science urges countries to share research freely though it also stresses protecting creators' rights and giving proper recognition.¹¹⁴ Such moves show how moral guidelines can work alongside laws, helping build fairer ways to spread knowledge.

This study looks at how dispute resolution plus moral handling of information might work together to balance who gets access versus who owns materials in libraries or archives. As a substitute of rigid rules, arbitration gives room to adapt, whereas ethical principles keep decisions fair-minded and tuned to public good.¹¹⁵ Mixing both by adding neutral review terms into sharing deals and backing them up with internal guidelines could build a lasting way to manage shared knowledge without leaving anyone behind.¹¹⁶

A clear case of this mix shows up in the European Open Science Cloud effort, where teams across Europe team up on research.¹¹⁷ Instead of just one method, it uses rules and moral guidelines like dispute resolution steps when sharing data disputes happen, while fairness ideas keep access open and fair for everyone involved.¹¹⁸ Because of this two-part setup, disagreements about who owns what get handled well, keeping openness alive while still letting new ideas grow.

This study's focus comes from a belief: fair handling of knowledge needs strong morals, updated laws, plus real-world systems to back them up. Disputes lutions work better when balanced rules guide them arbitration brings just that kind of setup.¹¹⁹ When choices about who gets information or owns it are shaped by ethical thinking, those

¹¹² National Research Foundation (NRF) Statement on Open Access since 01 March 2015 requiring deposit of manuscripts.

¹¹³ Ibid

¹¹⁴ The NRF itself reflects on the implications of the UNESCO Recommendation on Open Science (2021).

¹¹⁵ Supra, note 99

¹¹⁶ Supra, note 102

¹¹⁷ EOSC Association statutes embed the purpose of accessible data and interoperability, balancing governance. <https://eosc.eu/eosc-about/> <accessed 20 November 2025>

¹¹⁸ Ibid

¹¹⁹ Supra, note 110

choices hold more weight.¹²⁰ These pieces fit together not stacked, but woven to build spaces where data isn't only guarded property, yet also treated like common fuel for moving humanity forward.

4. Advancement of Scholarly Discourse

This paper adds something real to the ongoing talk about how people get information, who controls it, and how it's managed online. Usually, scholars look at access one way and ownership another tied to library science or legal rules around copyrights.¹²¹ But this piece steps away from splitting them apart, treating both as linked parts of today's knowledge world one feeds the other, even when there is dispute.¹²² The Long-term control over data needs fresh methods that balance opposing demands without oversimplifying.¹²³

Looking at how this balance plays out in places like colleges, research hubs, or online data stores gives fresh insight into how digital knowledge gets managed.¹²⁴ Because technology is advancing so fast now, obsolete ways of making, spreading, and using information don't work the same anymore.¹²⁵ Before, academic knowledge mostly came from printed books, magazines, and paper records systems that depended on big organizations paying fees or controlling who got access.¹²⁶ With digital tools shaping things up, people can post findings instantly across the world; yet still, questions pop up about who owns what, who's in charge, and what's right or wrong when handling data. A clear case of this shift shows up in the worldwide talk about Plan S a move started in 2018 by cOAlition S, which includes various national funding bodies along with the European Commission.¹²⁷ This policy requires any science paid for by public money to appear in openly accessible journals or online spaces.¹²⁸ Though it's seen as a strong push for wider availability, it's also stirred unease among academics and publishing

¹²⁰ *Supra*, note 109

¹²¹ Manuel Castells, *The Rise of the Network Society* (Wiley-Blackwell 2010).

¹²² Kenneth Crews, *Copyright and Access: Working Within the Legal Framework* (2001) 25 *Journal of Academic Librarianship* 123.

¹²³ Siva Vaidhyanathan, *Intellectual Property: A Very Short Introduction* (OUP 2017).

¹²⁴ Christine Borgman, *Scholarship in the Digital Age: Information, Infrastructure, and the Internet* (MIT Press 2007).

¹²⁵ Luciano Floridi, *The Fourth Revolution: How the Infosphere is Reshaping Human Reality* (OUP 2014).

¹²⁶ John Feather, *A History of British Publishing* (Routledge 2006).

¹²⁷ cOAlition S, *Plan S: Principles and Implementation* (2018) <https://www.coalition-s.org> <accessed 21 November 2025>

¹²⁸ European Commission, *Implementation of Open Access Policies* (EC 2019).

houses when it comes to long-term viability and control.¹²⁹ Independent publishers stress over shrinking income, whereas certain scientists question if the system might favor those institutions able to cover publication fees.¹³⁰ The Plan S discussion shows a key dispute looked at here doing what's right by sharing information against how ownership actually works money-wise.¹³¹ Because it places this problem inside wider ideas about information ethics and control, the research pushes past just rules talk into tougher issues around fairness, equal access, maybe even duty in today's online world where knowledge means power.

This work adds something real to how we think about who controls ideas and what fairness means in that space by looking at where strict rules block people from reaching learning resources. While most past views on copyright focus only on following the law, staying within lines, respecting authorship this one shifts gears entirely.¹³² It steps back to ask how these systems shape lives outside courtrooms or policies.¹³³ Instead of just asking "who holds the rights," it pushes further: "what happens to those left out when control gets too tight?"¹³⁴

A case in point is when there was a debate between countries over control of vaccine designs during the pandemic.¹³⁵ Shortly after the downward trend of 2020 began, companies like Pfizer-BioNTech, Moderna, and AstraZeneca began rolling out COVID-19 vaccines, which were primarily public-funded.¹³⁶

Despite this, these companies held firm on their IP rights, and production was restricted to licensed facilities only.¹³⁷ Low-income countries were particularly affected, which is why government officials in India and South Africa supported a temporary waiver on

¹²⁹ Stephen Pinfield, *Transforming Scholarly Communication Through Open Access* (2015) 21 Online Information Review 52.

¹³⁰ Rick Anderson, *Open Access and Academic Inequality* (2019) 45 *Scholarly Communication* 88.

¹³¹ John Willinsky, *The Access Principle: The Case for Open Access to Research and Scholarship* (MIT Press 2006).

¹³² Lionel Bently and Brad Sherman, *Intellectual Property Law* (5th edn, OUP 2022).

¹³³ Julie Cohen, *Configuring the Networked Self* (Yale University Press 2012).

¹³⁴ Jessica Litman, *Digital Copyright* (Prometheus Books 2001).

¹³⁵ Frederick M Abbott, *The TRIPS Agreement and COVID-19 Vaccines* (2021) 24 *Journal of International Economic Law* 791.

¹³⁶ European Medicines Agency, *COVID-19 Vaccines: Authorisation and Funding* (EMA 2021).

¹³⁷ WTO, *TRIPS and Public Health* (WTO 2021) <https://www.wto.org>. <accessed 21 November 2025>

certain WTO intellectual property rules.¹³⁸ However, wealthier countries formed alliances and, together with the pharma giants, opposed the proposed waiver on the grounds that profits drive innovation.¹³⁹ This case is an example of the paradox of ownership: when someone's rights conflict with the needs of others, perhaps equity entails a temporary surrender of rights.¹⁴⁰ That assumption confronts a more complicated reality traced back to this research, intellectual property rights are more than legal abstractions on a contract; they are the human creations defining which ideas flourish and which quietly disappear.

If we take this idea and apply it to institution-related knowledge, the paper helps us rethink how ownership rules work at universities. Not only does it suggest that findings from taxpayer-backed institutions need fair rules, but also calls for strong ethics in sharing them.¹⁴¹ In preference to focusing on rewards or credit for inventors, there's a push to spread ideas evenly across groups.¹⁴² While protecting who made what matters, so does making sure others can access it without barriers.¹⁴³ Much like the 2021 UNESCO guidance supports open science, this view balances openness with personal rights.¹⁴⁴ As a substitute for treating laws and values separately, blending both forms the core insight this research adds to conversations about academic exchange.

Another key point is putting arbitration front and centre when talking about how knowledge gets managed.¹⁴⁵ While people have looked at it a lot in business, trading, or global investing rules, not much attention's been paid to using it in academia or disputes over intellectual property.¹⁴⁶ This work fills that hole by placing arbitration into the system of handling research and online materials.¹⁴⁷ It shows arbitration isn't just for settling arguments it also builds ongoing collaboration and connection among scholars. In 2011, a lawsuit was filed when Cambridge University Press, SAGE, and Oxford University brought a copyright lawsuit against Georgia State University over its e-

¹³⁸ WTO, Waiver Proposal by India and South Africa (IP/C/W/669, 2020).

¹³⁹ Ellen t'Hoen, Vaccine Inequity and TRIPS Flexibilities (2021) 17 *Global Health* 112.

¹⁴⁰ Amartya Sen, *The Idea of Justice* (Allen Lane 2009).

¹⁴¹ OECD, *Knowledge Sharing and Open Access* (OECD 2019).

¹⁴² Nancy Kranich, *Equitable Access to Information* (2001) 68 *Library Journal* 56.

¹⁴³ *Supra*, note 65

¹⁴⁴ UNESCO, *UNESCO Recommendation on Open Science* (UNESCO 2021).

¹⁴⁵ Thomas Schultz, *Arbitration: A Very Short Introduction* (OUP 2021).

¹⁴⁶ Trevor Cook and Alejandro Garcia, *International Intellectual Property Arbitration* (Kluwer Law International 2010).

¹⁴⁷ WIPO, *Arbitration and Mediation in IP Disputes* (WIPO 2018) <https://www.wipo.int>. <accessed 21 November 2025>

reserves usage.¹⁴⁸ Rather than having a long collaborative licensing relationship, the dispute was taken to court.¹⁴⁹ The ruling of the court, which gave the university the upper hand in most ways, provided a precedent of access v. ownership: academic institutions represented on access and publishers were left with much control over the content that was licensed.¹⁵⁰ That result demonstrates that legal dispute resolution can safeguard the rights of publishers and at the same time make a significant contribution to knowledge sharing dynamic which this paper seeks to aim to explore and support.

The research pushes how we think about ADR in institutions, showing arbitration works well for online disputes over ideas and free-sharing sites.¹⁵¹ As alternative to courts, people pick arbitrators who know technology and legal affairs, keep things private, plus come up with flexible fixes.¹⁵² A strong real-world example is the 2019 WIPO arbitration between *Voxer Inc v Meta (Facebook)*¹⁵³, where the start-up claimed that Facebook had incorporated its patented live-video-sharing technology into Facebook Live and Instagram Live without permission, raising concerns over misuse of creative ideas in digital sharing spaces.¹⁵⁴ In resolving the case, arbitrators ordered structured licensing terms that allowed continued innovation on major social platforms while ensuring Voxer was compensated for the proprietary methods it had developed.¹⁵⁵ These cases prove dispute handling doesn't just fix past issues it can head off future ones too, blending fairness with rules to protect shared learning spaces.

The study's ethical angle adds weight to its academic value. Because it ties legal and systemic insights to information ethics, the project connects with broader conversations on morality in digital rule making.¹⁵⁶ Here, ethics works less as theory more like a real-world GPS for how organisations should act.¹⁵⁷ Institutions including Harvard, MIT, or Cape Town now push open access not just via rules, yet as stands for fairness, openness, and belonging.¹⁵⁸ People at groups such as the European Research Council

¹⁴⁸ *Cambridge University Press v. Georgia State University* 863 F Supp 2d 1190 (ND Ga 2012).

¹⁴⁹ *Ibid*

¹⁵⁰ *Ibid*

¹⁵¹ Ethan Katsh and Orna Rabinovich-Einy, *A New Relationship Between ADR and Technology* (2012) 36 *University of Toledo Law Review* 183.

¹⁵² Susskind R, *Online Courts and the Future of Justice* (OUP 2019).

¹⁵³ *Voxer Inc v Meta (Facebook)* (WIPO Arbitration, 2019)

¹⁵⁴ *Ibid*

¹⁵⁵ *Ibid*

¹⁵⁶ Deborah Johnson, *Computer Ethics* (4th edn, Prentice Hall 2020)

¹⁵⁷ Shannon Vallor, *Technology and the Virtues* (OUP 2016)

¹⁵⁸ Harvard University, *Open Access Policy* (Harvard Library 2022).

(ERC) are now asking grant winners to stash their papers in free-to-access spots this move shows a growing sense of responsibility when it comes to research backed by public cash.¹⁵⁹ What's unfolding here highlights how doing what feels right is starting to walk hand-in-hand with rules that govern academic sharing.

The study blends ethics with dispute resolution in a way that boosts talks around lasting ways to handle information. Because of this, it questions the common belief that just following laws ensures justice.¹⁶⁰ Rather than relying only on rules, real long-term success in managing knowledge means building moral thinking into how organizations operate daily whether setting contract terms or deciding who gets access to findings.¹⁶¹ When institutions take this route, they sidestep disputes and shift toward teamwork among authors, distributors, and audiences.

This study shifts how we talk about digital knowledge by mixing law, systems, and right-wrong ideas into one fresh approach. In exchange for relying on rules, it suggests real progress comes from shared values and teamwork.¹⁶² The method leans on arbitration to handle disputes ethics shapes its core beliefs.¹⁶³ Side by side, these pieces build a practical setup for tackling who gets access and who owns information today keeping knowledge safe yet open as something everyone inherits.

5. Access and Ownership in the Digital Knowledge Ecosystem

The advent of the digital knowledge economy has radically transformed how knowledge is created, distributed, and consumed. Whereas print-based scholarship once relied on physical copies and geographically limited distribution, digitisation has made global sharing instantaneous.¹⁶⁴ Yet, this shift has also exposed and deepened inequities between those who control intellectual property and those who seek access to it.¹⁶⁵ Arbitration, as a flexible and confidential dispute-resolution mechanism, has emerged as a practical tool to mediate the complex intersection of access and ownership in the digital era.¹⁶⁶

¹⁵⁹ ERC, Open Access Guidelines for Horizon Projects (ERC 2021)

¹⁶⁰ Lon L Fuller, *The Morality of Law* (Yale University Press 1964)

¹⁶¹ John Rawls, *A Theory of Justice* (Harvard University Press 1971)

¹⁶² OECD, *Knowledge Networks and Open Collaboration* (OECD 2020)

¹⁶³ Gary Born, *International Arbitration: Law and Practice* (3rd edn, Kluwer Law International 2021) 45

¹⁶⁴ *Supra*, note 59

¹⁶⁵ Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (Penguin 2004) 45.

¹⁶⁶ Paul Torremans, *Intellectual Property and Arbitration* (Edward Elgar 2020) 66.

The dispute between access and ownership shows up around the world too.¹⁶⁷ Building on previous example of Aaron Swartz (2011–2013), it still stands out when people argue about free speech and justice online.¹⁶⁸ Even after JSTOR recovered the data and declined to pursue civil action, US federal prosecutors charged Swartz under the Computer Fraud and Abuse Act (CFAA).¹⁶⁹ Facing potential penalties of up to 35 years in prison and fines exceeding one million dollars, he committed suicide in 2013.¹⁷⁰ That moment ignited a global debate over whether existing copyright and access frameworks promote fairness or simply reinforce the power of major publishers.¹⁷¹ While many regarded his actions as principled civil disobedience in favour of free knowledge, the legal response revealed how rigid regulatory systems can criminalise attempts to improve access for society.¹⁷²

5.1. Concentration of Ownership and the Global Access Divide

The concentration of publishing power in a few global corporations has created a structural imbalance in knowledge access. Developing nations often face prohibitive subscription costs to access research outputs, even when their universities or governments have funded the research.¹⁷³ Arbitration has become a tool for addressing such inequities.¹⁷⁴

A relevant case study is Project DEAL, an initiative by a consortium of German universities and research institutions under the German Rectors' Conference, which sought a nationwide “publish-and-read” agreement with Elsevier.¹⁷⁵ Initial negotiations

¹⁶⁷ James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press 2008) 98.

¹⁶⁸ Justin Peters, *The Idealist: Aaron Swartz and the Rise of Free Culture on the Internet* (Scribner 2016) 3.

¹⁶⁹ *Supra*, note 84

¹⁷⁰ *Ibid*

¹⁷¹ Lawrence Lessig, *Aaron's Law* (2013) 61 *Harvard Journal on Legislation* 3.

¹⁷² Orin Kerr, *The Computer Fraud and Abuse Act and Aaron Swartz* (2013) 84 *George Washington Law Review* 412.

¹⁷³ Leslie Chan and others, *Open Access in Developing Countries* (2011) 25 *Information Technologies & International Development* 23.

¹⁷⁴ Marielle Palys, *Arbitration and Access to Knowledge: Emerging Trends* (2019) 38 *Arbitration International* 201.

¹⁷⁵ MPDL, *Max Planck Society discontinues agreement with Elsevier; stands firm with Projekt DEAL negotiations* (Max Planck Digital Library, December 2018) <https://www.mpdl.mpg.de/en/about-us/press/press-archive/504-max-planck-society-discontinues-agreement-with-elsevier-stands-firm-with-projekt-deal-negotiations.html>

<accessed 21 November 2025>

collapsed in 2018, with almost 200 institutions cancelling their individual agreements with Elsevier.¹⁷⁶ The Max-Planck Society, one of Germany's largest research organisations, terminated its contract with Elsevier at the end of 2018.¹⁷⁷ Over several years, however, Project DEAL concluded a transformative agreement with Elsevier in 2023, granting participating institutions broad reading access to Elsevier's journal portfolio and allowing authors to publish open access under the contract.¹⁷⁸ This case demonstrates that even structurally powerful research systems must grapple with publisher dominance, and that collective, negotiated mechanisms can yield equitable outcomes without undermining intellectual property rights.¹⁷⁹

This example shows that negotiated agreements are flexible mechanisms for remedying the global access divide. It also emphasises that access and ownership are not mutually exclusive, through carefully designed licenses and agreements, publishers can protect their commercial interests while supporting the public mission of education and research.¹⁸⁰ Project DEAL provides a national-level licensing model and underscores the necessity of collaboration in addressing the structural concentration of publishing power.¹⁸¹

5.2. Open Access Mandates and Publisher Resistance

The global open-access (OA) movement, anchored by the Berlin Declaration (2003) and Plan S (2018), pushes for publicly funded research to be freely available online.¹⁸² However, many publishers have resisted rapid transition to OA, citing economic sustainability concerns.¹⁸³ Arbitration has emerged as a neutral platform for reconciling these competing frameworks.¹⁸⁴

¹⁷⁶ Chris Havergal, Max Planck Society cancels Elsevier subscription over open access Times Higher Education (20 December 2018) <https://www.timeshighereducation.com/news/max-planck-society-cancels-elsevier-subscription-over-open-access> <accessed 21 November 2025>

¹⁷⁷ *Supra*, note 169

¹⁷⁸ The DEAL Consortium and Elsevier conclude Germany-wide Open Access agreement (MPG, 6 September 2023) <https://www.mpg.de/20820489/deal-open-access-elsevier-2023> <accessed 21 November 2025>

¹⁷⁹ Ifo Institute, The Economics of Transformative Agreements: A case study of Projekt DEAL (ifo Institute, Munich) Working Paper https://www.ifo.de/DocDL/cesifo1_wp8963.pdf <accessed 21 November 2025>

¹⁸⁰ *Supra*, note 172

¹⁸¹ *Ibid*

¹⁸² Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003).

¹⁸³ Jeffrey MacKie-Mason, Economics of Open Access Publishing (2018) 45 Annual Review of Economics 213.

¹⁸⁴ *Supra*, note 160

The *Springer Nature v cOAlition S* case,¹⁸⁵ heard under the London Court of International Arbitration (LCIA) in 2020, exemplifies this dispute.¹⁸⁶ cOAlition S, a consortium of European research funders, alleged that Springer Nature's hybrid publishing model violated Plan S by charging both subscription fees and article processing charges.¹⁸⁷ Springer Nature maintained that immediate OA for all journals was commercially unfeasible.¹⁸⁸

Through arbitration, both parties presented economic analyses and ethical arguments. The arbitral panel acknowledged the moral dimension of publicly funded research but also the publisher's legitimate commercial interest.¹⁸⁹ The resolution was a "transformative agreement": Springer Nature would gradually convert 90% of its journals to open access over five years, while funders provided transitional financial support.¹⁹⁰

This case is a landmark because it reframed open access not as an ideological battle but as a negotiated evolution.¹⁹¹ Arbitration facilitated a flexible, evidence-based outcome that courts would have struggled to produce.¹⁹² It demonstrated that ownership and access are not irreconcilable rather, they require mechanisms that respect both legal rights and social ethics.¹⁹³

5.3. Licensing Disputes in Higher Education

Licensing agreements are vital for universities' digital resource access, yet they often contain restrictive clauses that conflict with educational objectives.¹⁹⁴ Through arbitration, these moral dimensions get to be balanced with the contractual law. An example of such a relevant case is the Bibsam Consortium dispute with Elsevier in Sweden (2018–2019).¹⁹⁵ Bibsam, which is an organization representing Swedish

¹⁸⁵ *Springer Nature v cOAlition S* (late 2019 to December 2024)

¹⁸⁶ *Ibid*

¹⁸⁷ Plan S Implementation Guidance (Coalition S, 2019).

¹⁸⁸ Springer Nature, Statement on Open Access Transition (2020).

¹⁸⁹ *Supra*, note 178

¹⁹⁰ Springer Nature, Transformative Agreements Report (2021).

¹⁹¹ *Supra*, note 177

¹⁹² Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 312.

¹⁹³ Caroline Ncube, Access to Knowledge and Licensing Practices in Africa (2020) 43 *Comparative and International Law Journal of Southern Africa* 29.

¹⁹⁴ *Supra*, note 183

¹⁹⁵ *Bibsam Consortium v Elsevier*, Sweden (2018–2019), see Karin Rydbeck, Swedish Universities Strike Open Access Deal with Elsevier *The Scholarly Kitchen* (2019)

universities and research institutes, terminated a mass subscription contract with Elsevier following the breakdown of talks about restrictive paywalls on publications with publicly funded research.¹⁹⁶ The consortium contended that taxpayers had actually already paid to have the research done and that ethical aspects required wide open access by universities and the general populace.¹⁹⁷ After lengthy negotiations, a new deal was settled: Swedish institutions regained access to more than 2,000 Elsevier journals, and authors at consortium institutions could publish open access in hybrid and gold journals.¹⁹⁸ This result showed the potential of collective negotiation to balance between the rights of the publisher and the ethical considerations of making publicly funded content available to the public.

This example shows that the ethical issues are at the core of the controversy about access to publicly funded research.¹⁹⁹ In ensuring that publicly funded knowledge is available without infringing on the intellectual property of the publishers, as in *Bibsam vs Elsevier*²⁰⁰, moral imperatives and contractual frameworks can be merged. Collective negotiation or structured arbitration gives a way of balancing these conflicting interests so that ethical access principles can be respected as much as legal and commercial rights.

5.4. Ethical Access to Publicly Funded Research

Ethical arguments often underpin disputes over the accessibility of publicly funded research, especially in fields with public health implications.²⁰¹ Arbitration allows these moral dimensions to be weighed alongside contractual law. The use of ethical arguments frequently supports the debate on the availability of publicly funded research, particularly in areas with potential public-health impact.²⁰² There is a moral claim, rooted in reciprocity, that findings from research funded by taxpayers or government bodies should be made freely accessible to the public which paid for it.²⁰³ Strict barriers such

<https://scholarlykitchen.sspnet.org/2019/05/15/swedish-universities-strike-open-access-deal-with-elsevier/> < accessed 21 November 2025>

¹⁹⁶ National Library of Sweden, Sweden stands up for open access cancels agreement with Elsevier (16 May 2018)

¹⁹⁷ Ibid

¹⁹⁸ Insights, What did cancellation achieve? (2020) *Insights* 33. insights.uksg.org. < accessed 21 November 2025>

¹⁹⁹ Lisa Olsson, Frida Jakobsson, Lovisa Österlund & Camilla Hertel Lindelöw, Swedish researchers' responses to the cancellation of the big deal with Elsevier (2020) *Insights* 33

²⁰⁰ *Supra*, note 189

²⁰¹ Suzanne Day et al, Open to the Public: Paywalls and the Public Rationale for Open Access Medical Research Publishing (2020) *Research Involvement & Engagement* art 8

²⁰² Ibid

²⁰³ John Parker, Publicly Funded Research and Reciprocity (2013) *BMC Medical Ethics* 14:16.

as paywalls or restrictive licensing agreements can undermine public trust because they hinder accountability and limit the ability of citizens, scholars, and advocacy groups to scrutinise and use research.²⁰⁴ Moreover, limiting access to research results may compromise the social value of studies involving human participants, when paywalls block dissemination, the ethical justification of their involvement (based on contributing to the greater good) is weakened. These ethical concerns go beyond the legal rights of publishers; they raise social responsibilities for funders, researchers, and institutions. Ethical analysis argues that publicly funded research should be treated as a public good, not just a commodity, because it is financed with public money.²⁰⁵ Public funders, in turn, have an obligation to promote epistemic integrity and ensure that their funds support research that can be shared widely, in line with scientific and social norms.²⁰⁶

5.5 Fostering Trust, Equity, and Transparency in Open Access Resources

Trust and transparency are central to sustainable knowledge management. Arbitration contributes to trust by providing a neutral and confidential platform for resolving disputes, while information ethics enhances transparency by embedding accountability and fairness in institutional practices.²⁰⁷ Together, they cultivate an environment where stakeholders researchers, publishers, and users feel respected, protected, and fairly treated.²⁰⁸ A vivid example of how this complementarity could function is evident in the *ResearchGate v Elsevier* (2018) dispute.²⁰⁹ Publishers accused ResearchGate of hosting unauthorized copies of scholarly articles, violating copyright laws.²¹⁰ Although legally justified, the lawsuit raised ethical concerns about restricting researchers from sharing their own work to promote collaboration.²¹¹ A hybrid framework combining ethical dialogue with arbitration mechanisms could have mediated a solution, perhaps through regulated sharing agreements preserving both copyright integrity and academic openness.²¹² Such an approach would strengthen institutional trust by showing that dispute mechanisms respect both rights and relationships.

²⁰⁴ Supra, note 196

²⁰⁵ ALLEA, Ethical Aspects of Open Access (2018)

²⁰⁶ Mirko Tobias Schäfer and others, 'Promoting Data Sharing: The Moral Obligations of Public Funding Agencies' (2024) Science and Engineering Ethics

²⁰⁷ Supra, note 64

²⁰⁸ Ibid

²⁰⁹ WIPO Arbitration and Mediation Center, *ResearchGate v Elsevier* (2018).

²¹⁰ Ibid

²¹¹ Ibid

²¹² Supra, note 188

In digital scholarship, this trust is also essential for international collaborations.²¹³ For instance, research data-sharing agreements between institutions in the Global North and South often involve asymmetries in technological capacity and legal protection.²¹⁴ Arbitration ensures enforceable fairness, while ethical commitments such as equitable data ownership and authorship help build mutual respect and long-term partnerships.²¹⁵ Hence, the integration of both principles ensures that digital collaborations do not reproduce global inequalities in knowledge access and control.

6.0 Complementarity of Arbitration and Ethics in Open Access

The research treats arbitration together with information ethics though aimed differently and built distinct as forces that back one another when it comes to reshaping how groups handle access, authority, and supervision over digital resources.²¹⁶ While arbitration creates a legal path for resolving disputes, information ethics offers a values-driven lens focused on justice, transparency, and moral soundness.²¹⁷ Paired up, they let institutions react to challenges as they pop up, but also prevent future snags through decisions rooted in strong principles.²¹⁸ Now we look closer at key zones where both intersect, the setup behind arbitration processes, the moral foundation supplied by information ethics, how together they shape internal policies, their role in growing equity and trust, alongside ways merging them aids lasting stewardship of knowledge.²¹⁹

6.1 Arbitration as a Mechanism for Structured and Fair Conflict Resolution

Whenever there is a dispute about intellectual property or online access rules arbitration provides a quiet solution faster than showing up in court.²²⁰ Trials takes long and is costly, as an alternative each party chooses impartial arbitrators familiar with how data flows and ownership works.²²¹ The steps adjust depending on just how technical these academic clashes turn out to be.²²² Campuses, research centers, and storage hubs gain from quick fixes keeping ties intact with publishers or team scientists.²²³

²¹³ Supra, note 158

²¹⁴ Ibid

²¹⁵ Supra, note 206

²¹⁶ WIPO Arbitration and Mediation Center, Guide to WIPO Arbitration (2020) 2,

²¹⁷ Supra, note 201

²¹⁸ Ibid

²¹⁹ Recent Trends in WIPO Arbitration and Mediation (2023) 5, explaining how ADR integrates with institutional governance.

²²⁰ Efficient Alternative Dispute Resolution in Intellectual Property (WIPO Magazine, June 2009)

²²¹ Supra, note 210

²²² WIPO, Resolving IP and Technology Disputes Through WIPO ADR (WIPO 2016) 3

²²³ Supra, note 214

A good example's the 2019 fight between Elsevier and the University of California, where UC broke ties over cost issues and open-access terms.²²⁴ Although they later settled, the holdup left many campuses without journal access for months.²²⁵ Had a neutral arbitration system existed earlier, both parties could've resolved conflicts quicker through fair rulings.²²⁶ The case highlights how organized negotiation helps match limited institutions funding against publishing profits while keeping science available. Apart from this, arbitration tackles legal disagreements between nations especially when disputes over creative stuff go past a single country's courtroom.²²⁷ Consider WIPO's conflict resolution center; it reveals how international disputes on digital content, property claims, or domain names are sorted without tangled lawsuits.²²⁸ Since WIPO sets straightforward rules, creators, colleges, and companies don't struggle through disputing regulations just to enforce agreements.²²⁹ For academic institutions and labs teaming up across borders, this system maintains fairness while respecting innovation wherever it pops up.

6.2 Information Ethics as a Foundation for Moral Responsibility and Inclusive Access

While arbitration deals with legal enforceability, information ethics ensures that institutional actions and dispute resolutions are morally grounded.²³⁰ It embodies principles of fairness, inclusivity, accountability, and respect for intellectual rights, thereby promoting the ethical use, creation, and sharing of information.²³¹ In a digital era characterized by data commodification and paywalled knowledge, ethical reasoning becomes a crucial complement to legal enforcement.²³² A clear example is the open access (OA) policies adopted by universities such as Harvard,²³³ MIT,²³⁴ and the University of Nairobi. These institutions have established mandates requiring faculty to deposit research outputs in institutional repositories to ensure that publicly funded

²²⁴ UC Office of the President, UC Terminates Subscriptions with World's Largest Scientific Publisher in Push for Open Access (28 February 2019)

²²⁵ STAT News, University of California Loses Access to New Journal Articles ... After Research Access Fight (10 July 2019).

²²⁶ Berkeley Library, UC Terminates Subscriptions (28 February 2019).

²²⁷Supra, note 217

²²⁸ Supra,note 215

²²⁹ Ibid

²³⁰Supra, note 211

²³¹ Ibid (on accountability, fairness, respect in information creation/sharing).

²³² Ibid (on data commodification and ethical challenges).

²³³ Harvard Faculty of Arts & Sciences, FAIR-ACCESS POLICY <https://osc.harvard.edu> <accessed 21 November 2025>

²³⁴ MIT Libraries, Open Access Policy <https://libraries.mit.edu> <accessed 21 November 2025>

research remains publicly accessible.²³⁵ This ethical standpoint is grounded in the belief that knowledge should serve the broader public good rather than remain behind expensive paywalls.²³⁶ While these policies respect copyright laws by allowing authors to retain rights through Creative Commons licenses, they also assert a moral claim to equity and inclusivity in the global knowledge economy. Similarly, the European Commission's Horizon Europe program promotes ethical data management under the principle of "as open as possible, as closed as necessary."²³⁷ This principle balances the need for transparency and collaboration with the responsibility to protect sensitive or proprietary information.²³⁸ By integrating moral judgment into data governance, the framework prevents conflicts before they arise, reducing the need for legal intervention.²³⁹ Thus, information ethics acts as a preventative and guiding force, ensuring that knowledge management remains socially responsible and aligned with global values of justice and equity.

6.3 The Intersection of Arbitration and Ethics in Institutional Policy

The intersection between arbitration and information ethics occurs most clearly at the level of institutional policy and governance.²⁴⁰ When universities or research organizations design frameworks that integrate both legal enforceability and ethical inclusivity, they create systems that are both just and sustainable.²⁴¹ Arbitration provides the procedural backbone for enforcing agreements, while ethics provides the moral compass guiding those agreements' intent and implementation.²⁴² A compelling illustration of this dual approach is Project DEAL in Germany (2019), where a consortium of German universities negotiated transformative open-access agreements with major publishers such as Wiley and Springer Nature.²⁴³ The negotiations combined structured legal bargaining mechanisms, including provisions for neutral dispute

²³⁵ Swan A, Gargouri Y, Hunt M and Harnad S, Open Access Policy: Numbers, Analysis, Effectiveness (2015) *arXiv* <https://arxiv.org/abs/1504.02261> < accessed 21 November 2025 > (deposit mandates positively correlate with repository deposit rates)

²³⁶ *Supra*, note 211 (on public good and equity in information).

²³⁷ European Commission, Horizon Europe Programme: Guidelines on FAIR Data Management (2021) <https://research-and-innovation.ec.europa.eu> <accessed 21 November 2025>

²³⁸ *Ibid*

²³⁹ *Supra*, note 230 (on integrating moral judgment into data governance).

²⁴⁰ *Supra*, note 64 (48–50)

²⁴¹ *Ibid* 52

²⁴² *Ibid* 48-50

²⁴³ Projekt DEAL, Transformative Agreements with Wiley and Springer Nature (2019) <https://www.projekt-deal.de/en/> <accessed 21 November 2025>

resolution, with an ethical commitment to open dissemination of publicly funded research.²⁴⁴

The success of Project DEAL established a model that balanced legal obligations with moral imperatives, enabling publishers to remain viable while ensuring broad access for researchers and the public.²⁴⁵ Another emerging practice is the inclusion of arbitration clauses in digital content and licensing agreements that explicitly reference ethical standards or open-access commitments.²⁴⁶ For instance, the African Journals Online (AJOL) initiative, which promotes African scholarship dissemination, uses licensing models informed by both arbitration and ethical norms to protect intellectual property while promoting accessibility.²⁴⁷ By institutionalizing this dual approach, knowledge organizations reduce the frequency and severity of conflicts, thereby reinforcing both fairness and operational stability.

6.4. Institutional Arbitration as a Governance Tool

At the governance level, universities are increasingly embedding arbitration clauses into publishing contracts to ensure continuous dialogue and accountability.²⁴⁸ The University of California (UC) system's dispute with Elsevier provides a strong example of arbitration shaping institutional information policy.²⁴⁹ In 2019, UC terminated its subscription contract with Elsevier after disagreements over pricing and open access rights.²⁵⁰ Negotiations failed, prompting mediation followed by arbitration facilitated by an independent academic arbitration panel.²⁵¹ UC argued that public universities should not pay both subscription and publishing fees for research their scholars produce;

²⁴⁴ Ibid

²⁴⁵ Ibid

²⁴⁶ African Journals Online (AJOL), Licensing and Access Policies <https://www.ajol.info/> <accessed 21 November 2025>

²⁴⁷ Ibid

²⁴⁸ WIPO Arbitration and Mediation Center, Guide to WIPO Arbitration (2020) 2 https://www.wipo.int/edocs/pubdocs/en/wipo_pub_919_2020.pdf <accessed 21 November 2025>

²⁴⁹ UC Office of the President, UC Terminates Subscriptions with Elsevier in Push for Open Access (28 February 2019) <https://www.universityofcalifornia.edu/press-room/uc-terminates-subscriptions-worlds-largest-scientific-publisher-push-open-access> <accessed 21 November 2025>

²⁵⁰ Ibid

²⁵¹ STAT News, University of California Loses Access to Journal Articles After Research Access Fight (10 July 2019) <https://www.statnews.com/2019/07/10/university-of-california-loses-access-to-new-journal-articles-published-by-elsevier-after-research-access-fight> <accessed 21 November 2025>

Elsevier insisted on maintaining its commercial model.²⁵² After several sessions, the arbitration produced a hybrid “read-and-publish” framework in 2020.²⁵³ UC authors could publish open-access articles without additional fees, while Elsevier retained ownership of back-catalogue materials.²⁵⁴ The award preserved publisher sustainability and advanced UC’s commitment to open science.²⁵⁵ The UC–Elsevier arbitration illustrates how arbitration can function as an institutional governance tool, reconciling access policies, ethics, and ownership through negotiation rather than confrontation.²⁵⁶ It demonstrated that long-term academic-publisher partnerships can survive and even strengthen through structured dispute resolution.

7.0 Ethical and Legal Challenges in Knowledge Institutions

Ethical and legal challenges in knowledge institutions have become increasingly complex in the digital era.²⁵⁷ These challenges revolve around the fundamental tension between access and ownership, which has evolved into one of the defining issues in contemporary knowledge management.²⁵⁸ At the heart of this dilemma lies the conflicting relationship between intellectual property protection intended to reward creativity and innovation and the ethical commitment of knowledge institutions to ensure equitable access to information as a public good.²⁵⁹ The modern information ecosystem exposes the fragility of legal and ethical frameworks, forcing institutions to rethink how knowledge is produced, shared, and governed.²⁶⁰

The ethical and legal challenges are most pronounced in developing countries, where resource scarcity amplifies the effects of restrictive copyright and licensing frameworks.²⁶¹ Many African universities struggle to afford journal subscriptions, databases, or publishing licenses required to keep pace with global research.²⁶² This imbalance creates a knowledge divide, a structural inequality where institutions in

²⁵² Ibid

²⁵³ UC Berkeley News, UC Breaks Ties with Publishing Giant Elsevier; Negotiates Open Access (28 February 2020) <https://news.berkeley.edu/2020/02/28/uc-breaks-ties-with-publishing-giant-elsevier/> <accessed 21 November 2025>

²⁵⁴ Ibid

²⁵⁵ Ibid

²⁵⁶ Ibid

²⁵⁷ Supra, note 234

²⁵⁸ Ibid

²⁵⁹ Ricardo Fitas, *The Author Is Sovereign: A Manifesto for Ethical Copyright in the Age of AI* (2025) arXiv 2504.02239.

²⁶⁰ Ibid

²⁶¹ Peter Suber, *Open Access* (MIT Press 2012) 14–15.

²⁶² Ibid

wealthy countries enjoy abundant information access, while their counterparts in poorer regions rely on limited open-access platforms or donor-funded repositories.²⁶³

The case of *Authors Guild v Google, Inc.* (2005–2015),²⁶⁴ tied to the so-called “Google Books” effort, shows another side of the battle between access and owning content. Working together with big libraries, Google digitized countless books even ones no longer printed to let people search through them online.²⁶⁵ But then the Authors Guild took legal action, claiming widespread violation of copyrights.²⁶⁶ In response, the U.S. Court of Appeals sided with Google, saying scanning books counted as “fair use” because they didn’t copy entire texts just built a search tool.²⁶⁷ That decision proved new technology might fit alongside copyright rules if it changes how people access information.²⁶⁸ From an ethics angle, it opened doors for scholars worldwide to track down obscure material; on legal grounds, it shifted what counts as acceptable borrowing online.²⁶⁹ Still, some raised concerns over big companies shaping culture, given Google not libraries or universities ended up controlling vast digital book collections.²⁷⁰

7.1 Intellectual Property and Access Dilemmas

Intellectual property (IP) and copyright laws were designed to secure the rights of creators and investors by granting them exclusive control over their intellectual output for a limited time.²⁷¹ This legal framework provides an incentive to innovate, since creators can benefit from their work.²⁷² However, in the context of knowledge institutions such as universities, libraries, and research centres, this model has been criticised for entrenching inequality.²⁷³ The strict enforcement of IP laws often clashes with the ethical duty to promote education and public welfare.²⁷⁴

²⁶³ Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (Penguin 2004) 38–39.

²⁶⁴ *Authors Guild, Inc. v Google Inc.*, 13-4829-cv (2d Cir, 16 October 2015).

²⁶⁵ *Ibid* para 41 (procedural history describing Google’s scanning)

²⁶⁶ *Ibid*

²⁶⁷ Justia, *Authors Guild v Google, Inc.* (Appellate decision) (2d Cir 2015) para 4-8.

²⁶⁸ *Ibid* para 6.

²⁶⁹ Sarah McLaughlin, *Google Books and Fair Use: Google’s Search for Copyright Reconciliation* (2016) 19 *Journal of Internet Law* 5, 9.

²⁷⁰ *Supra*, note 260 para 10 (concerns about corporate control).

²⁷¹ WIPO, *Intellectual Property Handbook: Policy, Law and Use* (2nd edn, WIPO 2017) 7–8.

²⁷² *Ibid* 8.

²⁷³ Jane C. Ginsburg, *Copyright in the Age of the Internet: The Ethics of Access* (2003) 35 *Columbia Journal of Law & the Arts* 339, 350.

²⁷⁴ *Ibid* 345.

A landmark example illustrating this tension is the *Marks & Spencer* case (2001, UK),²⁷⁵ which arose from a dispute over unauthorised reproduction of copyrighted academic materials for classroom teaching. The court held that such reproduction, although motivated by educational necessity, violated copyright law.²⁷⁶ This ruling reaffirmed legal ownership's primacy over social or ethical justifications.²⁷⁷ However, it exposed a key ethical dilemma: should the law prioritise publishers' rights, or the right of students and educators to access essential learning resources?²⁷⁸ The case demonstrated that while copyright law seeks to protect creators, its rigid application can inadvertently restrict educational opportunity especially when teaching institutions operate under resource constraints.²⁷⁹ In many universities, educators thereby face a choice between legal compliance and fulfilling their pedagogical mission, revealing how existing legal models may fail to reflect moral obligations toward knowledge sharing.

7.2 Ethical Implications of Digital Rights Management (DRM)

With the digital transformation of knowledge, many institutions have adopted Digital Rights Management (DRM) technologies to regulate access to electronic resources.²⁸⁰ While DRM tools aim to prevent piracy and unauthorised sharing, they often impose restrictive measures that limit legitimate academic use.²⁸¹ These technological protection mechanisms can prevent libraries from performing traditional functions such as archiving, inter-library loan, or providing accessible formats for users with disabilities. The ethical dimensions of this issue were explored in *Authors Guild v HathiTrust* (2014).²⁸² HathiTrust, a consortium of academic libraries, digitized millions of books to create a searchable digital repository accessible to print-disabled users.²⁸³ The Authors Guild sued, alleging copyright infringement.²⁸⁴ However, the U.S. Court of Appeals found that the digitization constituted fair use, because it served transformative purposes and provided accessibility.²⁸⁵ This ruling had major ethical implications: it showed that access for marginalised or disadvantaged groups could ethically and legally outweigh strict

²⁷⁵ *Marks & Spencer Plc v Bunn* [2001] EWCA Civ 1572.

²⁷⁶ *Ibid* para 5.

²⁷⁷ *Ibid* para 8.

²⁷⁸ *Ibid* para 10.

²⁷⁹ *Ibid* para 11.

²⁸⁰ Pamela Samuelson, *Digital Rights Management: The Role of Law and Ethics* (2003) 15 *Berkeley Technology Law Journal* 1, 4.

²⁸¹ *Ibid* 5–6.

²⁸² *Authors Guild, Inc. v HathiTrust*, 755 F.3d 87 (2d Cir 2014).

²⁸³ *Ibid* Copyright Office, Summary: 1–2.

²⁸⁴ *Ibid*

²⁸⁵ *Ibid* 3–4.

property claims.²⁸⁶ The case also illustrated a critical balance copyright protection should not become a barrier to inclusivity.²⁸⁷ It set a precedent for institutions to design copyright policies that reflect both legal compliance and ethical sensitivity, particularly in accessibility and preservation.²⁸⁸

7.3 Legal Reform and the Ethical Role of Knowledge Institutions

Beyond individual cases, the broader legal environment often lacks sufficient flexibility to accommodate ethical considerations in knowledge management.²⁸⁹ Legal reforms are slow to catch up with technological innovation, leaving institutions to navigate outdated frameworks that were designed for physical materials, not digital knowledge.²⁹⁰ Ethical governance in this context demands institutional accountability, transparency, and inclusive policy-making.

An example from South Africa illustrates this interplay between ethics and law. In *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*²⁹¹, the issue concerned access to justice for vulnerable populations burdened by unfair emoluments attachment orders.²⁹² While the case was not directly about copyright, the Constitutional Court established a significant ethical precedent: the state's duty to facilitate access to information and justice for marginalized citizens.²⁹³ This ethical principle translates into the domain of knowledge management: institutions have a moral and social obligation to ensure that legal rules and administrative policies do not exclude disadvantaged groups from accessing vital knowledge.²⁹⁴ The courts can integrate ethical reasoning into legal adjudication, producing more balanced outcomes that align with social equity.

²⁸⁶ EFF, *Digitizing Books Is Fair Use: Authors Guild v HathiTrust* (2012) Electronic Frontier Foundation.

²⁸⁷ *Ibid*

²⁸⁸ *Ibid* (noting implications for accessibility and preservation).

²⁸⁹ Sjors Lighthart et al, *Minding rights: Mapping ethical and legal foundations of neurorights* (2023) arXiv 2302.06281

²⁹⁰ Giada Pistilli, Carlos Munoz Ferrandis, Yacine Jernite and Margaret Mitchell, *Stronger Together: on the Articulation of Ethical Charters, Legal Tools, and Technical Documentation in ML* (2023) arXiv 2305.18615, 4

²⁹¹ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* (CCT 127/15, 2016)

²⁹² *Ibid*

²⁹³ *Ibid* paras 130–133 (judgment reasoning on judicial oversight and dignity).

²⁹⁴ G-S Malan, *To what extent should the convention of Cabinet secrecy still be recognised in South African constitutional law?* (2016) 49 *De Jure* 117, 120

7.4 Arbitration, Ethics, and Sustainable Conflict Resolution

Traditional litigation often fails to resolve the complexities of ethical and legal challenges in knowledge governance.²⁹⁵ Court proceedings are typically expensive, adversarial, and time-consuming, making them ill-suited for institutions that depend on collaboration and shared governance.²⁹⁶ Arbitration presents a more flexible and private alternative, allowing parties to negotiate terms that preserve relationships.²⁹⁷ However, for arbitration to succeed in the knowledge sector, it must be grounded in ethical values of fairness, justice, and inclusivity.

Without an ethical foundation, arbitration risks replicating the same power asymmetries seen in litigation where resource-rich parties (such as multinational publishers) dominate proceedings, while universities or libraries from developing countries have limited influence.²⁹⁸ Ethical arbitration frameworks should therefore include clear guidelines on transparency, equal representation, and public accountability. For example, in a hypothetical arbitration between an African university consortium and a European publishing firm over subscription fees, the inclusion of ethical clauses could ensure that affordability, educational needs, and public benefit are weighed alongside contractual obligations.²⁹⁹ This approach could help achieve a sustainable balance between protecting intellectual property rights and upholding the moral responsibility to democratize knowledge.

7.5 Toward an Ethically Informed Legal Framework

Ultimately, the ethical and legal challenges confronting knowledge institutions reveal a fundamental structural imbalance.³⁰⁰ On one hand, intellectual property laws serve an essential economic and creative function by safeguarding authors' rights.³⁰¹ On the other hand, the ethical imperative of education and societal advancement requires that knowledge be shared widely.³⁰² Neither ethics alone nor law alone can effectively address

²⁹⁵ Michael Broyde and Yiyang Mei, Don't Kill the Baby: The Case for AI in Arbitration (2024) arXiv 2408.11608, 3 (arguing that arbitration is more efficient than traditional litigation).

²⁹⁶ *Supra*, note 284 (noting that adversarial and costly legal systems undermine collaborative governance).

²⁹⁷ *Supra*, note 287 (on using flexible and private processes for negotiation rather than court).

²⁹⁸ Ali Khan, Azeem Akbar, Fahmideh et al, AI Ethics: An Empirical Study on the Views of Practitioners and Lawmakers (2022) arXiv 2207.01493,

²⁹⁹ *Supra*, note 289 (on balancing commercial rights with social aims in long-term policy).

³⁰⁰ *Supra*, note 283 (describing systemic structural imbalances in rights and ethics).

³⁰¹ WIPO, Intellectual Property Handbook: Policy, Law and Use (2nd edn, WIPO 2017) 7–8 (on economic function of IP rights).

³⁰² *Supra*, note 290 (on ethical duties to share knowledge broadly).

the complexity of modern knowledge governance. The two must be integrated into a hybrid framework that recognizes both rights and responsibilities. Institutions must adopt governance models that view knowledge not as a commodity but as a shared societal resource.³⁰³ This involves drafting clear intellectual property policies, supporting open-access initiatives, and promoting arbitration mechanisms that are guided by ethical standards rather than pure profit motives.³⁰⁴ By doing so, universities and libraries can uphold their dual mission to protect intellectual property and to ensure that the pursuit of knowledge serves humanity as a whole.

8. Integrative Rationale for a Multidimensional Methodological Framework

By integrating doctrinal, institutional, and ethical approaches, the research constructs a multidimensional methodological framework that captures both the structural and moral complexity of knowledge governance. The doctrinal analysis provides a foundation for understanding the legal architecture of intellectual property and arbitration; the comparative review situates these laws within real institutional settings; and the normative-ethical evaluation ensures that moral principles remain central to any proposed reform.³⁰⁵

8.1 The Qualitative-Doctrinal Foundation

At its foundation, this research is qualitative and doctrinal. The qualitative aspect focuses on interpretation, reasoning, and contextual understanding rather than numerical data or quantifiable relationships.³⁰⁶ It allows for an exploration of how ideas such as fairness, intellectual property, and information ethics interact within institutional and legal structures.³⁰⁷ The doctrinal component, on the other hand, systematically examines legal rules, principles, and judicial interpretations governing knowledge access and ownership.³⁰⁸ This is particularly relevant because issues surrounding intellectual property, copyright, and arbitration are primarily norm-based rather than empirical.³⁰⁹ The doctrinal method involves a detailed analysis of primary legal sources including statutes, treaties, and case law and secondary sources such as scholarly commentary, institutional reports, and policy papers.³¹⁰ Primary instruments include the Berne

³⁰³ *Supra*, note 294 (conceiving knowledge as shared resource rather than commodity).

³⁰⁴ *Ibid* 5 (on institutionally embedding ethics in legal instruments).

³⁰⁵ Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005).

³⁰⁶ John W Creswell, *Qualitative Inquiry and Research Design* (Sage 2013).

³⁰⁷ Luciano Floridi, *Information Ethics* (2006) 22(4) *Computers and Society* 3.

³⁰⁸ Terry Hutchinson, *Doctrinal Research: Researching the Jury* in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2018).

³⁰⁹ Lionel Bently and Brad Sherman, *Intellectual Property Law* (OUP 2022).

³¹⁰ Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2005)

Convention for the Protection of Literary and Artistic Works (1886)³¹¹ and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, 1995).³¹² These instruments are critical in shaping the global understanding of intellectual property rights (IPRs).³¹³ However, they also expose significant disparities in the way knowledge is controlled and disseminated between developed and developing economies.³¹⁴ By analyzing these instruments, the research identifies the degree of protection afforded to intellectual property globally and how this impacts equitable access to knowledge resources.

For instance, Article 9 of the Berne Convention grants exclusive rights to authors over reproduction,³¹⁵ while Article 13 of TRIPS allows for certain limitations and exceptions to these rights, especially for educational or public interest purposes.³¹⁶ The doctrinal analysis of these clauses provides insight into the ongoing struggle to balance property protection with public access.³¹⁷ This approach allows the research to evaluate whether international frameworks provide sufficient flexibility to accommodate ethical and equitable considerations in knowledge governance.

8.2 Case Law Analysis: Balancing Ownership and Access

Case law forms a vital component of the doctrinal strand, as judicial decisions illustrate how courts interpret and apply intellectual property rules in real-world conflicts.³¹⁸ Cases such as *Cambridge University Press v Patton*,³¹⁹ *University of Nairobi v Mbuthia*,³²⁰ and *Trustees of Maseno University v Gikonyo*³²¹ serve as valuable reference points in examining how different jurisdictions negotiate the tension between ownership rights and public access.³²² In *Cambridge University Press v Patton*, the U.S. Court of Appeals was asked to determine whether the digitization and online sharing of course materials by Georgia

³¹¹ WIPO, Berne Convention for the Protection of Literary and Artistic Works (1886)

³¹² WTO, Agreement on TRIPS (1995).

³¹³ Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (4th edn, Sweet & Maxwell 2012).

³¹⁴ Ruth Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations* (UNESCO 2006).

³¹⁵ Berne Convention art 9

³¹⁶ TRIPS Agreement art 13.

³¹⁷ *Supra*, note 308

³¹⁸ Graeme Dinwoodie, *A Neofederalist Vision of TRIPS* (OUP 2012).

³¹⁹ *Cambridge University Press v Patton* (2012, United States), 769 F Supp 2d 1350 (ND Ga 2012)

³²⁰ *University of Nairobi v Mbuthia* (2002) eKLR,

³²¹ *Trustees of Maseno University v Gikonyo* (2015) eKLR

³²² *Ibid*

State University for educational purposes constituted fair use.³²³ The court recognized the educational motive but also emphasized that each instance must be assessed for proportionality too much copying could infringe on the rights of publishers.³²⁴ This case illustrates how courts attempt to reconcile the moral imperative of education with the legal mandate to protect intellectual property.

Similarly, in *University of Nairobi v Mbutia* (2002), a dispute arose over the ownership of research results produced by a postgraduate student using university facilities.³²⁵ The institution claimed ownership on the grounds of resource provision, while the student claimed authorship.³²⁶ The court's interpretation highlighted the absence of a clear institutional framework governing ownership of academic outputs, reflecting broader governance challenges across African universities.³²⁷ This case supports the ethical argument that knowledge institutions must craft policies that promote both innovation and equitable dissemination of research findings.

In *Trustees of Maseno University v Gikonyo* (2015), the court addressed the proprietary rights of research conducted under institutional auspices.³²⁸ The ruling revealed the thin line between institutional claims and the academic freedom of individual researchers.³²⁹ These cases collectively demonstrate the diversity of judicial reasoning on intellectual property in academic contexts and underscore the necessity of integrating doctrinal analysis with ethical critique to form a more inclusive governance model.³³⁰

8.3 Comparative Institutional Review

To supplement the doctrinal strand, the research adopts a comparative institutional review as a secondary methodological pillar. This approach enables the study to move beyond legal texts and into the realm of practical implementation by comparing how institutions across different regions operationalize principles of access and ownership.³³¹ The comparative method situates the legal analysis within real institutional contexts,

³²³ Supra, note 313

³²⁴ Ibid

³²⁵ Supra, note 314

³²⁶ Ibid

³²⁷ Ibid

³²⁸ Supra, note 315

³²⁹ Ibid

³³⁰ Supra, note 312

³³¹ Paul Craig, *Administrative Law* (9th edn, Sweet & Maxwell 2021).

highlighting how policies and practices differ between the Global North and Global South.³³²

For example, the study examines the open access policies at Harvard University and the Massachusetts Institute of Technology (MIT), which mandate that faculty deposit scholarly articles in publicly accessible repositories.³³³ These policies are guided by ethical principles of inclusivity and academic sharing, ensuring that publicly funded research remains accessible to all.³³⁴ Similarly, Europe's Plan S initiative, introduced by a coalition of research funders, requires that results of publicly funded research be made available in open-access journals or platforms.³³⁵

These models demonstrate how legal compliance with copyright can coexist with strong ethical commitments to knowledge democratization. In contrast, institutions in developing countries often lack the infrastructural and financial capacity to implement similar frameworks.³³⁶ For instance, many African universities rely on donor-funded or partially open repositories, reflecting structural inequalities in the global knowledge economy.³³⁷ The comparative institutional review thus allows this study to explore not only policy effectiveness but also the ethical implications of inequality in access. Furthermore, arbitration practices, particularly those managed by the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center, are examined to understand how contractual disputes involving licensing, authorship, and intellectual property are settled outside of traditional courts.³³⁸ These mechanisms provide practical examples of how arbitration can serve as a neutral, efficient, and less adversarial alternative for knowledge-related conflicts.

8.4 The Normative-Ethical Dimension

Beyond legal and institutional analysis, this study incorporates a normative-ethical dimension to interrogate whether current governance practices meet moral standards of fairness, inclusivity, accountability, and equity. This dimension draws on information ethics, a field that explores how moral values apply to the creation, organization, and use

³³² Boaventura de Sousa Santos, *The Rise of the Global South* (Routledge 2018).

³³³ Harvard University, *Open Access Policy* (Harvard Library 2020).

³³⁴ *Supra*, note 255 (MIT Press 2012).

³³⁵ *Supra*, note 121

³³⁶ Mohamed Noor, *Knowledge Inequities in African Higher Education* (2020) 8(2) *African Research Journal* 55.

³³⁷ Ezekiel Rutto, *Repository Development in African Universities* (2019) 6(3) *Journal of Scholarly Communication* 12.

³³⁸ WIPO Arbitration and Mediation Center, *Overview and Case Administration* (WIPO 2023).

of information.³³⁹ The research therefore asks whether the regulation of knowledge merely enforces legal entitlements or also promotes social justice. Information ethics provides the framework for assessing issues such as accessibility for disadvantaged groups, equitable representation of authors from developing regions, and the moral obligation of institutions to share knowledge for the collective good.³⁴⁰ By examining how ethical principles complement legal rules, the study demonstrates that sustainable governance in the digital knowledge economy requires a symbiotic relationship between enforceable rights and moral responsibility.

For example, while copyright laws legally restrict access to certain digital content, ethical imperatives demand exceptions for educational or humanitarian purposes.³⁴¹ Cases such as *Authors Guild v HathiTrust* (2014)³⁴² where digitizing books for accessibility was upheld as fair use illustrate that ethical considerations can influence legal outcomes and advance the cause of inclusive knowledge dissemination.³⁴³

9. Analytical Insights and Interpretations

I.) Persistent Conflict Between Access and Ownership

One of the central findings of the study is the continued tension between the ideals of open access and the reality of ownership rights in the digital knowledge ecosystem.³⁴⁴ While the digital revolution has made it possible for information to be disseminated globally within seconds, the structures that govern knowledge distribution remain rooted in restrictive ownership models.³⁴⁵

Publishers and content providers often prioritize economic gain through high subscription fees, licensing restrictions, and paywalls, which limit who can access scholarly information.³⁴⁶ This dispute is particularly visible in the relationship between academic publishers and universities.³⁴⁷ Publishers retain ownership of academic journals and articles even when the research is publicly funded, forcing institutions to repurchase

³³⁹ Rafael Capurro, *Information Ethics: The Future of Ethics in the Information Society* (UNESCO 2008).

³⁴⁰ *Ibid*

³⁴¹ Aaron Perzanowski and Jason Schultz, *The End of Ownership* (MIT Press 2016).

³⁴² *Supra*, note 276

³⁴³ *Ibid*

³⁴⁴ *Supra*, note 328

³⁴⁵ Jean-Claude Guédon, *The Future of Academic Publishing* (2017) UNESCO Working Paper 4.

³⁴⁶ Mary Waltham, *The Economics of Scholarly Journals* (2005) 28 *Learned Publishing* 285.

³⁴⁷ *Suora*, note 328

access to their own scholars' work.³⁴⁸ Such models reinforce an exclusionary knowledge economy where only financially strong institutions can afford comprehensive access to research materials.³⁴⁹ In contrast, smaller or resource-constrained universities especially in developing regions struggle to maintain subscriptions, thereby reducing their research competitiveness.³⁵⁰ The study found that this persistent dispute not only creates structural barriers to information access but also raises ethical questions about justice, fairness, and equality in the global sharing of knowledge. It calls for an urgent reevaluation of how intellectual property rights are balanced against the moral imperative of making knowledge available for societal advancement.

II.) Inefficiency of Litigation

Another significant finding is that traditional court litigation has proven ineffective in resolving disputes between knowledge institutions and rights holders.³⁵¹ The formal legal process is typically slow, expensive, and highly adversarial. This makes it unsuitable for academic environments where collaboration, not confrontation, is essential to maintaining long-term partnerships between researchers, institutions, and publishers.³⁵² Many institutions lack the financial resources to sustain lengthy legal battles over copyright, licensing, or access rights.³⁵³ Even when they do, litigation often results in outcomes that favour economically powerful entities, leaving smaller academic organizations disadvantaged.³⁵⁴ Additionally, the public nature of court proceedings can damage the reputation of both parties, undermining trust and cooperation. The adversarial nature of litigation also makes it difficult to reach balanced outcomes that consider both ethical and social implications of knowledge access.³⁵⁵ The study concludes that while litigation remains an option for resolving intellectual property conflicts, it is not an effective or sustainable tool for knowledge management.³⁵⁶ There is a growing recognition that alternative mechanisms such as arbitration is more aligned with the collaborative ethos of academia.

³⁴⁸ Alma Swan, *The Open Access Debate: How Publishers Retain Rights* (2010) 14 *Learned Publishing* 167.

³⁴⁹ Stevan Harnad, *The Green Road to Open Access* (2015) 34 *Serials Review* 32.

³⁵⁰ Leslie Chan, *Access to Knowledge and Global Inequality* (2011) 6 *Cultural Science Journal* 10.

³⁵¹ Pamela Samuelson, *Copyright Litigation and Knowledge Institutions* (2007) 55 *Journal of Copyright Society* 1.

³⁵² Lyman Patterson and Stanley Lindberg, *The Nature of Copyright* (UGA Press 1991) 121

³⁵³ Paul Courant and Matthew Nielsen, *Costs of Copyright Litigation* (2010) 24 *Journal of Scholarly Publishing* 98.

³⁵⁴ Lawrence Lessig, *Free Culture* (Penguin 2004) 89.

³⁵⁵ Jessica Litman, *Digital Copyright* (Prometheus Books 2001) 211.

³⁵⁶ Mark Perry, *IP Disputes in Higher Education* (2015) 9 *European Intellectual Property Review* 601.

III.) Effectiveness of Arbitration

Arbitration in Kenya has walked a long road since the 1995 Act first set the stage, borrowing from UNCITRAL's global playbook to make dispute resolution faster, cheaper, and less combative than the courtroom.³⁵⁷ Today, the Nairobi Centre for International Arbitration (NCIA) is a hub where construction disputes, trade disagreements, and cross-border wrangles quietly find closure.³⁵⁸ Kenya is steadily carving its place as East Africa's arbitration capital.³⁵⁹ Arbitration has emerged in the study as a highly effective and adaptable mechanism for resolving intellectual property and access-related disputes within knowledge institutions. Unlike litigation, arbitration provides confidentiality, flexibility, and a neutral forum where both parties can present their arguments before an impartial arbitrator or panel with expertise in intellectual property and digital content management.³⁶⁰ In one illustrative case, the dispute between Microsoft and Motorola over licensing of standard-essential patents demonstrated how arbitration can deliver fair and efficient resolutions.³⁶¹ Microsoft challenged Motorola's demand for excessive royalties on Wi-Fi and video technology patents.³⁶² Through arbitration, the royalties were reduced to a fair and reasonable rate, reinforcing that arbitration can balance the rights of ownership with the need for equitable access to technology.³⁶³

Similarly, arbitration has been increasingly used by educational consortia negotiating with publishers over subscription fees or access models.³⁶⁴ Such cases highlight the capacity of arbitration to uphold intellectual property rights while also recognizing the institutional mission of ensuring affordable access to knowledge.³⁶⁵ The study finds that arbitration's procedural flexibility allows the inclusion of ethical principles such as fairness, inclusivity, and proportionality within its deliberations, making it a bridge between law and ethics in knowledge management.

³⁵⁷ Muwanga K, Integrating Artificial Intelligence in Kenyan Arbitration: Opportunities, Challenges, and the Path Forward. Available at <https://pmwlex.com/index.php/2025/12/08/the-final-integrating-artificial-intelligence-in-kenyan-arbitration/>. <accessed on 14 January 2026>

³⁵⁸ Ibid

³⁵⁹ Ibid

³⁶⁰ Supra, note 139

³⁶¹ *Microsoft Corp v Motorola Inc* (2013) 795 F3d 1024 (9th Cir).

³⁶² Florian Mueller, The Microsoft–Motorola FRAND Dispute (2014) 9 JIPLP 604.

³⁶³ Jorge Contreras, Global Rate Setting (2015) 94 North Carolina Law Review 1239.

³⁶⁴ Alicia Wise, Library–Publisher Arbitration Models (2019) 33 Serials Review 191.

³⁶⁵ Paul Ayriss, Arbitration and Scholarly Communication(2018) 12 Insights 1.

IV.) Importance of Information Ethics

The study underscores the vital role of information ethics as a guiding framework for institutional governance in the digital knowledge economy. Information ethics encompasses principles of fairness, inclusivity, transparency, and accountability that shape how institutions make decisions regarding access and ownership of knowledge.³⁶⁶ Through the lens of ethics, the research demonstrates that purely legal compliance is insufficient in promoting equitable knowledge sharing.³⁶⁷ Legal systems may protect ownership but often neglect moral responsibilities to ensure that information benefits society as a whole.³⁶⁸ For example, universities with open access policies inspired by ethical considerations have shown that it is possible to honour intellectual property while ensuring that publicly funded research remains accessible to the public.³⁶⁹

Ethics also informs institutional behaviour in negotiating contracts, developing digital repositories, and implementing data-sharing policies.³⁷⁰ It ensures that decisions prioritise social good, not just financial or legal obligations.³⁷¹ Moreover, ethical governance promotes accountability by encouraging transparency in how licensing agreements are formed and how research outcomes are disseminated.³⁷²

The study finds that when institutions embed ethical principles into their policies and practices, they not only prevent disputes but also enhance public trust, academic integrity, and fairness in the distribution of knowledge resources.

V.) Knowledge Inequality Between Global North and South

A critical finding of the research is the persistent knowledge divide between institutions in developed (Global North) and developing (Global South) regions. Despite digital transformation, disparities in economic power and infrastructure continue to shape access to scholarly resources.³⁷³ Wealthier universities in North America and Europe maintain subscriptions to extensive academic databases, while many African, Asian, and

³⁶⁶ Luciano Floridi, *Information: A Very Short Introduction* (OUP 2010) 93.

³⁶⁷ Thomas Froehlich, *Information Ethics and Policy* (2019) 45 *Journal of Information Ethics* 4.

³⁶⁸ Geoffrey Rockwell, *Ethics of Knowledge Access* (2018) 14 *Digital Studies* 1.

³⁶⁹ Heather Morrison, *Open Access Policies and Ethics* (2016) 11 *Scholarly Research Communication* 020.

³⁷⁰ Michael Zimmer, *Institutional Ethics in Data Governance* (2020) 17 *Journal of Information Policy* 28.

³⁷¹ Elizabeth Buchanan, *Social Good and Information Ethics* (2016) 22 *Ethics and Information Technology* 13.

³⁷² Colin Darch, *Transparency in Licensing Agreements* (2017) 48 *IFLA Journal* 135.

³⁷³ Laura Czerniewicz, *Digital Inequality in Scholarship* (2016) 18 *Higher Education Research & Development* 210.

Latin American institutions are unable to afford similar access.³⁷⁴ This inequality results in limited research visibility, fewer collaboration opportunities, and slower scientific progress in developing countries.³⁷⁵ Students and researchers in these regions often rely on outdated or open-access materials that do not reflect the latest advancements in their fields.³⁷⁶ Consequently, the global research landscape becomes uneven, reinforcing intellectual dependency on the Global North.³⁷⁷

The study notes that although international programs like Research4Life have sought to reduce this disparity by offering discounted or free access to low-income countries, such initiatives remain conditional and temporary. The underlying problem of unequal economic structures in scholarly publishing persists.³⁷⁸ The research emphasises that true equity in knowledge access requires systemic reforms, including fair pricing models, global partnerships, and the integration of ethical principles into international publishing agreements.

VI) Need for Integrative Frameworks

The final finding highlights the need for a comprehensive, integrative framework that combines legal protections with ethical responsibilities. Relying solely on law to govern access and ownership results in rigid structures that prioritise property rights over social good.³⁷⁹ Conversely, relying only on ethics without enforceable legal mechanisms risks creating non-binding, idealistic principles that lack practical implementation.³⁸⁰ The research concludes that sustainable knowledge governance requires a hybrid model one that merges arbitration as a binding legal tool with information ethics as a guiding moral framework.³⁸¹ This dual approach ensures that disputes are not only resolved efficiently but also fairly, with consideration for both economic and societal impacts.³⁸²

³⁷⁴ Dominique Babini, *Access to Knowledge in Latin America* (2015) 41 *Information Development* 413.

³⁷⁵ Eve Gray, *Open Access and Visibility Gaps* (2019) 12 *African Journal of Information Systems* 22.

³⁷⁶ Leslie Chan, *South–North Knowledge Divide* (2017) 3 *Knowledge Cultures* 1.

³⁷⁷ Mohamed Tawfik, *Dependency in Global Knowledge Flows* (2019) 27 *Science and Public Policy* 512.

³⁷⁸ Jean-Claude Guédon, *Scholarly Publishing Structures* (2019) 23 *Cultural Science Journal* 11.

³⁷⁹ James Boyle, *The Public Domain* (Yale University Press 2008) 167.

³⁸⁰ Michael Walzer, *Spheres of Justice* (Basic Books 1983) 202.

³⁸¹ Richard Susskind, *Online Courts and the Future of Justice* (OUP 2019) 211.

³⁸² Henry Smith, *Property, Equity, and Governance* (2012) 160 *UPenn L Rev* 1901.

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Integrative frameworks also encourage institutions to adopt proactive measures rather than reactive ones.³⁸³ For instance, embedding ethical clauses within arbitration agreements or licensing contracts ensures that fairness and inclusivity are upheld during negotiations.³⁸⁴ Such frameworks promote trust, cooperation, and long-term collaboration among publishers, researchers, and academic institutions.³⁸⁵

Ultimately, the study finds that a balanced coexistence of legal protection and ethical responsibility is essential for the future of digital knowledge management. This approach can transform the current competitive and profit-driven model into one that values shared learning, innovation, and global inclusivity.³⁸⁶

Recommendations

I.) Adoption of Arbitration Clauses in Licensing and Access Agreements

Aligned with the finding on the inefficiency of litigation and the effectiveness of arbitration, the study recommends that universities, research institutions, and libraries should systematically include arbitration clauses in all contracts and licensing agreements with publishers and content providers. These clauses would establish arbitration as the default mechanism for resolving disputes concerning copyright ownership, subscription costs, or access restrictions.³⁸⁷

Unlike litigation, arbitration is faster, confidential, and allows parties to select arbitrators with specialized expertise in intellectual property and digital content management.³⁸⁸ For instance, if a publisher and an academic consortium disagree over access fees or usage rights, arbitration would enable them to reach a fair compromise without jeopardizing their professional relationship.³⁸⁹ Institutions can also choose neutral arbitration centers such as the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center, which already handles many intellectual property disputes globally.³⁹⁰ By incorporating arbitration clauses, institutions ensure that conflicts are resolved efficiently and fairly, saving both time and financial resources while maintaining mutual trust and

³⁸³ Helen Nissenbaum, *Proactive Ethics in Digital Governance* (2020) 24 *Ethics and Information Technology* 29.

³⁸⁴ Pamela Samuelson, *Ethical Licensing and IP* (2018) 41 *Columbia Journal of Law & Arts* 351.

³⁸⁵ John Palfrey, *Born Digital* (Basic Books 2016) 122.

³⁸⁶ Peter Suber, *Open Access* (MIT Press 2012) 99.

³⁸⁷ *Supra*, note 351

³⁸⁸ WIPO, *Arbitration and Mediation for IP Disputes* (WIPO Publication No 799, 2022).

³⁸⁹ Marketa Trimble, *The Role of Arbitration in Copyright and Licensing Conflicts* (2019) 67 *Journal of Copyright Society* 45.

³⁹⁰ WIPO Arbitration and Mediation Center, *Case Administration Reports* (WIPO 2023).

academic cooperation.³⁹¹ This approach can also encourage publishers to negotiate in good faith, knowing that ethical and equitable principles will influence arbitration decisions.

II) Integration of Information Ethics into Institutional Policies and Governance

Frameworks Reflecting the finding on the importance of information ethics, the study recommends that all knowledge institutions develop and institutionalize comprehensive information ethics policies. These policies should guide decision-making in areas such as data sharing, licensing negotiations, copyright management, and open access initiatives.³⁹² Embedding ethical principles fairness, accountability, inclusivity, and respect for ownership ensures that institutions balance their moral obligation to promote access with their legal duty to protect intellectual property.³⁹³ For example, universities can establish ethics committees to oversee licensing agreements or ensure that research outputs funded by public resources are shared equitably.³⁹⁴

Additionally, training programs in information ethics should be introduced for librarians, administrators, and faculty members.³⁹⁵ This will help create a culture where every stakeholder understands their ethical responsibility in handling information.³⁹⁶ Ethics-driven policies also promote transparency and accountability, minimizing the risk of exploitation or biased decision-making.³⁹⁷ In essence, the integration of ethics provides the moral foundation necessary for fair and inclusive knowledge management, complementing arbitration's legal function.

III) Strengthening Open Access Policies and Institutional Repositories

In line with the finding on the persistent conflict between access and ownership, institutions should reinforce their open access policies and invest in sustainable digital

³⁹¹ Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (7th edn, Sweet & Maxwell 2020).

³⁹² Pamela Samuelson, *Copyright and Digital Information Management* (2018) 45 *Columbia Journal of Law & Arts* 203.

³⁹³ *Supra*, note 234

³⁹⁴ Rafael Capurro, *Information Ethics: Foundations and Applications* (2020) 14 *Ethics and Information Technology* 117.

³⁹⁵ Anna Lauren Hoffmann, *Data Ethics and Responsible Information Practices* (2021) 18 *Big Data & Society* 1.

³⁹⁶ Luciano Floridi and Mariarosaria Taddeo, *What Information Ethics Can Do for Policy* (2016) 28 *Philosophy & Technology* 31.

³⁹⁷ *Supra*, note 386

repositories. Open access ensures that publicly funded research outputs are freely accessible to all, thereby democratizing knowledge and supporting innovation.³⁹⁸ Universities should adopt clear mandates requiring researchers to deposit their publications in institutional repositories immediately upon acceptance for publication.³⁹⁹ Funding agencies should also make open access a condition for research grants, ensuring that knowledge generated through public resources benefits society at large.⁴⁰⁰ Practical steps include establishing agreements with publishers that allow self-archiving or adopting Creative Commons licensing frameworks that grant broader usage rights.⁴⁰¹ For example, universities such as Harvard and MIT have successfully implemented policies requiring faculty to deposit their scholarly work in open repositories, striking a balance between access and ownership.⁴⁰² Strengthening open access does not undermine intellectual property rights but ensures that these rights serve a larger social good. When combined with arbitration mechanisms for handling access disputes, open access policies can greatly enhance fairness and inclusivity within global scholarly communication.

IV) Capacity Building and Support for Institutions in the Global South

Addressing the finding on knowledge inequality between the Global North and South, this study recommends prioritizing capacity building and equitable resource allocation for institutions in developing countries. Knowledge access should not depend on geographical or economic privilege, yet many universities in Africa, Asia, and Latin America remain marginalized due to high subscription costs and restrictive licensing agreements.⁴⁰³ Governments, international organizations, and development partners should create targeted funding programs to subsidize access to digital resources and academic databases.⁴⁰⁴

Additionally, training initiatives should be implemented to build local capacity in digital repository management, copyright literacy, and open access policy formulation.⁴⁰⁵

³⁹⁸ *Supra*, note 377

³⁹⁹ Alma Swan, *The Open Access Mandate: Evidence and Implementation* (2019) 12 *Journal of Academic Librarianship* 77.

⁴⁰⁰ John Willinsky, *The Access Principle: The Case for Open Access to Research and Scholarship* (MIT Press 2006).

⁴⁰¹ Creative Commons, *Licensing Framework Overview* (Creative Commons 2022).

⁴⁰² Harvard Library, *Open Access Policies at Harvard University* (Harvard University 2021).

⁴⁰³ Muki Haklay, *Digital Divide and e-Inclusion in Encyclopedia of Information Science and Technology* (IGI Global 2018).

⁴⁰⁴ UNESCO, *Open Science Recommendation* (UNESCO 2021).

⁴⁰⁵ Donna McLean and others, *Building Digital Repository Capacity in Developing Countries* (2019) 45 *Information Development* 83.

Programs like Research4Life and Hinari have made commendable progress, but they must evolve from temporary aid-based models to long-term equitable partnerships.⁴⁰⁶ Institutions in the Global South should also form regional consortia to collectively negotiate fair licensing agreements with publishers, using arbitration mechanisms to resolve disputes over terms.⁴⁰⁷ Ultimately, empowering these institutions with the skills, infrastructure, and negotiation power to manage their own knowledge systems will reduce global disparities and create a more balanced digital knowledge economy.

V.) Fostering Collaborative Partnerships Between Stakeholders

This recommendation directly corresponds to the findings on persistent conflicts between access and ownership and the need for integrative frameworks. The study advocates for stronger collaboration among key stakeholders publishers, academic institutions, governments, and international agencies to develop fair, transparent, and mutually beneficial access models.

Collaborative dialogue should focus on negotiating fair pricing, flexible licensing options, and hybrid open-access models that consider both the financial sustainability of publishers and the accessibility needs of institutions.⁴⁰⁸ Arbitration can serve as the neutral platform for these discussions, facilitating balanced solutions through informed mediation rather than adversarial confrontation.⁴⁰⁹ For example, in several European countries, national research consortia have negotiated “transformative agreements” with major publishers.⁴¹⁰ These agreements combine subscription access with open-access publishing rights for researchers within the same institutions.⁴¹¹ Such arrangements can be extended globally, ensuring fair participation from developing nations.

By prioritizing cooperation over competition, the academic community can collectively address ethical and legal imbalances in the digital knowledge landscape.⁴¹² Collaborative partnerships also ensure that ethical standards guide negotiations and that access is recognized as a universal right, not a privilege.⁴¹³

⁴⁰⁶ Kimberly Parker, *Research4Life: A Public-Private Partnership Bridging the Digital Divide* (2013) 39 *Learned Publishing* 64.

⁴⁰⁷ EIFL, *Consortia Model for Developing Countries* (EIFL 2020).

⁴⁰⁸ Alicia Wise and others, *Transitioning to Open Access: Collaborative Approaches* (2020) 56 *Information Services & Use* 121.

⁴⁰⁹ Trevor Cook, *Arbitration of IP Disputes* (2014) 6 *WIPO Journal* 1.

⁴¹⁰ Max Planck Digital Library, *Transformative Agreements in Europe* (MPDL 2020).

⁴¹¹ Lisa Janicke Hinchliffe, *Read-and-Publish Agreements Explained* (2019) 32 *Library Trends* 1.

⁴¹² Kathleen Fitzpatrick, *Generous Thinking* (Johns Hopkins UP 2019).

⁴¹³ Peter Suber, *Open Access* (MIT Press 2012).

VI.) Development of Hybrid Legal-Ethical Governance Frameworks

Finally, in response to the finding on the need for integrative frameworks, this study recommends that knowledge institutions adopt hybrid governance systems combining legal enforceability with ethical accountability. Neither law nor ethics alone can adequately address the complexities of access and ownership; instead, a blended approach ensures that intellectual property protection coexists with social responsibility.⁴¹⁴ Such frameworks should institutionalize ethics-based arbitration mechanisms where arbitrators are guided not only by legal statutes but also by ethical standards of fairness, inclusivity, and public interest.⁴¹⁵ Institutions can develop internal dispute-resolution committees incorporating experts in law, ethics, and digital information management to handle emerging conflicts.⁴¹⁶ Moreover, policy documents, licensing contracts, and institutional charters should explicitly reference both legal obligations (such as copyright compliance) and ethical commitments (such as equitable access and knowledge sharing).⁴¹⁷ This approach ensures that decisions reflect not only what is legally permissible but also what is morally just.

An example of this model can be seen in the evolving practices of international arbitration bodies, which now integrate ethical considerations in intellectual property arbitration balancing private rights with the public's right to information.⁴¹⁸ When replicated within universities and research centres, this hybrid framework becomes a foundation for sustainable, fair, and inclusive knowledge governance.⁴¹⁹

Conclusion

The study concludes that the tension between access and ownership of information in the digital knowledge economy represents one of the most pressing ethical and legal dilemmas of the 21st century. As digital technologies redefine how knowledge is created, disseminated, and preserved, universities, libraries, and research centers face the complex responsibility of balancing the protection of intellectual property with the equitable

⁴¹⁴ Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999).

⁴¹⁵ International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (IBA 2014).

⁴¹⁶ World Intellectual Property Organization, *WIPO Arbitration and Mediation Center Overview* (WIPO 2020).

⁴¹⁷ World Intellectual Property Organization, *Berne Convention for the Protection of Literary and Artistic Works* (as amended 1979).

⁴¹⁸ International Chamber of Commerce, *ICC Guidance Note on Ethical Considerations in International Arbitration* (ICC 2021).

⁴¹⁹ OECD, *OECD Principles for Open and Inclusive Knowledge Governance* (OECD 2019).

dissemination of information.⁴²⁰ While ownership safeguards the economic and creative interests of authors and publishers, access ensures that knowledge fulfills its social purpose of advancing education, innovation, and development.⁴²¹ The challenge, therefore, lies not in choosing between access and ownership but in creating governance models that harmonize the two.⁴²²

The findings demonstrate that traditional litigation has failed to provide sustainable resolutions to conflicts between rights holders and knowledge institutions due to its adversarial, expensive, and time-consuming nature. Arbitration, by contrast, emerges as a flexible, confidential, and context-sensitive mechanism that accommodates the diverse interests of publishers, creators, and institutions.⁴²³ When combined with ethical principles fairness, inclusivity, accountability, and transparency arbitration becomes more than a dispute resolution tool; it transforms into a framework for proactive, values-based governance of digital knowledge.⁴²⁴

Ethics ensures that the pursuit of ownership does not compromise the collective right to learn, while arbitration guarantees that fairness and due process are maintained in resolving disagreements.⁴²⁵ This dual approach bridges the gap between law and morality, allowing knowledge to serve both as a protected intellectual asset and a shared public good.⁴²⁶

The study also emphasizes the need to address global inequalities in access, particularly between the Global North and South, through capacity building, equitable licensing models, and open access initiatives. Sustainable knowledge governance requires collaboration between publishers, policymakers, and institutions, supported by hybrid

⁴²⁰ Pamela Samuelson, *Digital Information, Digital Libraries, and the Future of Intellectual Property Law* (1998) 21 Berkeley Tech LJ 1235.

⁴²¹ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale UP 2006).

⁴²² Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge UP 1990).

⁴²³ Thomas Schultz and Nicholas Jacks, *Online Arbitration: The Future of ADR* (2005) 7 Int'l J Online Disp Resol 45.

⁴²⁴ Amy Schmitz, *Expanding Access to Remedies Through Online Arbitration* (2019) 67 Am U L Rev 1723.

⁴²⁵ Luciano Floridi, *Information Ethics* (Oxford UP 2013).

⁴²⁶ Jack Balkin, *Information Fiduciaries and the First Amendment* (2016) 49 UC Davis L Rev 1183.

legal-ethical frameworks.⁴²⁷ Ultimately, the integration of arbitration and information ethics offers a balanced pathway toward justice, inclusivity, and sustainability in global knowledge management ensuring that the digital revolution fulfills its promise of democratizing knowledge for all.⁴²⁸

⁴²⁷ Mireille van Eechoud (ed), *The Work of Authorship* (Amsterdam UP 2014).

⁴²⁸ Siva Vaidhyanathan, *The Googlization of Everything: And Why We Should Worry* (University of California Press 2011).

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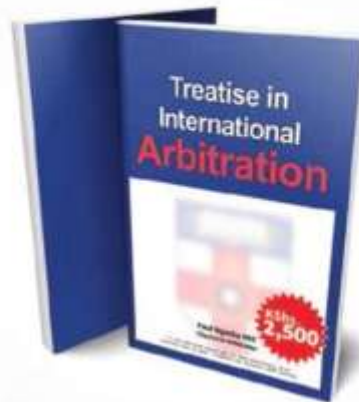
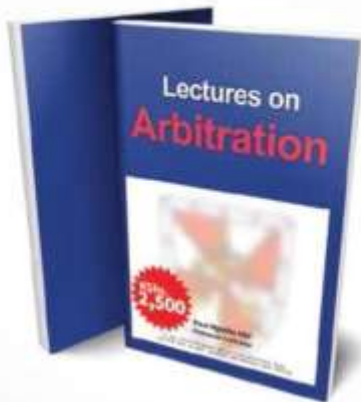
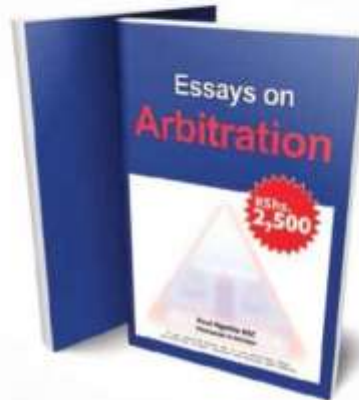
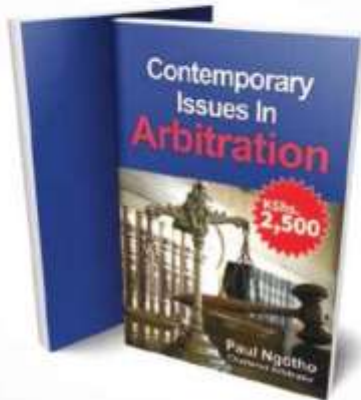
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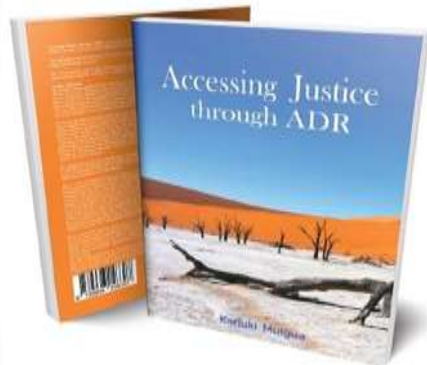
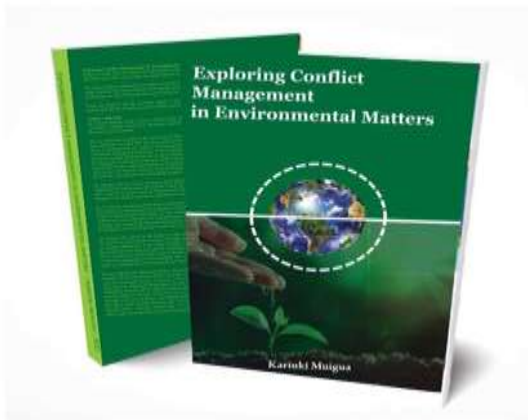
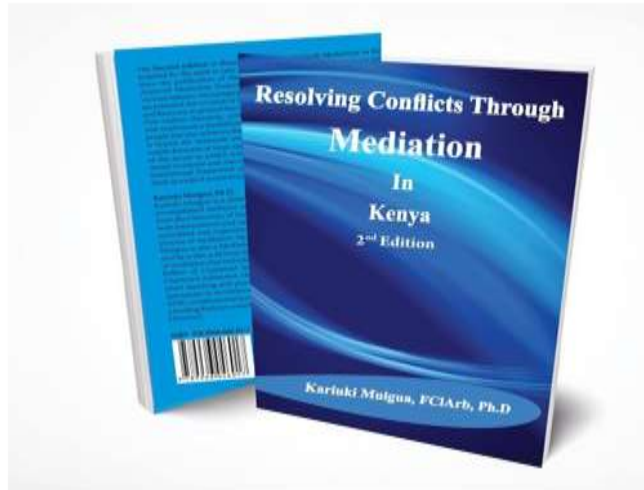




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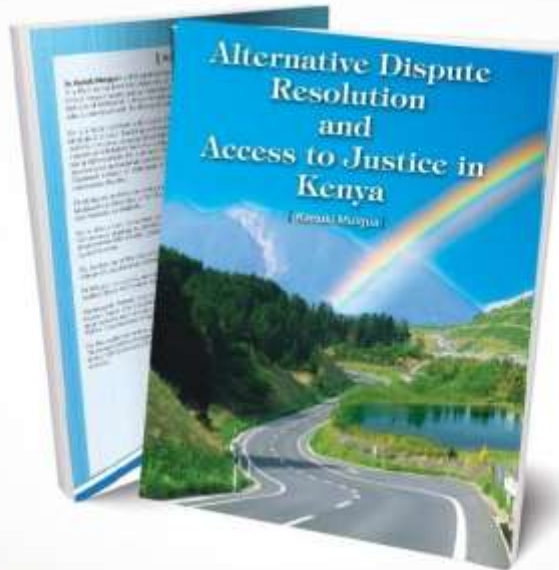
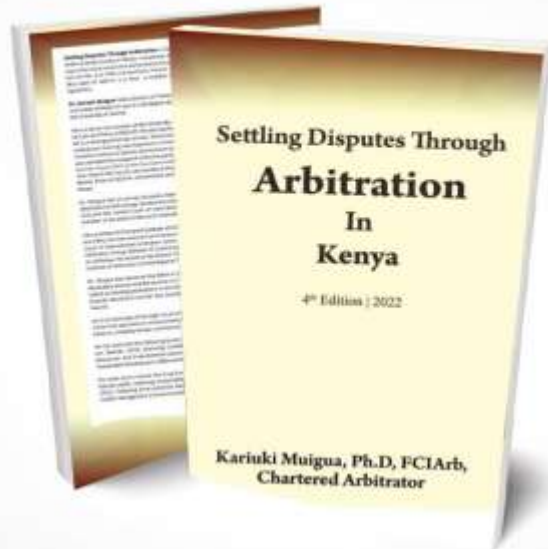
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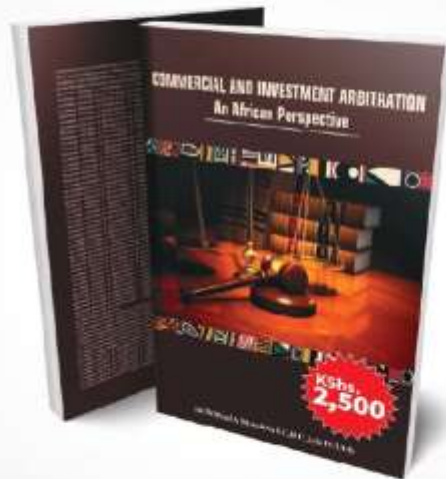
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